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 Audit and Control

NOTICE OF ADOPTION

Repeal Part 339 of Title 2 of the NYCRR

I.D. No. AAC-15-09-00002-A
Filing No. 907
Filing Date: 2009-07-30
Effective Date: 2009-08-19

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

Action taken: Repeal of Part 339 of Title 2 NYCRR.

Statutory authority: State Finance Law, section 8

Subject: Repeal Part 339 of Title 2 of the NYCRR.

Purpose: To repeal Part 339 of Title 2 of the NYCRR relating to the Committee on Investor Responsibility of the NYSLRS.

Text or summary was published in the April 15, 2009 issue of the Register, I.D. No. AAC-15-09-00002-P.

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

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

Assessment of Public Comment
The agency received no public comment.

Division of Criminal Justice Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Security Guard Instructor and Security Guard Training School Fees

I.D. No. CJS-33-09-00003-P

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

Proposed Action: Amendment of sections 6028.4, 6028.6, 6029.1, 6029.2, 6029.3, 6029.5, 6029.6(b); and addition of sections 6028.8 and 6029.8 to Title 9 NYCRR.

Statutory authority: Executive Law, section 837(8-b) and (13); State Fiscal Year 2009-10 budget

Subject: Security guard instructor and security guard training school fees.

Purpose: To establish application fees for approval of security guard training schools and certification of security guard instructors.

Text of proposed rule: 1. Sections 6028.4 of Title 9 NYCRR is amended to read as follows:

§ 6028.4 Requirements for approval of a security guard training school.
(a) Each security guard training school applying for approval shall appoint a school director, whose name, address, type of instructor certification (if any), and telephone number shall be filed with the commissioner upon his or her appointment.

(b) No later than forty-five (45) days prior to commencement of initial training, the school director shall file a copy of the school qualifications with the commissioner. The qualifications shall be in a form prescribed by the commissioner and shall include, but not be limited to:

(1) the name of the security guard training school;

(2) the location(s) of the security guard training school;

(3) the names of the certified security guard instructor(s) and the type of instructor certification(s) held by such instructor; and

(4) the name(s) and address(es) of the owner(s) of the security guard training school.

(c) Each security guard training school applying for approval shall submit a school application fee as determined by the schedule of fees prescribed by the commissioner in section 6028.8 of this Part.

[(c)] *(d)* The commissioner may require any additional information deemed necessary for the purposes of approving a security guard training school.

[(d)] *(e)* The commissioner shall provide a written approval of a security guard training school when in his or her judgment, the information provided warrants approval.

2. Section 6028.6 of title 9 NYCRR is amended to read as follows:

§ 6028.6 Term and renewal of security guard training school approval.
The security guard training school approval shall be valid for a period of two (2) years from the date of approval, provided that the council has not made any changes to the minimum qualifications as set forth in this Part. Such approval may be renewed by a security guard training school upon filing a copy of the current school qualifications *and submission of a school renewal fee as determined by the schedule of fees prescribed by the commissioner in section 6028.8 of this part* and approval by the commissioner in accordance with this Part.

3. A new section 6028.8 is added to Title 9 NYCRR to read as follows:

§ 6028.8 Schedule of fees. (a) The following application fees will apply to:

Initial school application	*$1000.00*
School Renewal	*$ 500.00*

(b) Payment for services shall be made by electronic transfer of funds; postal money order; Western Union, Integrated Payment Systems, bank, American Express, or Travelers Express money orders; corporate check; or governmental check, unless otherwise provided by agreement. Bank money orders must be issued by a bank chartered in the United States, must be payable in U.S. funds, and must be valid for at least 90 days from the date of issuance. A $25 service charge may be imposed for all checks that are returned due to insufficient funds. The commissioner may refuse to accept a certain form of payment if that form of payment has previously been uncollectible. Remittance shall be made payable to the Division of Criminal Justice Services.

(c) The commissioner may waive the initial school application fee or school renewal fee if the school is operated by a New York state or local government entity that provides training solely for security guards in its employ or a school district providing security guard training as part of a curriculum approved by the Department of Education.

4. Section 6029.1 of Title 9 NYCRR is amended by adding a new subdivision (n) to read as follows:

(n) The term application fee means the minimum fee charged for each initial application for instructor certification or renewal of certification as determined by the schedule of fees prescribed by the commissioner in section 6029.8 of this Part.

5. Section 6029.2 of Title 9 NYCRR is amended to read as follows:

Section 6029.2. Certification of security guard instructor and armed security guard instructor. Instructor certification for security guard instructor and armed security guard instructor may be granted by the commissioner upon demonstration of instructor competency and subject matter expertise *and payment of an application fee*, in accordance with the minimum requirements established by this Part.

6. Section 6029.3 of Title 9 NYCRR is amended to read as follows:

(a) Each applicant requesting security guard instructor certification shall:

[(a)] *(1)* possess a high school diploma or its equivalent; [and]

[(b)] *(2)* satisfy minimum qualification criteria relating to education, teaching experience, formal training, and security experience as determined by the commissioner[.] *;*

(3) submit an application fee as determined by the schedule of fees prescribed by the commissioner in section 6029.8 of this Part.

(b) The applicant shall forward any other additional information as determined by the commissioner to be necessary to establish the competence of a security guard instructor or for any other pertinent purpose.

7. Section 6029.5 of Title 9 NYCRR is amended to read as follows:

(a) All armed security guard instructors must be qualified based upon:

[(a)] *(1)* having a minimum of three years experience as a police officer, peace officer or security guard or security guard supervisor or manager. The requirements relating to experience shall be satisfied by an individual who has carried a firearm in the course of his or her official duties and has done so for the prescribed period of time. Individuals who are not otherwise exempted from the licensing requirements of the Penal Law shall possess the requisite license in accordance with section 400.00 of the Penal Law; [and]

[(b)] *(2)* successful completion of a Firearms Instructor Course as prescribed by the commissioner[.] *;*

(3) submission of an application fee as determined by the schedule of fees prescribed by the commissioner in section 6029.8 of this Part.

(b) All armed security guard instructors shall provide any other additional information as determined by the commissioner to be relevant to establishing the competence of an armed security guard instructor.

8. Subdivision (b) of section 6029.6 of Title 9 NYCRR is amended to read as follows:

(b) A certification granted by the commissioner in accordance with this Part may be renewed by the instructor if he or she demonstrates continued technical competence in accordance with criteria established by the commissioner *and submits an application fee as determined by the schedule of fees prescribed by the commissioner in section 6029.8 of this Part.*

9. A new section 6029.8 is added to Title 9 NYCRR to read as follows:

§ 6029.8 Schedule of fees. (a) The following application fee will apply to:

Initial application	*$500.00*
Initial application for armed security guard instructor	*$500.00*
Instructor renewal	*$250.00*

(b) Persons who maintain a valid security guard instructor certification who subsequently apply for armed security guard certification shall be subject to a renewal fee at the time of initial application for armed security guard certification.

(c) Payment for services shall be made by electronic transfer of funds; postal money order; Western Union, Integrated Payment Systems, bank, American Express, or Travelers Express money orders; corporate check; or governmental check, unless otherwise provided by agreement. Bank money orders must be issued by a bank chartered in the United States, must be payable in U.S. funds, and must be valid for at least 90 days from the date of issuance. A $25 service charge may be imposed for all checks that are returned due to insufficient funds. The commissioner may refuse to accept a certain form of payment if that form of payment has previously been uncollectible. Remittance shall be made payable to the Division of Criminal Justice Services.

Text of proposed rule and any required statements and analyses may be obtained from: Mark Bonacquist, Division of Criminal Justice Services, 4 Tower Place, Albany, NY 12203, (518) 457-8413

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: Executive Law sections 837(8-b) & (13); State Fiscal year 2009-10 budget.

2. Legislative objectives: Executive Law section 837(8-b) was amended in connection with the fiscal year 2009-10 enacted State Budget to authorize the Division to charge a fee for the approval and renewal of security guard training schools and for the certification and renewal certification of security guard instructors. The proposed rule establishes a schedule of such fees.

3. Needs and benefits: In accordance with Executive Law section 841-c, the Commissioner of the Division of Criminal Justice Services approves and certifies security guard training schools and certifies as qualified security guard instructors. Pursuant to 9 NYCRR section 6028.6, a security guard training school approval is valid for two years. Pursuant to 9 NYCRR section 6029.6, a security guard instructor certification is valid for five years.

Executive Law section 837(8-b) was amended as part of the fiscal year 2009-10 enacted State Budget to authorize the Division to charge a fee for the approval and renewal of security guard training schools and the certification and renewal certification of security guard instructors. The Executive Budget proposed a $500 initial application and a $250 renewal security guard instructor fee, and a $1,000 initial application and a $500 renewal security guard training school fee (see 2009-10 Executive Budget, Public Protection and General Government Article VII Legislation, Memorandum in Support, Part G). These fees were subsequently adopted by the Legislature in 2009-10 enacted State Budget. The proposed rule establishes a fee schedule consistent with the budget provisions.

4. Costs:

a. Costs to regulated parties for the implementation of and continuing compliance with the rule: The rule establishes a $500 initial application and a $250 renewal security guard instructor fee, and a $1,000 initial application and a $500 renewal security guard training school fee.

b. Costs to the agency, the state and local governments for the implementation and continuation of the rule: Costs to the Division for implementation of the proposed rule are expected to be negligible.

c. The information, including the source(s) of such information and the methodology upon which the cost analysis is based: The fees set forth in the proposed rule are based on the State fiscal year 2009-10 enacted Stateb Budget.

5. Local government mandates: The initial application and renewal security guard training school fee are applicable to local governments that operate security guard training schools. There are currently two towns, ten school districts, and twenty-five BOCES that have approved security guard training schools. However, the proposed rule would allow the commissioner to waive either fee if the school is operated by a New York state or local government entity that provides training solely for security guards in its employ or a school district providing security guard training as part of a curriculum approved by the Department of Education.

6. Paperwork: There are no new reporting requirements, forms, or other paperwork that would be required as a result of the rule.

7. Duplication: No other legal requirements of the state and federal governments, duplicate, overlap, or conflict with the rule.

8. Alternatives: There are no alternatives. The enacted State fiscal year 2009-10 budget assumes general fund revenue based on these fees.

9. Federal standards: There are no applicable federal standards.

10. Compliance schedule: Regulated parties are expected to be able to comply with the rule immediately.

Regulatory Flexibility Analysis

1. Effect of rule: There are currently 917 approved security guard training schools, 2 of which are operated by local governments (the Town of

Oyster Bay, Nassau County, and the Town of Brookhaven, Suffolk County), 10 of which are operated by school districts, and 25 of which are operated by BOCES programs.

A majority of security guard training schools are operated by small businesses, although the exact number is not known.

2. Compliance requirements: Apart from paying the fee, there are no reporting, recordkeeping, or other affirmative acts that a small business or local government will have to undertake to comply with the rule.

3. Professional services: No professional services will be needed to comply with the proposed rule.

4. Compliance costs: The rule establishes a $500 initial application and a $250 renewal security guard instructor fee, and a $1,000 initial application and a $500 renewal security guard training school fee.

5. Economic and technological feasibility: No economic or technological impediments to compliance have been identified.

6. Minimizing adverse impact: The rule provides that the commissioner may waive the initial school application fee or school renewal fee if the school is operated by a New York state or local government entity that provides training solely for security guards in its employ or a school district providing security guard training as part of a curriculum approved by the Department of Education.

7. Small business and local government participation: The fees were established as part of the fiscal year 2009-10 enacted State budget. Accordingly, the Division did not conduct outreach with small business or local governments regarding the rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: There are currently 917 approved security guard training schools, most of which are located in urban areas of the State. It is estimated that 108 schools operate in rural areas, although the exact number is not known.

There are 2263 certified security guard instructors. Most reside in urban or suburban areas of the State, although an unknown number, believed to be relatively small, reside in rural areas.

2. Reporting, recordkeeping and other compliance requirements; and professional services: Apart from paying the fee, there are no reporting, recordkeeping, or other affirmative acts that a small business or local government will have to undertake to comply with the rule, nor will any professional services will be needed to comply with the proposed rule.

3. Costs: The rule establishes a $500 initial application and a $250 renewal security guard instructor fee, and a $1,000 initial application and a $500 renewal security guard training school fee.

4. Minimizing adverse impact: The rule provides that the commissioner may waive the initial school application fee or school renewal fee if the school is operated by a New York state or local government entity that provides training solely for security guards in its employ or a school district providing security guard training as part of a curriculum approved by the Department of Education.

5. Rural area participation: The fees were established as part of the fiscal year 2009-10 enacted State budget. Accordingly, the Division did not conduct outreach with public and private interests in rural areas.

Job Impact Statement

1. Nature of impact: It is possible, although considered unlikely, that some security training schools will cease operation rather than pay the $500 renewal security guard training school fee. Likewise, some schools may not commence operation because of the $1,000 initial application. In such cases, employment opportunities at those schools that cease operation or never begin operations would be impacted.

2. Categories and numbers affected: The principal category of job affected would be instructors who teach the training material to students. It is difficult to estimate the number of jobs at issue, but it is considered to be relatively small.

3. Regions of adverse impact: The proposed rule applies equally throughout the State. However, because a majority of security guard training schools are located in the New York City/Long Island metropolitan area, that area has the greatest likelihood to experience an adverse impact on jobs or employment opportunities.

4. Minimizing adverse impact: The rule provides that the commissioner may waive the initial school application fee or school renewal fee if the school is operated by a New York state or local government entity that provides training solely for security guards in its employ or a school district providing security guard training as part of a curriculum approved by the Department of Education.

5. Self-employment opportunities: Although not known for certain, it is believed that many security guard training schools are operated by sole proprietors. It is possible, but considered unlikely, that the new fees may discourage such sole proprietors from continuing or starting a security guard training school.

Delaware River Basin Commission

INFORMATION NOTICE

INFORMATION NOTICE
NOTICE OF PROPOSED RULEMAKING AND HEARING

The Delaware River Basin Commission (''Commission'' or ''DRBC'') is a federal-state regional agency charged with managing the water resources of the Delaware River Basin without regard to political boundaries. Its members are the governors of the four Basin states – New Jersey, New York, Pennsylvania and Delaware – and a federal representative, the North Atlantic Division Commander of the United States Army Corps of Engineers. The Commission is not subject to the requirements of the New York Administrative Procedures Act. This notice is published by the Commission for informational purposes.

Proposed Amendments to the *Water Quality Regulations*, *Water Code* and *Comprehensive Plan* to Revise the Human Health Water Quality Criteria for PCBs in the Delaware Estuary, to Apply the PCB Human Health Water Quality Criterion to Delaware Bay, and to Provide for the Use of Compliance Schedules to Implement Stream Quality Objectives Established by the Commission

Summary: The Delaware River Basin Commission (DRBC or ''Commission'') will hold a public hearing to receive comments on proposed amendments to the Commission's Water Quality Regulations, Water Code and Comprehensive Plan to revise the human health water quality criteria for polychlorinated biphenyls (PCBs) in the Delaware Estuary (DRBC Water Quality Management Zones 2 through 5), extend application of the DRBC's PCB human health water quality criterion to Delaware Bay (DRBC Water Quality Zone 6) and provide for the use of compliance schedules where implementation of a stream quality objective established by the Commission requires a reduction of the pollutant concentration or loading of a discharge to Basin waters.

Dates: Two informational meetings will be held in late September, 2009 on the proposed revised human health water quality criterion for PCBs and accompanying implementation plan. The exact locations and dates will be posted on the Commission's website, DRBC.net, on or before August 17, 2009.

The public hearing will be held at 1:30 p.m. on Thursday, October 8, 2009 at the Commission's office building located at 25 State Police Drive, West Trenton, NJ. As Internet mapping tools are inaccurate for this location, please use the driving directions posted on the Commission's website. The hearing will continue until all those wishing to testify have had an opportunity to do so. Persons wishing to testify at the hearing are asked to register in advance by phoning Ms. Paula Schmitt at 609-883-9500, ext. 224.

Written comments will be accepted and must be received by 5:00 p.m. on Monday, October 19, 2009. Written comments may be submitted as follows: if by email, to paula.schmitt@drbc.state.nj.us; if by fax, to Commission Secretary at 609-883-9522; if by U.S. Mail, to Commission Secretary, DRBC, P.O. Box 7360, West Trenton, NJ 08628-0360. In all cases, please include the commenter's name, address and affiliation, if any, in the comment document and ''PCB Rulemaking'' in the subject line.

Supplementary Information

Background. The current DRBC water quality criteria for PCBs in the Delaware Estuary were established in 1996. They pre-date the collection of site-specific bioaccumulation data for the Delaware Estuary and Bay and site-specific fish-consumption data for Zones 2 through 4 that are relevant to the development of human health water quality criteria. They are also inconsistent with current U.S. Environmental Protection Agency (EPA) guidance for the development of such criteria, and they vary by water quality zone. One consequence of the current varied criteria is that in order to ensure that the current water quality criterion of 7.9 picograms per liter in the downstream portion of Zone 5 can be achieved, the allowable PCB loading to Zones 2 and 3, where the applicable criterion currently is 44.4 picograms per liter, must be even lower than would be required if the proposed uniform criterion were in place. DRBC currently has no PCB water quality criteria for the Delaware Bay, a shared interstate water for which the states of New Jersey and Delaware have established a criterion of 64 picograms per liter.

By Resolution No. 2003-11 on March 19, 2003 the Commission directed its executive director to initiate rulemaking on a proposal to revise the Commission's human health water quality criteria, including those for PCBs, to reflect site-specific data on fish consumption, site-specific bioaccumulation factors, and current EPA guidance on development of human

health criteria. Rulemaking was delayed, however, pending the completion of an effort by the Commission's Toxics Advisory Committee (TAC) to revise the criterion for PCBs and a separate effort to develop recommendations for achieving reductions in PCB loadings to the river that could be issued in conjunction with the criterion.

Rigorously applying the most current available data and methodology, including site-specific data on fish consumption, site-specific bioaccumulation factors, and the current EPA methodology for the development of human health criteria for toxic pollutants (*see* EPA-822-B-00-004, October 2000), the TAC in July 2005 completed development of a revised human health water quality criterion for PCBs for the Delaware Estuary and Bay of 16 picograms per liter. Accordingly, by Resolution No. 2005-19 on December 7, 2005, the Commission directed the executive director to proceed with rulemaking to establish the new criterion in DRBC Water Quality Zones 2 through 6.

Elevated levels of PCBs in the tissues of fish caught in the Delaware Estuary and Bay currently prevent the attainment of the designated uses ''maintenance and propagation of resident fish and other aquatic life'' (Zone 2, Zone 5 below River Mile 70 and Zone 6), ''passage of anadromous fish'' (Zones 2 through 6), and ''maintenance of resident fish and other aquatic life'' (Zones 3, 4 and 5 above River Mile 70). (*See DRBC Water Quality Regulations* (WQR), Art. 3, sec's 3.30.2 B.2, 3.30.3 B.2, 3.30.4 B.2, 3.30.5 B.2 and 3.30.6 B.2 for Zones 2 through 6, respectively). These uses are commonly referred to collectively as ''fishable'' and are deemed to include human consumption of resident fish. Accordingly, these waters are listed by the bordering states as impaired under Section 303(d) of the Clean Water Act (CWA), which requires that a total maximum daily load (TMDL) be established for them. A TMDL expresses the maximum amount of a pollutant that a water body can receive and still attain water quality standards. Once the load is calculated, it is allocated to all sources in the watershed – point and nonpoint – which may not discharge loads in excess of the share allocated to them in order to achieve and maintain the water quality standards. EPA established TMDLs for PCBs in December of 2003 for the Delaware Estuary and in December of 2006 for the Delaware Bay (''Stage 1 TMDLs''). It is anticipated that EPA will establish revised TMDLs (''Stage 2 TMDLs'') for the Delaware Estuary and Bay to attain the revised PCB human health water quality criterion if approved.

When the Commission directed the executive director in 2005 to initiate rulemaking on updated PCB criteria, in accordance with a recommendation of the TAC, it also asked her to work with state regulatory agencies and EPA (collectively, ''co-regulators'') to develop recommendations for implementing criteria for bioaccumulative toxic pollutants such as PCBs that would be ''consistent with the existing Clean Water Act National Pollutant Discharge Elimination System (NPDES) framework while. . . reflecting principles of adaptive management'' and to solicit public comment on these recommendations (DRBC Resolution No. 2005-19 par's. 3-4). It is expected that Stage 2 TMDLs issued by EPA will include as an appendix a TMDL implementation plan developed by DRBC and its co-regulators. The implementation plan, which will take the form of a guidance document, will explain how the load allocations assigned by the TMDL to nonpoint sources and the wasteload allocations assigned to point sources can be achieved consistent with the Clean Water Act and principles of adaptive management.

According to the 2003 and 2006 TMDLs, actual loadings of PCBs to the Delaware Estuary and Bay respectively are in some cases orders of magnitude above those needed to allow attainment of the designated use. The EPA's 2003 Delaware Estuary TMDL report projects that ''due to the scope and complexity of the problem that has been defined through these TMDLs, achieving the estuary water quality standards for PCBs will take decades.'' (EPA 2003, Executive Summary, p. xiii). As required by Section 4.30.9 of the DRBC *Water Quality Regulations*, adopted by DRBC Resolution No. 2005-9 on May 18, 2005, the largest point source dischargers of PCBs to the Delaware Estuary and Bay have already undertaken pollutant minimization plans designed to locate the sources of PCBs entering their wastewater and stormwater systems and contain or remove them. The TMDL implementation plan developed by the co-regulators recognizes that many point source dischargers already have reduced their PCB loadings in an effort to meet their TMDL wasteload allocations assigned by the Stage 1 TMDLs. Some point source dischargers are expected to achieve their required reductions soon; however, others will require an extended period of time, including in some instances decades, to achieve the PCB loading reductions needed to meet their assigned wasteload allocations. The implementation plan developed by the co-regulators will accommodate these dischargers through the use of compliance schedules consistent with the Clean Water Act and applicable regulations. It is understood that those dischargers who cannot achieve their wasteload allocations within a single five-year permit cycle notwithstanding good faith efforts to do so as soon as possible will be given additional time, even if this requires compliance schedules extending well beyond a single five-year permit cycle.

Subjects on Which Comment is Expressly Solicited. Public comment is solicited on all aspects of the proposed rule. Without limiting the foregoing, the Commission has identified certain subject matters on which it expressly seeks comment. First, comments are solicited on the assumptions applied in developing the criterion, including the appropriate cancer risk level. (*See* Resolution No. 2005-19, par. 2). In accordance with current DRBC regulations, that level is 10-6, or one additional cancer in every one million humans exposed for 70 years. (*See* DRBC WQR, § 3.10.3 D.4). The assumptions applied in developing the revised PCB criterion of 16 picograms per liter are set forth in a basis and background document that is available on the DRBC website, DRBC.net. The second area on which the Commission expressly seeks comment is best approaches for implementing water quality criteria for bioaccumulative pollutants consistent with the NPDES framework and principles of adaptive management. (*See* Resolution No. 2005-19, par. 4). The third is the implementation plan developed by the co-regulators, which will be posted on the Commission's website, DRBC.net, on or before August 17, 2009.

Further Information, Contact. The basis and background document and the co-regulators' implementation plan for the proposed criterion will be available on the DRBC website, DRBC.net, on or before August 17, 2009. The dates, times and locations for the informational meetings to take place in late September will be posted on the website by the same date. Please contact Commission Secretary Pamela M. Bush, 609-883-9500 ext. 203 with questions about the proposed rule or the rulemaking process.

PAMELA M. BUSH, ESQ.
Commission Secretary

Text of Proposed Amendments

It is proposed to amend the Comprehensive Plan, Articles 3 and 4 of the *Water Quality Regulations* (WQR) and Article 3 of the *Water Code* (WC) as set forth below. Editor's instructions are denoted by underscore thus. Deleted text is denoted by brackets [thus] and added text is denoted by boldface **thus**.

Amend Section 3.10.3 D. of Article 3 of the WQR and WC as follows:

3.10.3 Stream Quality Objectives

* * * *

D. Human Health Objectives for Toxic Pollutants. It is the policy of the Commission to designate numerical stream quality objectives for the protection of human health for the Delaware River Estuary (Zones 2 through 5) which correspond to the designated uses of each zone. **It is also the policy of the Commission to designate a stream quality objective for the protection of human health from carcinogenic effects for PCBs in Delaware Bay (Zone 6).**

Stream quality objectives for protection from both carcinogenic and systemic effects are herein established on a pollutant-specific basis for:

* * *

Other toxic substances for which any of the three Estuary states have adopted criteria or standards may also be considered for the development of stream quality objectives.

* * *

6. A rate of ingestion of water of 2.0 liters per day is assumed in calculating objectives for river zones where the designated uses include public water supplies after reasonable treatment. [A] **For toxic pollutants other than PCBs, a** rate of ingestion of fish of 6.5 grams per day (equivalent to consuming a ½ pound portion every 35 days) is assumed in calculating freshwater stream quality objectives for human health[. A]; **and a** rate of ingestion of fish of 37 grams per day (equivalent to consuming a ½ pound portion every 6 days) is assumed in calculating marine stream quality objectives for human health. **For PCBs in Zones 2 through 6, a rate of ingestion of fish of 17.5 grams per day (equivalent to consuming a ½ pound portion every 13 days) is assumed in calculating both freshwater and marine stream quality objectives.**

* * *

Amend Table 6 of Section 3.30 of Article 3 of the WQR and WC as follows:

For the parameter ''PCBs (Total)'', in the column headed ''Freshwater Objectives (ug/l): Fish & Water Ingestion,'' remove the number ''0.0000444'' and insert ''0.000016''; in the column headed ''Freshwater Objectives (ug/l): Fish Ingestion Only,'' remove the number ''0.0000448'' and insert ''0.000016''; and in the column headed ''Marine Objectives (ug/l): Fish Ingestion Only,'' remove the number ''0.0000079'' and insert ''**0.000016**''.

Amend Section 3.30.6 C. of Article 3 of the WQR and WC by the addition of a new subsection 3.30.6 C.11. as follows:

3.30.6 Zone 6

* * * *

C. Stream Quality Objectives.

* * *

11. Toxic Pollutants. The applicable marine stream quality objective for PCBs for the protection of human health from carcinogenic effects is 0.000016 ug/l.

* * *

Amend Section 4.20.2 of Article 4 of the WQR as follows:

4.20.2 Additional Specifications. [The Standards have set limits for most of the significant and commonly used indicators which are pertinent to water quality management in the Basin. When a need arises, or upon application to the Commission, additional indicators and limits will be defined.]

Redesignate subsection 4.20.2 A. of Article 4 of the WQR as 4.20.2 B. and insert new language at Section 4.20.2 A. as follows:

A. Schedules of Compliance. Where implementation of a stream quality objective established by the Commission requires a reduction of the pollutant concentration or loading of a discharge to Basin waters, the Commission and/or environmental agency of the signatory party may establish a schedule of compliance (''compliance schedule'') subject to the following:

1. Where the U.S. Environmental Protection Agency (EPA) or a state agency authorized by EPA to issue NPDES permits under the Clean Water Act issues a NPDES permit governing the discharge, then the compliance schedule shall be consistent with the Clean Water Act and applicable federal regulations; and

2. in all other instances, the compliance schedule issued by the Commission or the environmental agency of the signatory party shall obligate the discharger to attain as soon as reasonably possible in the judgment of the agency issuing such schedule the concentration or loading required to implement the stream quality objective.

B[A]. Background, Total Dissolved Solids. The following background levels of total dissolved solids shall be utilized for the specified zones of the Delaware River:

* * *

Education Department

EMERGENCY RULE MAKING

Computation of Nonresident Pupil Tuition Rate

I.D. No. EDU-18-09-00007-E

Filing No. 902

Filing Date: 2009-07-30

Effective Date: 2009-07-30

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

Action taken: Amendment of section 174.2 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 2040(1) and (2), 2041(not subdivided), 2042(not subdivided), 2045(1) and 3206

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State Aid categories with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. The proposed amendment will enable the Department to accurately reflect the actual cost to districts of educating nonresident pupils.

The proposed amendment was adopted as an emergency rule at the April 20-21, 2009 meeting of the Board of Regents, effective May 1, 2009. A Notice of Proposed Rule Making was published in the State Register on May 6, 2009. The proposed rule has been revised in response to public comment. Pursuant to the State Administrative Procedure Act, a revised rule cannot be permanently adopted until after publication of a Notice of Revised Rule Making and expiration of a 30-day public comment period. Because the Board of Regents meets at fixed intervals, the earliest the proposed revised rule could be presented for permanent adoption, after publication of the Notice and expiration of the 30-day public comment period, would be the September 14-15, 2009 Regents meeting. However, the emergency rule which took effect on May 1, 2009 will expire on July 29, 2009. The expiration of the emergency rule could cause disruptions to the preparation and administration of contracts for the reimbursement of school districts which provide instruction to nonresident pupils for the 2009-2010 school year. In addition, the revised rule corrects certain deficiencies and clarifies certain provisions in the rule, in response to public comment.

Therefore, a second emergency action is necessary for the preservation of the general welfare in order to immediately adopt clarifying and corrective revisions to the rule in response to public comment and to otherwise ensure that the emergency rule, which established the methodology for computing allowable tuition rates for nonresident pupils for public reporting by school districts, remains continuously in effect until such time as it can be adopted as a permanent rule, and thereby avoid disruption to the preparation and administration of contracts for the reimbursement of school districts which provide instruction to nonresident pupils for the 2009-2010 school year.

It is anticipated that the proposed revised rule will be presented for permanent adoption at the September 14-15, 2009 Regents meeting, after publication of a Notice of Revised Rule Making in the State Register and expiration of the 30-day public comment period prescribed for revised rule makings in the State Administrative Procedure Act.

Subject: Computation of nonresident pupil tuition rate.

Purpose: To conform section 174.2 to the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and other statutory changes.

Text of emergency rule: Section 174.2 of the Regulations of the Commissioner of Education is amended, effective July 30, 2009, as follows:

§ 174.2 Computation of tuition charges for nonresident pupils.

The provisions of this section shall apply to all contracts [entered into after January 1, 1975,] for the reimbursement of a school district which provides instruction to a nonresident pupil. The charge for the instruction of each nonresident pupil shall not exceed the actual net cost of educating such pupil. If the accounting records of the school district providing such instruction are not maintained in a manner which would indicate the net cost of educating such pupil, a board of education, board of trustees or sole trustee of each school district shall compute the tuition to be charged for the instruction of each nonresident pupil admitted to the schools of such district, or for the education of whom such district contracts with a board of cooperative educational services, in accordance with the following formulae:

(a) The tuition to be charged by a school district which provides full-day instruction for each nonresident pupil shall be computed as follows:

(1) . . .

(2) . . .

(3) The net amount of State aid received by the school district, as defined in this paragraph, shall be distributed among the categories set forth in paragraph (2) of this subdivision in the same proportion that the [aidable pupil units] *average daily membership* in each of such categories bears to the [total aidable pupil units] *average daily membership* for the school district. [Such aidable pupil units] *For the purposes of this section, such average daily membership* shall be computed in accordance with the provisions of *paragraph l of* subdivision [8] *1* of section 3602 of the Education Law, except that for the purpose of this computation the [additional aidable pupil units for pupils enrolled in special schools] *enrollment of pupils attending under the provisions of paragraph c of subdivision 2 of section 4401 of the Education Law and the equivalent attendance of the school district, as computed pursuant to paragraph d of subdivision 1 of section 3602 of the Education Law,* shall not be included in such computation. For the purposes of this section, net State aid shall include aid received in the general fund for operating expenses, textbooks, experimental programs, educational television, county vocational boards and boards of cooperative educational services, building aid, and other forms of State aid as approved by the department for inclusion herein, but shall not include transportation aid [or aid attributable to pupils attending special schools]. Net State aid shall also include the sum which is withheld from the school district for payment to the teacher's retirement fund.

(4) . . .

(5) The maximum nonresident pupil tuition which may be charged shall be determined by dividing the net cost of instruction of pupils in each category by the estimated average daily [attendance] *membership* of pupils in each category.

(6) Refunds or additional charges shall be made at the conclusion of the school year based upon actual revenues, expenditures and average daily [attendance] *membership*.

(b) . . .

(c) . . .

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-18-09-00007-P, Issue of May 6, 2009. The emergency rule will expire September 27, 2009.

Text of rule and any required statements and analyses may be obtained from: Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Regulatory Impact Statement

STATUTORY AUTHORITY:

Education Law section 207 authorizes the Board of Regents and the Commissioner to adopt rules and regulations to carry out the laws of the State regarding education and the functions and duties conferred on the Department by law.

Education Law section 2040(1) authorizes a school district by majority vote of the qualified voters to contract for the education of its pupils by one or more other school districts in the State. Education Law section 2040(2) provides that the designation of the school districts with which such contracts may be made shall be made pursuant to the Commissioner's regulations.

Education Law section 2041 authorizes school districts to enter into contracts to receive and educate the children of any district which authorizes its board of education or trustees to contract for the education of its children pursuant to Education Law section 2040.

Education Law section 2042 pertains to the form and validity of contracts for the education of nonresident pupils.

Education Law section 2045(1) provides that the tuition charged for the instruction of nonresident pupils in excess of the difference between the cost of educating such pupils and the apportionment of public moneys on account of the attendance of such pupils shall be a charge upon the district from which such nonresident pupil attends, subject to the right of such district to designate the school where instruction shall be given at the district's expense, and provided that no tuition shall be payable by the district of residence for the education by another district of an elementary pupil unless a contract has been entered into between such districts.

Education Law section 3602 provides for the apportionment of State monies to school districts, and the process therefore. Chapter 57 of the Laws of 2007 amended section 3602 to change the school funding system by replacing approximately 30 State aid items with a single Foundation Aid.

LEGISLATIVE OBJECTIVES:

The proposed amendment is consistent with the authority conferred by the above statute and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes.

NEEDS AND BENEFITS:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State Aid categories with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. The proposed amendment will enable the Department to accurately reflect the actual cost to districts of educating nonresident pupils.

COSTS:

(a) Costs to State government: None.

(b) Costs to local government: None.

(c) Costs to private regulated parties: None.

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

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs beyond those inherent in Chapter 57 of the Laws of 2007 and other applicable statutes.

LOCAL GOVERNMENT MANDATES:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional program, service, duty or responsibility upon local governments beyond those inherent in Chapter 57 of the Laws of 2007 and other applicable statutes.

PAPERWORK:

The proposed amendment conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional reporting or other paperwork requirements on school districts.

DUPLICATION:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other State statutory changes, and to eliminate obsolete provisions, and does not duplicate, overlap or conflict with State and federal legal requirements.

ALTERNATIVES:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. There are no significant alternatives and none were considered.

FEDERAL STANDARDS:

The proposed amendment relates to the computation of nonresident tuition by school districts, and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other State statutory changes. There are no related federal standards.

COMPLIANCE SCHEDULE:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements, mandates or costs on school districts beyond those inherent in Chapter 57 and other applicable statutes. It is anticipated that regulated parties can achieve compliance with the proposed rule making upon its effective date.

Regulatory Flexibility Analysis

Small Businesses:

The proposed amendment relates to the computation of nonresident tuition by school districts, and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed rule making that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

Local Government:

EFFECT OF RULE:

The proposed amendment applies to each of the 698 public school districts in the State.

COMPLIANCE REQUIREMENTS:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils.

PROFESSIONAL SERVICES:

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

COMPLIANCE COSTS:

The proposed amendment is necessary to reflect the Foundation Aid

provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes, and to eliminate obsolete provisions. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs beyond those inherent in Chapter 57 and other applicable statutes.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed amendment does not impose any additional costs or new technological requirements on school districts.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to reflect the fact that the existing statutory reference is now incorrect and that aid is now computed based on an enrollment-based pupil count rather than the previous, attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils.

LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed amendment were solicited from school districts through the offices of the district superintendents of each supervisory district in the State, and from the chief school officers of the five big city school districts.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts in the State, including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements or local government mandates on school districts in rural areas. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to reflect the fact that the existing statutory reference is now incorrect and that aid is now computed based on an enrollment-based pupil count rather than the previous, attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils. The proposed amendment will impose no additional professional services requirements on rural school districts.

COMPLIANCE COSTS:

The proposed amendment is necessary to revise the Commissioner's Regulations to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any costs on rural school districts beyond those inherent in Chapter 57 and other applicable statutes.

MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements, local government mandates or costs on school districts in rural areas. Chapter 57 of the Laws of 2007 changed the school funding system by replacing approximately 30 State aid items with a single Foundation Aid. Since pupils counts used to compute Operating Aid and other aids replaced by Foundation Aid are referenced in section 174.2 of the Commissioner's Regulations, there is need to amend this section to correct the existing statutory reference and to provide for the computation of aid on an enrollment-based pupil count rather than the previous attendance-based count. These amendments will enable the department to accurately reflect the actual cost to districts of educating nonresident pupils.

RURAL AREA PARTICIPATION:

Comments on the proposed rule making were solicited from the Department's Rural Advisory Committee, whose membership includes school districts located in rural areas.

Job Impact Statement

The proposed amendment relates to the payment of State aid to school districts, and is necessary to reflect the Foundation Aid provisions enacted by Chapter 57 of the Laws of 2007 and to otherwise bring the Commissioner's Regulations into compliance with other statutory changes to the law. As such, the rule making conforms the Commissioner's Regulations to existing statutes and practices, and does not impose any additional compliance requirements, mandates or costs on school districts, and will not have an adverse impact on job or employment opportunities. Because it is evident from the nature and purpose of the proposed amendment that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

EMERGENCY RULE MAKING

Teachers Performing Instructional Support Services

I.D. No. EDU-19-09-00002-E

Filing No. 905

Filing Date: 2009-07-29

Effective Date: 2009-07-29

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

Action taken: Amendment of sections 30-1.1, 30-1.2, 30-1.9 and 80-1.1; and addition of section 80-5.21 to Title 8 NYCRR.

Statutory authority: Education Law, section 207

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

Specific reasons underlying the finding of necessity: The purpose of the proposed amendment is to establish qualifications for teachers performing duties in instructional support services in school districts or board of cooperative educational services (BOCES) and to authorize teachers performing such functions to accrue tenure and seniority rights in a tenure area for which they are properly certified.

These positions have never been formally recognized under the Education Law or Regents Rules and, therefore, no tenure area exists for them. Therefore, by default under Civil Service Law, these positions are considered classified Civil Service positions that are not instructionally related and, therefore, teachers serving in these positions would not be eligible to accrue tenure and seniority rights.

To address this issue, the Commissioner has certified to the New York State Civil Service Commission that teachers providing instructional support services to classroom teachers and other school personnel for the purpose of enhancing instruction and improving student performance are part of the teaching staff of a public school. Accordingly, these positions are now in the unclassified service, require an appropriate teaching certificate, and are subject to certain provisions in Education Law in regard to appointment, tenure, and seniority rights.

As a result of this action, at the April 2009 meeting, the Board of Regents adopted as an emergency measure a proposed rule authorizing teachers performing such services to accrue tenure and seniority rights and to establish qualifications for appointment to positions covered by this tenure area. This enables teachers serving in instructional support positions to be appointed to an appropriate tenure area. Given the current budget difficulties faced by schools and BOCES in New York State and the possibility of impending lay-offs, it is critical that teachers currently serving in instructional support positions have appropriate tenure protection and that their accrued seniority rights be protected.

The proposed amendment was adopted as an emergency rule at the April 20-21, 2009 meeting of the Board of Regents, effective May 1, 2009. A Notice of Proposed Rule Making was published in the State Register on May 13, 2009. It is anticipated that the proposed amendment will be adopted as permanent rule at the July 2009 Regents meeting. Pursuant to the State Administrative Procedure Act, the earliest the adopted rule can become effective is after its publication in the State Register on August 20, 2009. However, the emergency rule which took effect on May 1, 2009 will expire on July 29, 2009.

Therefore, a second emergency action is necessary for the preservation

of the general welfare in order to ensure that the emergency rule adopted at the April 2009 Regents meeting, which authorizes a teacher employed by a school district or BOCES to accrue tenure and seniority rights for the performance of instructional support services, remains continuously in effect until the effective date of its adoption as a permanent rule.

Subject: Teachers performing instructional support services.

Purpose: Establish qualifications and tenure and/or seniority rights for teachers performing instructional support services.

Text of emergency rule: 1. A new subdivision (j) shall be added to section 30-1.1 of the Rules of the Board of Regents, effective July 29, 2009, to read as follows:

(j) Instructional support services shall mean professional development, pedagogical support, technical assistance, consultation, and/or program coordination offered by teachers to other school personnel including, but not limited to: conducting workshops, study groups, and demonstration lessons; modeling instruction; providing feedback, coaching, mentoring and other professional support for instructional staff; providing training in best instructional practices in specific content areas; assisting instructional staff in analyzing student performance data and differentiating instruction to meet the needs of all students; coordinating the provision of special education services; developing and promoting a culture of reflective instructional practice; providing curriculum and assessment resources to instructional staff; providing information and support on technology tools to extend and support student learning; assessing curriculum development or professional development needs; and such similarly related work.

2. Subdivisions (b) and (c) of section 30-1.2 of the Rules of the Board of Regents shall be renumbered to subdivisions (c) and (d) of section 30-1.2 of the Rules of the Board of Regents, effective July 29, 2009.

3. A new subdivision (b) shall be added to section 30-1.2 of the Rules of the Board of Regents, effective July 29, 2009, to read as follows:

(b) The provisions of this Subpart shall apply to a professional educator appointed by a board of education or board of cooperative educational services for the performance of duties in instructional support services, as defined in subdivision (j) of section 30-1.1 of this Subpart, on or after August 1, 1975 as follows:

(1) A professional educator employed by a board of education or board of cooperative educational services on May 1, 2009 that was appointed to tenure or a probationary period in a tenure area identified in this Subpart for the performance of duties in instructional support services and who did not provide knowing consent to an assignment outside of his previous tenure area pursuant to section 30-1.9 of this Subpart when he was assigned by such board of education or board of cooperative educational services prior to May 1, 2009 to the performance of duties in instructional support services shall receive credit toward tenure and/or accrue tenure and seniority rights in his previous tenure area from the initial date of his assignment to the performance of such duties and shall continue to receive tenure and/or seniority rights in his previous tenure area while assigned to perform duties in instructional support services.

(2) A professional educator employed by a board of education or board of cooperative educational services on May 1, 2009 who was appointed by such board of education or board of cooperative educational services prior to May 1, 2009 for the performance of duties in instructional support services, and who was appointed to tenure or a probationary period in an improper tenure area or a tenure area not authorized under this Subpart based upon the performance of such duties, shall be deemed to have been appointed or assigned by such board of education or board of cooperative educational services to serve in a tenure area for which he holds the proper certification as described in subdivision (b) of section 30-1.9 of this Subpart as it exists on May 1, 2009, from the initial date of his assignment and shall continue to receive credit toward tenure and/or accrue tenure and seniority rights in such tenure area while assigned to perform duties in instructional support services provided that he holds the proper certification for such tenure area.

(3) Any board of education or board of cooperative educational services that employs a professional educator on May 1, 2009 who has not been appointed to tenure or a probationary period in a tenure area and is performing duties in instructional support services, shall make a probationary appointment in accordance with the provisions of subdivision (b) of section 30-1.9 of this Subpart by July 1, 2009 if the board desires to continue to employ such professional educator for instructional support services, provided that the professional educator meets the requirements of section 80-5.21 of the Regulations of the Commissioner of Education. Thereafter, appointments on tenure shall be made in accordance with the provisions of this Subpart.

(4) Any board of education or board of cooperative educational services that assigns a professional educator to the performance of instructional support services on or after May 1, 2009 who has previously been appointed to tenure or a probationary period by such board in a tenure area identified in this Subpart shall credit the professional educator with tenure and seniority rights in their existing tenure area while assigned to perform duties in instructional support services.

(5) Any board of education or board of cooperative educational services that appoints a professional educator on or after May 1, 2009 for the performance of duties in instructional support services shall make probationary appointments and appointments on tenure in accordance with subdivision (b) of section 30-1.9 of this Subpart.

4. Renumbered subdivision (c) of section 30-1.2 of the Rules of the Board of Regents shall be amended, effective July 29, 2009, to read as follows:

(c) *Except as otherwise provided in subdivision (b) of this section,* each board of education or board of cooperative educational services shall on and after the effective date of this Subpart make probationary appointments and appointments on tenure in accordance with the provisions of this Subpart.

5. Subdivision (a) of section 30-1.9 of the Rules of the Board of Regents shall be amended, effective July 29, 2009, to read as follows:

(a) [A] *Except as otherwise provided in subdivision (b) of this section, a* board of education or a board of cooperative educational services shall appoint and assign a professional educator in such a manner that he shall devote a substantial portion of his time throughout the probationary period in at least one designated tenure area except that a professional educator who teaches in an experimental program as defined in [subdivision (i) of] section 30-1.1 of this Subpart and who does not devote 40 percent or more of his time to service in any one tenure area may be appointed to a tenure area for which he holds the proper certification.

6. Subdivisions (b) through (e) of section 30-1.9 of the Rules of the Board of Regents shall be renumbered to subdivisions (c) through (f) of section 30-1.9 of the Rules of the Board of Regents, effective July 29, 2009.

7. A new subdivision (b) shall be added to section 30-1.9 of the Rules of the Board of Regents, effective July 29, 2009, to read as follows:

(b) Except as otherwise provided in subdivision (b) of section 30-1.2 of this Subpart, a board of education or a board of cooperative educational services shall appoint and assign a professional educator in such a manner that he shall devote a substantial portion of his time in at least one designated tenure area except that a professional educator appointed or assigned on or after May 1, 2009 to duties described in either paragraph (1) or (2) of this subdivision, shall be appointed to a tenure area for which he holds the proper certification.

(1) A professional educator appointed or assigned to devote a substantial portion of his time to the performance of duties in instructional support services; or

(2) A professional educator appointed or assigned to devote a substantial portion of his time to a combination of duties in instructional support services and time in at least one designated tenure area identified in this Subpart.

8. Paragraphs (23) through (46) of subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education shall be renumbered to paragraphs (24) through (47) of subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education, effective July 29, 2009.

9. A new paragraph (23) shall be added to subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education, effective July 29, 2009, to read as follows:

(23) Instructional support services, for purposes of section 80-5.21 of the Regulations of the Commissioner of Education, shall mean professional development, pedagogical support, technical assistance, consultation, and/or program coordination offered by teachers to other school personnel including, but not limited to: conducting workshops, study groups, and demonstration lessons; modeling instruction; providing feedback, coaching, mentoring and other professional support for instructional staff; providing training in best instructional practices in specific content areas; assisting instructional staff in analyzing student performance data and differentiating instruction to meet the needs of all students; coordinating the provision of special education services; developing and promoting a culture of reflective instructional practice; providing curriculum and assessment resources to instructional staff; providing information and support on technology tools to extend and support student learning; assessing curriculum development or professional development needs; and such similarly related work.

10. A new section 80-5.21 of the Regulations of the Commissioner of Education shall be added, effective July 29, 2009, to read as follows:

§ 80-5.21 Authorization for appointment or assignment of a teacher to provide instructional support services.

(a) Purpose. The purpose of this section is to authorize a board of education or board of cooperative educational services to appoint or assign an experienced and qualified teacher to provide instructional support services to other school personnel.

(b) Requirements for authorization to provide instructional support

services. To be eligible to provide instructional support services to other school personnel, a candidate shall meet the requirements in either paragraph (1) or (2) of this subdivision.

(1)(i) Certification. The candidate shall hold a valid permanent or professional certificate in the teaching service identified in Subpart 80-2 or 80-3 of the Regulations of the Commissioner of Education and be competent and qualified to perform instructional support services by meeting the education and experience qualifications set by the employing school district or board of cooperative educational services, including holding any appropriate certificate(s) in the teaching service required by the school district or board of cooperative educational services for such position; and

(ii) Experience. The candidate shall have at least three years of satisfactory experience as a teacher as defined in section 80-1.1 of the Regulations of the Commissioner of Education, as determined by the department.

(2)(i) Certification. The candidate shall hold a valid initial, provisional, permanent or professional certificate in the teaching service identified in Subpart 80-2 or 80-3 of the Regulations of the Commissioner of Education and be competent and qualified to perform instructional support services by meeting the education and experience qualifications set by the employing school district or board of cooperative educational services, including holding any appropriate certificate(s) in the teaching service required by the school district or board of cooperative educational services for such position; and

(ii) Education. The candidate shall hold an educational degree(s) beyond the baccalaureate level for which the superintendent of school or district superintendent finds sufficiently qualifies such person to be competent and qualified to provide instructional support services.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-19-09-00002-P, Issue of May 13, 2009. The emergency rule will expire September 26, 2009.

Text of rule and any required statements and analyses may be obtained from: Christine Moore, NYS Education Department, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the legislative objectives of the above- referenced statute by establishing qualifications for teachers appointed by a school district or BOCES to serve in a position in instructional support services and authorizes teachers serving in such positions to accrue tenure and seniority rights for the performance of such duties.

3. NEEDS AND BENEFITS:

The purpose of the proposed amendment is to permit teachers employed in instructional support service positions in school districts and BOCES to accrue tenure and seniority rights in a tenure area for which they are properly certified. (The regulations do not impact teachers serving in the New York City School District.) The proposed amendment is necessary because the number of individuals serving in these types of positions has grown considerably in the past three decades and these positions have never been formally recognized as being educational in nature under section 35-g of the Civil Service Law. The effect is that teachers serving in these positions currently are not eligible to accrue tenure and seniority rights in any tenure area.

Despite the fact that instructional support service positions have grown in number and variety, these positions were never certified to the State Civil Service Commission pursuant to the provisions of 35-g of the Civil Service Law as educational in nature and therefore individuals appointed to such positions were not required to have a teaching certificate and teachers in such positions were not able to acquire tenure and/or seniority rights for the performance of such duties.

To address this issue, the Commissioner will certify to the New York State Civil Service Commission that positions providing direct instructional support to other educators for the purpose of enhancing instruction and improving student performance are part of the teaching staff of a public school. Accordingly, these positions will become part of the unclassified service, require an appropriate teaching certificate, and be subject to the Education Law in regard to appointment and tenure.

The proposed amendment authorizes a teacher who is performing instructional support services in a school district or BOCES to accrue tenure and/or seniority rights in a tenure area for which they are properly. It also permits teachers who did not provide knowing consent to an assignment outside of their previous tenure to receive retroactive credit for their prior service in an instructional support position and continue to receive credit in their previous tenure area while assigned to perform instructional support services and authorizes teachers who were appointed to an improper tenure area or a tenure area not authorized by Part 30 of the Rules of the Board of Regents to receive retroactive credit for their prior service in instructional support services in a tenure area for which they are properly certified and to continue to receive such credit while assigned to perform instructional support services.

The proposed amendment also requires that by July 1, 2009, any school district or BOCES which currently employs a certified individual who is not appointed to tenure or a probationary period and who is working in an instructional support service position make a probationary appointment for such individual in a tenure area in which they are properly certified if the district/BOCES intends to continue to employ such individual.

In addition, the proposed amendment provides for an exception to the general rule that, to accrue tenure and seniority rights in a tenure area, a teacher must devote at least 40% of his/her time working in classroom instruction in his/her tenure area. The proposed amendment authorizes teachers to accrue tenure and seniority rights for the performance of duties in instructional support services in any tenure area for which they are properly certified.

The proposed amendment also adds a new Section 80-5.21 to the Commissioner's Regulations to establish qualifications for an appointment of a teacher to a position in instructional support services. The proposed amendment requires that an individual performing instructional support services: (1) hold a valid Permanent or Professional teaching certificate and have at least three years of satisfactory teaching experience, or (2) hold a valid Initial, Provisional, Permanent or Professional certificate and hold an educational degree(s) beyond the baccalaureate level that qualifies such person to be competent and qualified to provide instructional support services.

4. COSTS:

(a) Costs to State government: The proposed amendment will not impose any additional costs on State government, including the State Education Department.

(b) Costs to local governments: The proposed amendment will not impose any additional costs on local governments, including school districts and BOCES.

(c) Costs to private regulated parties: The proposed amendment will not impose any additional costs on private regulated parties.

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in ''Costs to State Government,'' the amendment will not impose any additional costs on the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment applies to both school districts and boards of cooperative educational services. Therefore, the mandates in Section 3 apply to BOCES as well. The State Education Department has determined that uniform requirements are necessary to ensure the quality of the State's teaching workforce and consistency in tenure and seniority rights for teachers performing duties in instructional support services across the State.

6. PAPERWORK:

In general, the amendment does not impose additional paperwork requirements upon school districts or BOCES.

7. DUPLICATION:

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

8. ALTERNATIVES:

One alternative that was explored was to create a new tenure area in instructional support services for teachers in all school districts and BOCES across the State (with the exception of New York City). However, this alternative was rejected because many teachers are selected for an assignment in instructional support services based on expertise gained from years of quality service to the district and possibly additional education or training attained. These teachers literally ''bubble up'' from the ranks of the various teaching areas as a result of exemplary service. It made more sense to treat these additional responsibilities as an extension of their teaching duties and permit them to remain in their tenure area and continue to accrue seniority while performing instructional support services. The State Education Department rejected the alternative to create a new instructional support services tenure area because this approach could serve as a deterrent for the recruitment of tenured, experienced teachers to these positions. Most tenured teachers would not want to leave their tenure area to serve in these positions. The proposed amendment provides for an exception to the general rule that, to earn seniority credit, a teacher must devote at least 40% of his/her time working in classroom instruction in his/her tenure area and permits teachers to accrue tenure and seniority rights for the performance of instructional support duties in any tenure area where they are properly certified.

Another alternative was a ''blended approach'', to establish a new tenure area in instructional support services for teachers serving in these positions in a BOCES and for teachers performing these duties in a school district, they would receive tenure and seniority rights in a tenure area for which they were properly certified. This alternative was also rejected because the State Education Department determined that tenure and seniority rights for individuals performing duties in instructional support services should apply uniformly across the State.

9. FEDERAL STANDARDS:

There are no Federal standards that establish qualifications and/or tenure and seniority rights for teachers performing instructional support services.

10. COMPLIANCE SCHEDULE:

School districts and BOCES will be required to comply with the proposed amendment on its stated effective date.

Regulatory Flexibility Analysis

(a) Small Businesses:

The proposed amendment applies to school districts and boards of cooperative educational services (BOCES) and relates to qualifications for teachers performing instructional support services and tenure and seniority rights for teachers performing such duties. The proposed amendment does not impose any adverse economic impact, reporting, recordkeeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

The proposed amendment relates to the qualifications of teachers performing instructional support services and tenure and seniority rights for teachers performing such duties in school districts and BOCES throughout the State.

1. EFFECT OF RULE:

The proposed amendment applies to the 698 school districts and seven BOCES located in New York State and relates to the qualifications of teachers appointed to positions in instructional support services and authorizes teachers to accrue tenure and seniority rights for the performance of such duties.

2. COMPLIANCE REQUIREMENTS:

The purpose of the proposed amendment is to permit teachers employed in instructional support service positions in BOCES and school districts to receive tenure and seniority rights in a tenure area for which they are properly certified. (The regulations do not impact teachers serving in the New York City School District.) The proposed amendment is necessary because the number of individuals serving in these types of positions has grown considerably in the past three decades and these positions have never been formally recognized as being educational in nature under section 35-g of the Civil Service Law. The effect is that teachers serving in these positions currently are not eligible to accrue tenure and seniority rights in any tenure area.

Despite the fact that instructional support service positions have grown in number and variety, these positions were never certified to the State Civil Service Commission pursuant to the provisions of 35-g of the Civil Service Law as educational in nature and therefore individuals appointed to such positions were not required to have a teaching certificate and teachers in such positions were not able to acquire tenure and/or seniority rights for the performance of such duties.

To address this issue, the Commissioner will certify to the New York State Civil Service Commission that positions providing direct instructional support to other educators for the purpose of enhancing instruction and improving student performance are part of the teaching staff of a public school. Accordingly, these positions will become part of the unclassified service, require an appropriate teaching certificate, and be subject to Education Law in regard to appointment and tenure.

The proposed amendment authorizes a teacher who is performing instructional support services in a school district or BOCES to accrue tenure and/or seniority rights in a tenure area for which they are properly. It also permits teachers who did not provide knowing consent to an assignment outside of their previous tenure to receive retroactive credit for their prior service in an instructional support position and continue to receive credit in their previous tenure area while assigned to perform instructional support services and authorizes teachers who were appointed to an improper tenure area or a tenure area not authorized by Part 30 of the Rules of the Board of Regents to receive retroactive credit for their prior service in instructional support services in a tenure area for which they are properly certified and to continue to receive such credit while assigned to perform instructional support services.

In addition, the proposed amendment requires that by July 1, 2009, any school district or BOCES which currently employs a certified individual who is not appointed to tenure or a probationary period and who is working in an instructional support service position make a probationary appointment for such individual in a tenure area in which they are properly certified if the district/BOCES intends to continue to employ such individual.

For individuals employed by a school district or BOCES after May 1, 2009, the proposed amendment provides an exception to the general rule that, to accrue tenure and seniority credit, a teacher must devote at least 40% of his/her time working in classroom instruction in his/her tenure area and will now permit teachers to accrue tenure and seniority rights for the performance of instructional support duties in any tenure area for which they are properly certified.

The proposed amendment also adds a new Section 80-5.21 to the Commissioner's Regulations to establish qualifications for an appointment of a teacher to a position in instructional support services. The proposed amendment requires that an individual performing instructional support services: (1) hold a valid Permanent or Professional teaching certificate and have at least three years of satisfactory teaching experience, or (2) hold a valid Initial, Provisional, Permanent or Professional certificate and hold an educational degree(s) beyond the baccalaureate level that qualifies such person to be competent and qualified to provide instructional support services.

3. PROFESSIONAL SERVICES:

The proposed amendment does not mandate that school districts or BOCES contract for additional professional services to comply.

4. COMPLIANCE COSTS:

In general, the proposed amendment does not impose any additional compliance costs on school districts and BOCES.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment applies to school districts and BOCES and relates to qualifications for teachers performing instructional support services and tenure and seniority rights for teachers performing such duties. The State Education Department has determined that uniform qualifications are necessary to ensure the quality of the State's teaching workforce and a uniform tenure system across the State for individuals performing such duties.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the proposed rule were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES across the State. Comments on the proposed rule were also solicited from the BOCES District Superintendents, New York State Council of School Superintendents, New York State United Teachers, New York State School Boards Association, School Administrators Association of New York State, and New York State Association of School Personnel Administrators.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATE OF THE NUMBER OF RURAL AREAS:

The proposed amendment will affect teachers in the 698 school districts and seven boards of cooperative services in all areas of New York State, including the 44 rural counties with fewer than 200,000 inhabitants and the 71 towns and urban counties with a population density of 150 square miles or less.

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

The purpose of the proposed amendment is to permit teachers employed in instructional support service positions in school districts and BOCES to accrue tenure and seniority rights in a tenure area for which they are properly certified. (The regulations do not impact teachers serving in the New York City School District.) The proposed amendment is necessary because the number of individuals serving in these types of positions has grown considerably in the past three decades and these positions have never been formally recognized as being educational in nature under section 35-g of the Civil Service Law. The effect is that teachers serving in these positions currently are not eligible to accrue tenure and seniority rights in any tenure area.

Despite the fact that instructional support service positions have grown in number and variety, these positions were never certified to the State Civil Service Commission pursuant to the provisions of 35-g of the Civil Service Law as educational in nature and therefore individuals appointed to such positions were not required to have a teaching certificate and teachers in such positions were not able to acquire tenure and/or seniority rights for the performance of such duties.

To address this issue, the Commissioner will certify to the New York State Civil Service Commission that positions providing direct instructional support to other educators for the purpose of enhancing instruction

and improving student performance are part of the teaching staff of a public school. Accordingly, these positions will become part of the unclassified service, require an appropriate teaching certificate, and be subject to the Education Law in regard to appointment and tenure.

The proposed amendment authorizes a teacher who is performing instructional support services in a school district or BOCES to accrue tenure and/or seniority rights in a tenure area for which they are properly. It also permits teachers who did not provide knowing consent to an assignment outside of their previous tenure to receive retroactive credit for their prior service in an instructional support position and continue to receive credit in their previous tenure area while assigned to perform instructional support services and authorizes teachers who were appointed to an improper tenure area or a tenure area not authorized by Part 30 of the Rules of the Board of Regents to receive retroactive credit for their prior service in instructional support services in a tenure area for which they are properly certified and to continue to receive such credit while assigned to perform instructional support services.

The proposed amendment also requires that by July 1, 2009, any school district or BOCES which currently employs a certified individual who is not appointed to tenure or a probationary period and who is working in an instructional support service position make a probationary appointment for such individual in a tenure area in which they are properly certified if the district/BOCES intends to continue to employ such individual.

In addition, the proposed amendment provides for an exception to the general rule that, to accrue tenure and seniority rights in a tenure area, a teacher must devote at least 40% of his/her time working in classroom instruction in his/her tenure area. The proposed amendment authorizes teachers to accrue tenure and seniority rights for the performance of duties in instructional support services in any tenure area for which they are properly certified.

The proposed amendment also adds a new Section 80-5.21 to the Commissioner's Regulations to establish qualifications for an appointment of a teacher to a position in instructional support services. The proposed amendment requires that an individual performing instructional support services: (1) hold a valid Permanent or Professional teaching certificate and have at least three years of satisfactory teaching experience, or (2) hold a valid Initial, Provisional, Permanent or Professional certificate and hold an educational degree(s) beyond the baccalaureate level that qualifies such person to be competent and qualified to provide instructional support services.

3. COSTS:

The proposed amendment will not impose any additional costs on private regulated parties.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment establishes the qualifications for teachers employed in instructional support service positions in school districts and BOCES and authorizes these teachers to accrue tenure and seniority rights in a tenure area for which they are properly certified. Because these requirements apply to teachers, school districts and BOCES located in all areas of the State, including rural areas, it is not possible to exempt those from rural areas from the proposed amendment or impose a lesser standard. Moreover, the State Education Department has determined that uniform qualifications for appointment to these positions and accrual of tenure and seniority rights in such positions are necessary to ensure the quality of the State's teaching workforce and consistency in the application of tenure and seniority rights for such positions.

5. RURAL AREA PARTICIPATION:

Comments on the proposed rule were solicited from the State Professional Standards and Practices Board for Teaching. This is an advisory group to the Board of Regents and the Commissioner of Education on matters pertaining to teacher education, certification, and practice. The Board has representatives of school districts and BOCES located in rural areas of New York State. Comments on the proposed rule were also solicited from the District Superintendents, New York State Council of School Superintendents, New York State United Teachers, New York State School Boards Association, School Administrators Association of New York State, and New York State Association of School Personnel Administrators, the constituencies of which include those from rural areas.

Job Impact Statement

The purpose of the proposed amendment is to establish qualifications for teachers serving in instructional support service positions and to authorize teachers employed in instructional support service positions in school districts and boards of cooperative educational services to accrue tenure and seniority rights in a tenure area for which they are properly certified.

Because it is evident from the nature of this regulation that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The rule was adopted by emergency action on April 21, 2009, effective May 1, 2009. A Notice of Proposed Rule Making was published in the State Register on May 13, 2009. Below is a summary of written comments received by the State Education Department concerning the emergency rule and the Department's assessment of these comments.

COMMENT #1: One commenter stated that the rule adopted by the Board of Regents at their April 2009 meeting ignores the concerns of BOCES, due to the differences in the way BOCES and school districts employ teachers to provide instructional support services. The commenter noted that BOCES hire and assign instructional support staff to provide specialized services to component school districts under cooperative service agreements (CO-SERS) while districts often assign already-employed classroom teachers to instructional support service positions. The commenter believes that, in the event of staff cuts, the new rule will have a negative impact on the quality of BOCES services and their customer relationships with component school districts, and that it is unfair to the individuals BOCES hire. The commenter requested that the emergency regulations be revised so that either BOCES and school districts are treated differently or BOCES staff are covered by a grandfathering clause. Further, the commenter requested an in-depth analysis of the impact on BOCES.

RESPONSE #1: These comments reflect the concerns of some of the BOCES district superintendents. Prior to the April Regents meeting, the Department engaged in extensive consultation with representatives of the district superintendents, New York State United Teachers, Council of State School Superintendents, School Administrators Association of New York State, the New York State School Boards Association, and others to explore potential solutions for the inclusion of individuals performing instructional support services in a school district or BOCES as part of the teaching staff. The primary options discussed were to either create new tenure areas for teachers performing instructional support duties or to credit teachers for the performance of duties in instructional support services in their existing tenure area or if they did not already have one, in a tenure area in which they are properly certified.

After extensive discussions, it became clear that not all parties could agree on one approach. The majority of parties favored crediting teachers for the performance of instructional support services in their existing tenure area or if they did not already have one, in a tenure area for which they are properly certified. Based upon meetings with BOCES district superintendents, the majority of BOCES district superintendents recommended this solution; although, there were some BOCES district superintendents who recommended the solution of creating new tenure areas. The determination of the Board of Regents to adopt these regulations at their April 2009 meeting was based upon the following principles:

- Many teachers are selected for an assignment in instructional support services based on expertise gained from years of quality service to the district and possibly additional education or training attained. These teachers literally ''bubble up'' from the ranks of the various teaching areas as a result of exemplary service. It, therefore, makes sense to treat these additional responsibilities as an extension of their teaching duties and permit them to remain in their tenure area and continue to accrue seniority while performing instructional support services.
- This approach provides for flexibility in assignments within the same tenure area so that school leaders can best utilize their teaching workforce.
- Grandparenting provisions provide equitable relief to tenured teachers who accepted instructional support positions in good faith and were appointed by their school district or BOCES to one of the existing tenure areas in Part 30 of the Rules of the Board of Regents or to a tenure area that does not currently exist in the Rules of the Board of Regents.

At the time that the emergency rules were adopted, all parties agreed that it was absolutely necessary to have rules in place so that school districts and BOCES would be able to follow a set of rules as they implemented the reduction in force for the 2009-10 school year. While the rules that were put in place satisfied the majority of school districts and BOCES, they did not address the concerns of all BOCES.

The Senior Deputy Commissioner, in her ongoing discussions with the district superintendents, has asked the district superintendents to provide documentation of the problems that have occurred as a result of implementation of the emergency Regents Rules. While the Department does not anticipate recommending to the Regents any retroactive change to the rules, the concerns expressed by some of the BOCES need to be fully explored to determine if prospective changes in the tenure rules or the Education Law are necessary for certain instructional support services positions in the BOCES.

COMMENT #2: A second commenter concurred with concerns of the first regarding what they see as the negative impact on some BOCES, particularly those that contract with the Department to be the LEA for essential functions. The commenter stated that the emergency rule diminishes the work that BOCES do to improve student achievement on behalf

of the Department and will result in teachers being placed in classrooms and in instructional support positions where they have no experience.

RESPONSE #2: The response provided to Comment #1 applies to this comment as well. The essence of Comment #2 appears to be that some teachers may be placed in classroom assignments or instructional support assignments where they have no work experience. SED agrees that this is a possibility as a result of the new rules. However, at the time these regulations were adopted, it was understood that this was a potential consequence and there was agreement by most of the interested parties that these positions should be part of the teaching force of a school district or BOCES.

COMMENT #3: A third commenter requested reconsideration of the rule because of what they feel will be unintended negative consequences for employees and employers. The commenter requested that the Regents delay implementation of the emergency measure in order to give serious consideration to adding the option of a new tenure area for teachers serving in instructional support positions and to allow more time to collect information regarding the impact of the rule.

RESPONSE #3: The implementation of the emergency regulations adopted by the Regents in April of this year has proceeded with school districts and the majority of BOCES satisfied with the provisions of these new rules and regulations. Some of the BOCES organizations have experienced problems based on the provisions of the new regulations in combination with statutory provisions which apply to a reduction in force. To delay the implementation of these regulations would not provide for a satisfactory solution for all districts and BOCES.

One of the considerations upon which all interested parties involved in the consultation process prior to the April Regents meeting were in agreement, was that there needed to be Regents Rules that would provide for how teachers performing instructional support services duties should be treated in a reduction in force situation. Even though all parties could not unanimously agree on exactly the approach to be used in those rules, they did agree that the Regents and SED should not force school districts and BOCES into a situation of coping with necessary reductions in force without giving them Rules to follow. Accordingly, the Department recommended, and the Regents adopted, emergency Rules in April which gave guidance to all school districts and BOCES for any required reductions in force.

As mentioned in response #1 above, based on meetings with the district superintendents, the majority of the BOCES district superintendents have found the emergency regulations acceptable. It is a smaller group of BOCES where operational problems have been identified and the concerns expressed by such BOCES need to be fully explored to determine if prospective changes in the tenure rules or the Education Law might be necessary for certain instructional support services positions in the BOCES.

COMMENT #4: A fourth commenter pointed out that BOCES professional development positions have distinctive job qualifications that differ from those of classroom teachers, although they may hold the same certification. The commenter stated that the new requirements will create havoc with BOCES ability to staff and retain these CO-SER positions. The commenter provided a possible scenario in which, in the event of layoffs, a classroom teacher with no experience in providing instructional support may bump the incumbent in an instructional support position. The commenter predicts an adverse impact on BOCES employees and the continued delivery of certain BOCES services, stating that the new rule takes away flexibility in recruiting and retaining qualified staff development specialists and may have the effect of shifting who is laid off from areas of actual reduction in force to other divisions in the BOCES organization. The commenter noted that this sets teachers up for potential failure when placed in positions based on tenure alone. The commenter urges the Regents to seek alternative tenure structures that recognize BOCES as a unique service provider that needs flexible staffing options.

RESPONSE #4: Response #2, above, is also applicable to this fourth comment. In addition, part of this comment relates to the situation that existed prior to the Commissioner's August 2008 decision in a Section 310 appeal and the Regents resulting emergency regulations adopted in April 2009. The situation that existed prior to August 2008 was problematic in that, as clarified by the Commissioner's 310 decision, individuals performing instructional support services were not considered to be part of the teaching workforce of a school district.

There was substantial confusion in school districts and BOCES in regard to the employment status of such individuals. In some cases, individuals were hired as permanent Civil Service employees. In other cases, they were hired as teachers and appointed to tenure areas which did not exist, or they were hired as teachers and appointed to a tenure area for which they were properly certified, or in some cases, individuals were hired as teachers but not granted tenured appointments. Needless to say, this created substantial confusion over the rights and responsibilities of both employers and employees in these situations. It became clear after the Commissioner's August 2008 decision on the Section 310 appeal that there needed to be clarification as to whether teachers employed to perform instructional support services were part of the teaching service of a school district or whether they were classified Civil Service employees that did not require a teaching certificate. After consultation with all interested parties, there was a consensus that these positions were, in fact, teaching positions and should be part of the teaching service of a school district or BOCES.

Once having determined that these positions are part of the teaching service, it follows that appointment to such positions must be made in accordance with the Education Law and that probationary appointments should be made and tenure and seniority rights provided, in accordance the Education Law and the Rules of the Board of Regents.

However, as mentioned in the earlier responses to the above comments, some of the BOCES have expressed concerns as to the negative impact on BOCES programs for component school districts when a reduction in force situation occurs and teachers performing instructional support services are credited with seniority in their existing tenure area or a tenure area for which they are properly certified. The Department believes that it is appropriate to continue to investigate exactly the nature of the problems that have occurred and determine whether prospective changes in the tenure rules or the Education Law might be necessary to address certain instructional support services positions in the BOCES.

NOTICE OF ADOPTION

Maintenance of Electronic Records by Pharmacists and Licensure Requirement for Pharmacists

I.D. No. EDU-18-09-00008-A
Filing No. 909
Filing Date: 2009-08-04
Effective Date: 2009-08-19

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

Action taken: Amendment of sections 29.7, 63.3 and 63.6 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6506(1), 6507(2)(a), (4)(h), 6509(9), 6801(not subdivided), 6805(3) and 6810(4) and (5)

Subject: Maintenance of electronic records by pharmacists and licensure requirement for pharmacists.

Purpose: Maintain records in electronic format and provide applicants with an alternative to passing the practical examination.

Text or summary was published in the May 6, 2009 issue of the Register, I.D. No. EDU-18-09-00008-P.

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

Text of rule and any required statements and analyses may be obtained from: Christine Moore, NYS Education Department, Office of Counsel, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

Assessment of Public Comment

The proposed rule was published in the State Register on May 6, 2009. Below is a summary of written comments received by the State Education Department concerning the proposed rule making and the Department's assessment of these comments.

COMMENT: Two commentors wrote in support of the proposed amendment as they applied to licensure requirements for pharmacists. It was stated that the proposed amendment will encourage graduates from other states to come to New York State to complete their residencies and potentially stay in New York State to practice pharmacy. Both commentors also indicated that nationally accredited residency programs are well equipped to determine the competency of graduate pharmacists as such skills are already evaluated in the beginning of each resident's year of training.

RESPONSE: The State Education Department agrees.

NOTICE OF ADOPTION

Teachers Performing Instructional Support Services

I.D. No. EDU-19-09-00002-A
Filing No. 911
Filing Date: 2009-08-04
Effective Date: 2009-08-19

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

Action taken: Amendment of sections 30-1.1, 30-1.2, 30-1.9, 80-1.1; and addition of section 80-5.21 to Title 8 NYCRR.

Statutory authority: Education Law, section 207

Subject: Teachers performing instructional support services.

Purpose: Establish qualifications and tenure and/or seniority rights for teachers performing instructional support services.

Text or summary was published in the May 13, 2009 issue of the Register, I.D. No. EDU-19-09-00002-P.

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

Text of rule and any required statements and analyses may be obtained from: Christine Moore, NYS Education Department, Office of Counsel, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 473-8296, email: cmoore@mail.nysed.gov

Assessment of Public Comment

The rule was adopted by emergency action on April 21, 2009, effective May 1, 2009. A Notice of Proposed Rule Making was published in the State Register on May 13, 2009. Below is a summary of written comments received by the State Education Department concerning the emergency rule and the Department's assessment of these comments.

COMMENT #1: One commenter stated that the rule adopted by the Board of Regents at their April 2009 meeting ignores the concerns of BOCES, due to the differences in the way BOCES and school districts employ teachers to provide instructional support services. The commenter noted that BOCES hire and assign instructional support staff to provide specialized services to component school districts under cooperative service agreements (CO-SERS) while districts often assign already-employed classroom teachers to instructional support service positions. The commenter believes that, in the event of staff cuts, the new rule will have a negative impact on the quality of BOCES services and their customer relationships with component school districts, and that it is unfair to the individuals BOCES hire. The commenter requested that the emergency regulations be revised so that either BOCES and school districts are treated differently or BOCES staff are covered by a grandfathering clause. Further, the commenter requested an in-depth analysis of the impact on BOCES.

RESPONSE #1: These comments reflect the concerns of some of the BOCES district superintendents. Prior to the April Regents meeting, the Department engaged in extensive consultation with representatives of the district superintendents, New York State United Teachers, Council of State School Superintendents, School Administrators Association of New York State, the New York State School Boards Association, and others to explore potential solutions for the inclusion of individuals performing instructional support services in a school district or BOCES as part of the teaching staff. The primary options discussed were to either create new tenure areas for teachers performing instructional support duties or to credit teachers for the performance of duties in instructional support services in their existing tenure area or if they did not already have one, in a tenure area in which they are properly certified.

After extensive discussions, it became clear that not all parties could agree on one approach. The majority of parties favored crediting teachers for the performance of instructional support services in their existing tenure area or if they did not already have one, in a tenure area for which they are properly certified. Based upon meetings with BOCES district superintendents, the majority of BOCES district superintendents recommended this solution; although, there were some BOCES district superintendents who recommended the solution of creating new tenure areas. The determination of the Board of Regents to adopt these regulations at their April 2009 meeting was based upon the following principles:

- Many teachers are selected for an assignment in instructional support services based on expertise gained from years of quality service to the district and possibly additional education or training attained. These teachers literally "bubble up" from the ranks of the various teaching areas as a result of exemplary service. It, therefore, makes sense to treat these additional responsibilities as an extension of their teaching duties and permit them to remain in their tenure area and continue to accrue seniority while performing instructional support services.
- This approach provides for flexibility in assignments within the same tenure area so that school leaders can best utilize their teaching workforce.
- Grandparenting provisions provide equitable relief to tenured teachers who accepted instructional support positions in good faith and were appointed by their school district or BOCES to one of the existing tenure areas in Part 30 of the Rules of the Board of Regents or to a tenure area that does not currently exist in the Rules of the Board of Regents.

At the time that the emergency rules were adopted, all parties agreed that it was absolutely necessary to have rules in place so that school districts and BOCES would be able to follow a set of rules as they implemented the reduction in force for the 2009-10 school year. While the rules that were put in place satisfied the majority of school districts and BOCES, they did not address the concerns of all BOCES.

The Senior Deputy Commissioner, in her ongoing discussions with the district superintendents, has asked the district superintendents to provide documentation of the problems that have occurred as a result of implementation of the emergency Regents Rules. While the Department does not anticipate recommending to the Regents any retroactive change to the rules, the concerns expressed by some of the BOCES need to be fully explored to determine if prospective changes in the tenure rules or the Education Law are necessary for certain instructional support services positions in the BOCES.

COMMENT #2: A second commenter concurred with concerns of the first regarding what they see as the negative impact on some BOCES, particularly those that contract with the Department to be the LEA for essential functions. The commenter stated that the emergency rule diminishes the work that BOCES do to improve student achievement on behalf of the Department and will result in teachers being placed in classrooms and in instructional support positions where they have no experience.

RESPONSE #2: The response provided to Comment #1 applies to this comment as well. The essence of Comment #2 appears to be that some teachers may be placed in classroom assignments or instructional support assignments where they have no work experience. SED agrees that this is a possibility as a result of the new rules. However, at the time these regulations were adopted, it was understood that this was a potential consequence and there was agreement by most of the interested parties that these positions should be part of the teaching force of a school district or BOCES.

COMMENT #3: A third commenter requested reconsideration of the rule because of what they feel will be unintended negative consequences for employees and employers. The commenter requested that the Regents delay implementation of the emergency measure in order to give serious consideration to adding the option of a new tenure area for teachers serving in instructional support positions and to allow more time to collect information regarding the impact of the rule.

RESPONSE #3: The implementation of the emergency regulations adopted by the Regents in April of this year has proceeded with school districts and the majority of BOCES satisfied with the provisions of these new rules and regulations. Some of the BOCES organizations have experienced problems based on the provisions of the new regulations in combination with statutory provisions which apply to a reduction in force. To delay the implementation of these regulations would not provide for a satisfactory solution for all districts and BOCES.

One of the considerations upon which all interested parties involved in the consultation process prior to the April Regents meeting were in agreement, was that there needed to be Regents Rules that would provide for how teachers performing instructional support services duties should be treated in a reduction in force situation. Even though all parties could not unanimously agree on exactly the approach to be used in those rules, they did agree that the Regents and SED should not force school districts and BOCES into a situation of coping with necessary reductions in force without giving them Rules to follow. Accordingly, the Department recommended, and the Regents adopted, emergency Rules in April which gave guidance to all school districts and BOCES for any required reductions in force.

As mentioned in response #1 above, based on meetings with the district superintendents, the majority of the BOCES district superintendents have found the emergency regulations acceptable. It is a smaller group of BOCES where operational problems have been identified and the concerns expressed by such BOCES need to be fully explored to determine if prospective changes in the tenure rules or the Education Law might be necessary for certain instructional support services positions in the BOCES.

COMMENT #4: A fourth commenter pointed out that BOCES professional development positions have distinctive job qualifications that differ from those of classroom teachers, although they may hold the same certification. The commenter stated that the new requirements will create havoc with BOCES ability to staff and retain these CO-SER positions. The commenter provided a possible scenario in which, in the event of layoffs, a classroom teacher with no experience in providing instructional support may bump the incumbent in an instructional support position. The commenter predicts an adverse impact on BOCES employees and the continued delivery of certain BOCES services, stating that the new rule takes away flexibility in recruiting and retaining qualified staff development specialists and may have the effect of shifting who is laid off from areas of actual reduction in force to other divisions in the BOCES organization. The commenter noted that this sets teachers up for potential failure when placed in positions based on tenure alone. The commenter urges the Regents to seek alternative tenure structures that recognize BOCES as a unique service provider that needs flexible staffing options.

RESPONSE #4: Response #2, above, is also applicable to this fourth comment. In addition, part of this comment relates to the situation that existed prior to the Commissioner's August 2008 decision in a Section 310 appeal and the Regents resulting emergency regulations adopted in April 2009. The situation that existed prior to August 2008 was problem-

atic in that, as clarified by the Commissioner's 310 decision, individuals performing instructional support services were not considered to be part of the teaching workforce of a school district.

There was substantial confusion in school districts and BOCES in regard to the employment status of such individuals. In some cases, individuals were hired as permanent Civil Service employees. In other cases, they were hired as teachers and appointed to tenure areas which did not exist, or they were hired as teachers and appointed to a tenure area for which they were properly certified, or in some cases, individuals were hired as teachers but not granted tenured appointments. Needless to say, this created substantial confusion over the rights and responsibilities of both employers and employees in these situations. It became clear after the Commissioner's August 2008 decision on the Section 310 appeal that there needed to be clarification as to whether teachers employed to perform instructional support services were part of the teaching service of a school district or whether they were classified Civil Service employees that did not require a teaching certificate. After consultation with all interested parties, there was a consensus that these positions were, in fact, teaching positions and should be part of the teaching service of a school district or BOCES.

Once having determined that these positions are part of the teaching service, it follows that appointment to such positions must be made in accordance with the Education Law and that probationary appointments should be made and tenure and seniority rights provided, in accordance the Education Law and the Rules of the Board of Regents.

However, as mentioned in the earlier responses to the above comments, some of the BOCES have expressed concerns as to the negative impact on BOCES programs for component school districts when a reduction in force situation occurs and teachers performing instructional support services are credited with seniority in their existing tenure area or a tenure area for which they are properly certified. The Department believes that it is appropriate to continue to investigate exactly the nature of the problems that have occurred and determine whether prospective changes in the tenure rules or the Education Law might be necessary to address certain instructional support services positions in the BOCES.

Department of Environmental Conservation

NOTICE OF ADOPTION

Requires All Dam Owners to Operate and Maintain Dams in a Safe Condition and Adopts Requirements for Owner Dam Safety Programs

I.D. No. ENV-07-08-00011-A

Filing No. 908

Filing Date: 2009-07-31

Effective Date: 2009-08-19

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

Action taken: Amendment of Parts 608, 621 and 673 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, art. 3, title 3 and art. 15, title 5

Subject: Requires all dam owners to operate and maintain dams in a safe condition and adopts requirements for owner dam safety programs.

Purpose: To Amend 6 NYCRR Parts 608, 621 and 673 to comply with Chapter 364 (1999) and amend Part 673 to comply with Chapter 178 (2006).

Substance of final rule: Part 608

608.1 Definitions have been added and revised to be consistent with revisions to Part 673.

608.3 The size thresholds for dams which require construction permits have been revised to be consistent with the ECL 15-0503.

608.6 Permit application procedures have been revised to better reflect the elements of a dam safety construction permit application.

608.6 has been revised to state that the department may accept a certification by a professional engineer, in lieu of a permit application, at its discretion.

Part 621.4

Part 621.4 has been revised to state that all dam projects are major, except projects at existing dams for which an engineering assessment pursuant to Part 673 is on file with the department.

Part 673

All of Part 673 is repealed. The Revised Part 673 incorporates Chapter 364 of the laws of 1999 and Chapter 178 of the laws of 2006 amendments to statute. The Revised Part 673 contains revised definitions, revised requirements for inspection and maintenance; emergency action planning; recordkeeping and reporting and notifications; revised language regarding the department's inspection, investigation, and enforcement process. Sections are renumbered and renamed.

673.1 Purpose; applicability; severability

This section revises language related to applicability of the regulation. This section references applicability based on dam size. The size thresholds match those of permit requirements (Part 608) except as otherwise noted. Some provisions of Part 673 apply to dams above these size thresholds.

Part 673 also applies to owners of all dams the failure of which poses a threat to public health, safety, property or natural resources.

Part 673 also applies to illegal dams.

Revised language regarding purpose and severability of the regulation.

673.2 Definitions

This section was expanded for clarification to include definitions not previously included and modifies some existing definitions.

673.3 General Provisions

Incorporates the statutory dam safety authority.

Requires all dams to be operated and maintained in safe condition.

Specifies that the department may consider any information on a dam that may be available.

Provides that the department may, at its discretion, accept equivalent reports from or to federal agencies in lieu, in whole or in part, of the reports of inspections and assessments required in this Part.

673.4 Permit Requirements for Dams

Advises the reader to consult Part 608 for permit requirements, and that the department's permits do not relieve the applicant from any requirements for other permits and approvals, such as federal permits.

673.5 Hazard Classifications

Revises language related to the hazard classifications that may be assigned to a dam, and the factors that the department may consider in assigning a hazard classification, for clarity.

Requires that the department must notify a dam owner when it changes the hazard classification, and that the department will make available a list of dams and the hazard classifications assigned to them.

Provides a process for appealing a hazard classification.

Part 673.6 Inspection, Operation and Maintenance

Owners of Intermediate Hazard and High Hazard dams, and dams above applicability size thresholds, must prepare and implement an inspection and maintenance plan.

Describes the elements of an inspection and maintenance plan.

Requires that the inspection and maintenance plan must be provided to the department upon request.

673.7 Emergency Action

Requires that Emergency Action Plans (EAP's) for Intermediate Hazard and High Hazard dams must be submitted to the department.

Provides a schedule for submitting the EAP's after the effective date of this regulation.

Requires that High Hazard dam owners must have the EAP prepared by an engineer unless the department agrees otherwise.

Requires that Intermediate Hazard dam owners must have the EAP prepared by an engineer if requested by the department.

Describes the elements of an EAP, that it must be provided to certain recipients, and that it must be updated annually.

673.8 Annual Certification

Intermediate Hazard and High Hazard dam owners must provide an annual certification on a form prescribed by the department

673.9 Notification of Auxiliary Spillway Flow

Intermediate Hazard and High Hazard dam owners must notify the department of flow in a dam's erodible spillway.

673.10 Recordkeeping; Response to Request for Records

All records on a dam must be kept in good order.

Records must be provided to the department upon request.

673.11 Notices of Property Transfer

The records required to be maintained related to a dam must be provided to the new owner upon transfer of the property where a dam is located.

Notice must be provided to the department and the municipality in which the dam is located, of the new owner's information, upon transfer of property where a dam is located.

673.12 Safety Inspections

Intermediate Hazard and High Hazard dam owners must conduct a safety inspection as provided for in their inspection and maintenance plan.

The department may require Safety Inspections on a more frequent schedule, if the dam is rated ''unsafe'' or ''unsound.''

The Safety Inspection must be conducted by an engineer

The department may require changes if the report is not acceptable.

673.13 Engineering Assessments

Engineering Assessments (EA's) for Intermediate Hazard and High Hazard dams must be submitted to the department.

Provides a schedule for submitting the EA's after the effective date of this regulation.

All EA's must be prepared by an engineer.

The department may require EA's on a more frequent schedule if the dam is rated Unsafe or Unsound.

The department may require changes if the EA report is not acceptable.

673.14 Inspection of a Dam by the Department

Describes the department's authority to conduct inspections, and the requirement for the department to provide inspection reports in accordance with ECL 15-0516.

673.15 Investigation of a Dam by the Department or Owner

Describes the department's authority to conduct investigations, or order investigations by the dam owner, when the public safety requires.

673.16 Condition Ratings

Describes the department's condition rating system, and its authority to require an Enhanced Safety Program for dams rated Deficiently Maintained, Unsound, or Unsafe.

Requires the department to notify the dam owner if a dam has been rated Unsafe, Unsound, or Deficiently Maintained.

Describes the process for disputing the department's assignment of a condition rating.

673.17 Orders of the Department

Describes the department's authority to issue orders and act upon noncompliance with orders, including the department's authority to alleviate safety problems at a dam when the owner fails to do so, and the department's authority to try to collect costs associated with its work in alleviating a safety problem at a dam.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 608.1(h), (n), 621.4(a)(2), 673.2(c), 673.5(a)(2), 673.8(d), 673.14(a), (c), (d), 673.15, 673.16(b)(3), (4) and 673.17(b).

Revised rule making(s) were previously published in the State Register on May 20, 2009.

Text of rule and any required statements and analyses may be obtained from: Ms. Jamie Woodall, NYSDEC, Bureau of Flood Protection and Dam Safety, 625 Broadway, 4th Floor, Albany, NY 12233-3504, http://www.dec.ny.gov/regulations/39559.html, (518) 402-8151, email: damsregs@gw.dec.state.ny.us

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

Statement explaining why a revised Regulatory Impact Statement (RIS), revised Regulatory Flexibility Analysis (RFA) for small businesses and local governments, revised Rural Area Flexibility Analysis (RAFA), or revised Job Impact Statement (JIS) is not required:

No substantive changes were made to the Revised Rulemaking for 6 NYCRR Parts 608, 621.4 and 673 published in the May 20, 2009 State Register. The nonsubstantive changes are identified under the Terms and Identification of Rule (section 6 (B)) of this Notice of Adoption. None of these regulatory changes requires any revision of the RIS, RFA, RAFA or JIS since their last publication in the State Register on May 20, 2009.

Assessment of Public Comment

Summary of Second Assessment of Public Comments (July 2009)

Adoption of Rule Amending Dam Safety Regulations

The original Notice of Proposed Rule Making was issued on February 13, 2008 to amend the dam safety regulations at 6 NYCRR Parts 608, 621.4, and 673. The regulatory amendments were proposed in order to comply with Chapter 364 of the laws of 1999 and with Chapter 178 of the Laws of 2006. A public comment period followed. On May 20, 2009, the New York Department of Environmental Conservation (NYSDEC) issued a revised Notice of Revised Rule Making. The second public comment period (for the revised rule making) closed on June 19, 2009.

The Second Assessment of Public Comments (SAPC) summarizes, condenses, and codifies all of the comments. Complete copies of all written submissions are included in the SAPC.

This summary of the SAPC provides an overview of the most frequently received comments and responses.

Frequent Comment #1: Comments concerning the cost of the revised regulations were largely the same as those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #1 and NYSDEC's Response.

Frequent Comment #2: Numerous comments were received regarding emergency action plans (EAP's). Definition of an EAP, EAP development, updating, and submission, EAP sections that need to be developed by an engineer, use of electronic submittals, inundation mapping standards, role emergency management authorities, and time frame to submit an EAP following a dam's hazard classification change. Additionally, would EAP's be required with a dam safety permit application for a ''B'' or ''C'' hazard class dam.

Response: NYSDEC reviewed U.S. Army Corp and FEMA provisions regarding EAPs, including definitions, during the course of this rule making, and wrote the regulations consistent with New York's existing dam safety statute, and existing permitting requirements, regulations and guidance.

The NYSDEC has guidance on EAPs in Chapter 8 of the NYSDEC's guidance document entitled, ''An Owner's Manual for the Inspection and Maintenance of Dams in New York''. Federal guidance for EAP development is in ''FEMA 64 - Federal Guidelines for Dam Safety: Emergency Action Planning for Dam Owners.'' The Department plans to issue additional guidance on the preparation of EAPs.

A hard copy of the initial EAP is required by the NYSDEC, emergency responders, and other applicable agencies.

EAP's have been a longstanding element of an owner dam safety program and the time frames for implementation are appropriate.

Frequent Comment #3: Comments concerning hazard classifications were similar to those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #3 and NYSDEC's Response.

Additional comments recommended that the NYSDEC add to include damage and/or economic loss related to property on the impoundment's shorelines; provide an analysis when NYSDEC changes a hazard classification; and ensure that all dams are assigned a hazard classification. Also guidance incorporating natural resource damage in hazard classification determinations was requested. A concern was raised regarding NYSDEC changing a dam's hazard class based on unfounded information. A comment also stated that the terms in the hazard classification definition were unclear or subjective.

Response: NYSDEC repeats the Response to Frequent Comment #3 from the May 2009 Assessment of Public Comments, and responds: downstream damages are considered when the hazard classification is established. By regulation, the owner will be notified when the hazard classification is changed and will be provided the basis for that change. DEC's practice is to verify any information received.

Frequent Comment #4:

Comments concerning engineers were similar to those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #4 and NYSDEC's Response.

Additional comments were about the definition of ''engineer'', engineers' qualifications and experience required under the regulations, and NYSDEC providing criteria or a list of approved engineers, and the use of conservationists for farm.

Response: ''Engineer'' was discussed in the Frequent Comment # 4 in the May 2009 Assessment of Public Comments and the NYSDEC repeats this response. Additionally, the topic of farms pond and use of a conservationist was discussed in the Frequent Comment #2 in the May 2009 Assessment of Public Comments and the NYSDEC refers to an excerpt from this response. NYSDEC also responds that the responsibility for retaining an engineer is with the owner, who should verify the engineer has the required education and experience for the particular project.

Frequent Comment #5:

Comments concerning the definition of dam owner were similar to those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #5 and NYSDEC's Response. Comments also noted that the definition could result in the State of New York being an owner of every dam. NYSDEC responds that the statutory definition of dam owner does not include the state. Environmental compliance requirements for state agencies are governed by the ECL and other state laws and executive orders.

Frequent Comment #6: Comments stated invoking the financial assurance provision of the regulations is punitive, could result in the loss of property, and the circumstances in which it will be used should be better defined. Financial assurance provisions, if used, should be used only if the dam is ''unsafe'' or ''unsound''. No financial assurance should be required if a State Public Benefit Corporation owns the dam. Public entities that are self-insured should be allowed to use ''global'' financial security if required to provide financial assurance.

Response: The inclusion of financial assurance was specifically authorized in the 1999 amendments to the dam safety statute (ECL § 15-0507). Under the revised regulations, financial assurance is not required unless a dam is ''unsafe'', ''unsound'' or ''deficiently maintained'', and then,

only when requested by the Department. The financial assurance elements would be invoked only after the owner has failed to bring the dam into compliance. The revised regulations clarify that financial assurance measures are not required of owners of all Class C (High Hazard) dams, specify when NYSDEC would seek financial assurance, and limit the goal to that of covering the costs of breach or removal of the dam.

Frequent Comment #7:

Comments concerning release of information on dams were similar to those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #7.

Response: NYSDEC and municipalities are subject to Freedom of Information Law (FOIL). NYSDEC responds to requests for information about dams in accordance with this law. Requirements for the distribution of inspection reports by NYSDEC are in ECL § 15-0516. FOIL does allow for the withholding of critical infrastructure information (CII). The Department will consider revising its inspection report format so CII is segregated and identified so that it may more easily be reviewed and, if necessary, redacted on a case-by-case basis in response to FOIL requests. Communities receiving an inspection report will be directed to withhold the CII.

Frequent Comment #8:

Comments concerning ''ordinary maintenance'' were similar to those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #11 and NYSDEC's Response.

Frequent Comment #9: comments were concerned with condition ratings (Subpart 673.16) based on their definitions, how they would be applied and time allowed to gather information to make an appeal.

Response: NYSDEC's discretion with respect to condition ratings is based on all of the facts and circumstances of the dam itself. This is also the case in assigning a condition rating in the absence of an engineering assessment. If a dam owner believes the Department's assignment is arbitrary or capricious, the owner must let the Department know promptly, through the appeal process in the regulations, or else focus on bringing the dam into compliance. Regulatory language was modified slightly to clarify ratings of ''deficiently maintained'' and ''no deficiencies noted.''

Frequent Comment #10: Comments stated Inspection and Maintenance Plans (I&M Plans) should be required only for Class B and C dams and more time is necessary to create the plans. The regulations should clarify owner responsibilities in developing and implementing I&M Plans.

Response: Owners of dams exceeding the permitting size thresholds, Class B or C dams, or dams that pose a threat of personal injury, substantial property damage, or environmental damage need develop an I&MP. Twelve months is adequate for the development of an I&M Plan for any dam. Guidance on inspection and maintenance is already available and additional guidance is under development. The regulations identifies that it is owners of dams who prepare I&M Plans.

Frequent Comment #12: The recent Executive Order 17 requires an assessment of formalized proposals for mandates on local governments which increase costs will raise property taxes. Comments expressed NYSDEC should investigate the potential cost of the required inspections, reports, financial assurance, and potential dam modifications. Many expressed that the rule making is an unfunded mandate upon private and municipal dam owners. Comments expressed the rule shifts NYSDEC's governmental responsibility for inspections of dam infrastructure to the dam owner.

Response: Dam owners, public and private, have long been obligated by law to operate and maintain their dams in a safe condition. The costs associated with the inspection, operation, maintenance, repair or reconstruction of a dam, even for those dams whose hazard classification has changed, are not new or newly shifted to dam owners and do not originate with this rule making. The Executive Order does not address private entities, and only addresses increases in costs imposed by the regulations themselves, if any.

Frequent Comment #13: The definition of ''breach'' of a dam was questioned. Additionally, it was asked if a permit is needed every time the normal impoundment level is lowered, even if temporarily.

Response: Definition of 'Breach' of a dam was clarified to state the ''permanent'' lowering of a dam's spillway level, or the construction of a channel through or around the dam, so as to reduce the dam's ability to normally impound waters. Breach/removal is distinguished from, and is treated differently in the regulations than, an unplanned release or dam failure.

Frequent Comment #14: The definition of the ''height'' of a dam is the vertical dimension from the downstream toe of the dam at its lowest point to the top of the dam. Comments said the top of the dam should be the height of the spillway. Comments also suggested definitions for the ''lowest point.''

Response: The Department reviewed U.S. Army Corp and FEMA provisions, including definitions, and ensured the revised regulations are consistent with New York's existing dam safety statute, permitting requirements, regulations and guidance. The Department has conformed the definition of height in 608.1(n) to match that in 673.2(n).

Frequent Comment #15: Subpart 608.1 and 673.2 both define the term ''Maximum Impoundment Capacity.'' C Comments requested language ''including during periods when a temporary surcharge pool exists'' to the definition. Others stated a properly designed dam would never have to impound waters to the top of the dam.

Response: The definition of ''maximum impoundment capacity'' is statutory. Revised regulations must interpret New York's existing dam safety statute (within ECL Article 15) and be consistent with New York's existing permitting requirements, regulations and guidance. Definition does not significantly change that in the 1987 regulations, and is consistent with current NYSDEC practice, and the laws, regulations, and practice of many other state and federal agencies and guidance.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Trapping Regulations

I.D. No. ENV-33-09-00004-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 6.1, 6.2 and 6.3 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-1101, 11-1103 and 11-1105

Subject: Trapping regulations.

Purpose: To set trapping seasons for beaver, river otter, mink, and muskrat; and to improve general trapping regulations.

Text of proposed rule: Repeal paragraph (1) of 6 NYCRR 6.1(a) and adopt new paragraph (1) of 6 NYCRR 6.1 (a) as follows:

(1) Beaver.

''Open season''	*''Wildlife management units''*
Closed	*1A, 1C, 2A*
Nov. 10 - Apr. 7	*3A, 3C, 3F, 3G, 3H, 3J, 3K, 3M, 3N, 3P, 3R, 3S, 4A, 4B, 4C, 4F, 4G, 4H, 4J, 4K, 4L, 4O, 4P, 4R, 4S, 4T, 4U, 4W, 4Y, 4Z, 5R, 5S, 5T, 6P, 6R, 6S, 7A, 7F, 7H, 7J, 7M, 7P, 7R, 7S*
Nov. 25 - Feb.15	*8A, 8C, 8F, 8G, 8H, 8J, 8M, 8N, 8P, 8R, 8S, 8T, 8W, 8X, 8Y, 9A, 9C, 9F, 9G, 9H*
Nov. 1 - Apr. 7	*5A, 5C, 5F, 5G, 5H, 5J, 6A, 6C, 6F, 6G, 6H, 6J, 6K, 6N*
Nov. 25 - Mar. 15	*9J, 9K, 9M, 9N, 9P, 9R, 9S, 9T, 9W, 9X, 9Y*

Repeal paragraph (2) of 6 NYCRR 6.1(a) and adopt new paragraph (2) of 6 NYCRR 6.1(a) as follows:

(2) Otter.

''Open season''	*''Wildlife management units''*
Closed	*1A, 1C, 2A, 3A, 4A, 4F, 4G, 4H, 40, 4P, 4R, 4W, 5R, 6P, 6R, 6S, 7A, 7F, 7H, 7J, 7M, 7P, 7R, 7S, 8A, 8C, 8F, 8G, 8H, 8J, 8M, 8N, 8P, 8R, 8S, 8T, 8W, 8X, 8Y, 9A, 9C, 9F, 9G, 9H, 9J, 9K, 9M, 9N, 9P, 9R, 9S, 9T, 9W, 9X, 9Y*
Nov. 10 - Feb. 28	*3C, 3F, 3G, 3H, 3J, 3K, 3M, 3N, 3P, 3R, 3S, 4B, 4C, 4J, 4K, 4L, 4S, 4T, 4U, 4Y, 4Z, 5S, 5T*
Nov. 1 - Apr. 7	*5A, 5C, 5F, 5G, 5H, 5J, 6A, 6C, 6F, 6G, 6H, 6J, 6K, 6N*

Repeal paragraph (1) of 6 NYCRR 6.2(a) and adopt new paragraph (1) of 6 NYCRR 6.2(a) as follows:

(a) Mink and muskrat.

''Open season''	*''Wildlife management units''*

Nov. 10 - Apr. 7	*3A, 3C, 3F, 3G, 3H, 3J, 3K, 3M, 3N, 3P, 3R, 3S, 4A, 4B, 4C, 4F, 4G, 4H, 4J, 4K, 4L, 4O, 4P, 4R, 4S, 4T, 4U, 4W, 4Y, 4Z, 5R, 5S, 5T, 6R, 6S*
Nov. 25 - Feb. 15	*6P, 7F, 7H, 7J, 7M, 7P, 7R, 7S, 8A, 8C, 8F, 8G, 8H, 8J, 8M, 8N, 8P, 8R, 8S, 8T, 8W, 8X, 8Y, 9A, 9C, 9F, 9G, 9H, 9J, 9K, 9M, 9N, 9P, 9R, 9S, 9T, 9X, 9W, 9Y*
Oct. 25 - Apr. 15	*5A, 5C, 5F, 5G, 5H, 5J, 6A, 6C, 6F, 6G, 6H, 6J, 6K, 6N, 7A*
Dec. 15 - Feb. 25	*1A, 1C, 2A*

Amend paragraph (4) of 6 NYCRR 6.3(a) as follows:

(4) Traps set for taking wildlife must be visited once in each 24 hours, except they must be visited once in each 48 hours when set in wildlife management units (WMUs) 5C, 5F, 5G, 5H, 5J, 6F, 6J and 6N and when set in water in WMUs 5A, 6A, 6C, 6G, [and] 6H*, and 6K* during the open season for beaver, otter, mink and muskrat.

Repeal paragraph (12) of 6 NYCRR 6.3(a) and adopt new paragraph (12) of 6 NYCRR 6.3(a) as follows:

(12) Trigger specifications for body gripping traps in the Southern Zone. In the Southern Zone, no person shall use or set a body gripping trap with a dimension of more than nine inches in any wildlife management unit where the river otter trapping season is closed, unless the trap has only one triggering device and such device is a ''two-way/parallel trigger'' possessing all of the following design features:

(i) the sides of the trigger notch are perpendicular to the side of the frame to which the trigger is attached;

(ii) the trigger only moves along an axis at right angles to the side of the frame to which the trigger is attached;

(iii) the trigger wires are joined together to form a fixed set of closely parallel or twisted wires operating as a single vertical trigger assembly;

(iv) the trigger assembly is no longer than 6 ½ inches, measured from the inside edge of the frame of the trap where the trigger is attached to the end of the trigger wires; and

(v) the distance between the inside edge of one side of the trap and the nearest trigger wire shall be no less than eight inches.

Amend subparagraph (ii) of 6 NYCRR 6.3(a)(16) as follows:

(ii) No person shall set on land a body-gripping trap that measures *5 ½ to* six inches [or less] unless it is set so that no part of the body-gripping surface of the trap is eight inches or more above the ground.

Text of proposed rule and any required statements and analyses may be obtained from: Gordon R. Batcheller, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8885, email: wildliferegs@gw.dec.state.ny.us

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

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

Additional matter required by statute: A programmatic environmental impact statement is on file with the Department of Environmental Conservation.

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law section 11-1101 provides for the regulation of body gripping type traps when used for beaver and otter trapping in water. Environmental Conservation Law section 11-1103 provides for the regulation of beaver, otter, mink, and muskrat trapping seasons. Environmental Conservation Law section 11-1105 provides for the regulation of trapping procedures, including the trap visitation requirements.

2. Legislative objectives:

The legislative objective behind the statutory provisions listed above is to authorize the Department of Environmental Conservation (DEC or department) to establish the methods by which furbearers may be taken by trapping, and to establish appropriate trapping seasons.

3. Needs and benefits:

There are five separate components of this proposal-

Beaver, river otter, mink, and muskrat seasons:

The Department of Environmental Conservation proposes to amend the trapping seasons for beaver, otter, mink, and muskrat. The proposed beaver trapping seasons will maintain beaver population levels at or close to acceptable levels. In Wildlife Management Units (WMUs) where otter trapping is allowed, the season is generally established to run at the same time as the beaver trapping season since both river otter and beaver occur in similar habitats. However, in most of the eastern portion of New York, the otter seasons are proposed to close prior to the end of the beaver season. In these areas, DEC has sufficient information on beaver populations based on complaints received, but insufficient information on the status of river otter populations to lengthen the trapping season. In these WMUs, trappers will be required to use a modified trap to avoid the capture of river otter, pursuant to existing regulations. In establishing dates for the 2009-2010 beaver and river otter trapping seasons, DEC proposes to consolidate opening and closing dates whenever possible especially in contiguous WMUs. The consolidation of seasons will enhance both compliance with, and enforcement of trapping regulations.

Beaver damage problems continue to be significant in New York. The Department of Environmental Conservation receives nearly 2,000 public complaints of beaver damage per year. Beaver primarily damage farms and roadways, but residences are also affected. Annual trapping seasons, as proposed by this rule making, are essential to manage these problems and maintain public tolerance of beaver.

In the Northern Zone, DEC proposes to lengthen beaver and otter seasons by about two weeks in the Tug Hill Transition and East Ontario Plain. In the St. Lawrence River Valley, the beaver trapping season will be shortened by about two weeks to align with the remaining WMUs of the Northern Zone. In 2008, nuisance beaver complaints for the Tug Hill Transition and East Ontario Plain increased by 60 percent and 56 percent, respectively from 2007. Trapping in the Champlain Valley and Transition, Central Adirondacks, Northern Adirondacks, and Tug Hill WMUs will remain the same but the opening and closing dates will be shifted one week later to better coincide with periods of pelt primeness in the fall, and to provide some ''open water'' trapping opportunity in the spring. These changes will result in uniform seasons in the Northern Zone. In addition, the proposed dates will align well with preferences expressed by trappers in this area.

In Southeastern and Central New York, DEC proposes to lengthen the beaver trapping season by about five weeks in the Hudson Valley, Catskills, South Taconic Highlands, North Taconic Highlands, Mohawk Valley, Neversink-Mongaup Hills, and Otsego-Delaware Hills, and Lower Hudson River Valley. In 2008, nuisance beaver complaints for these aggregates increased by 24 percent over 2007. Severe winter conditions were experienced in these areas during the 2008-09 trapping season and it is anticipated that beaver harvests will be minimal (much of this area was subject to a beaver trapping season extension in March and April of 2009 as a result of the short harvest). The otter season in the Neversink-Mongaup Hills, Catskills (WMU 3C only), Hudson Valley, South Taconic Highlands, and North Taconic Highlands will remain the same length as previous seasons, but will have the opening and closing dates shifted two weeks earlier to align with the opening date for beaver. In compliance with current regulations, beaver trappers in these areas will be required to use modified triggers on their 330 size body-gripping traps following the close of the river otter trapping season.

In the Oswego Lowlands, Oneida Lake Plains, and East Appalachian Plateau the season will remain approximately the same length, but open and close two weeks earlier. This will shift most of the open water trapping opportunity to the fall instead of the spring when the majority of trappers are active, allowing trappers to more effectively address nuisance beaver issues that peak in November. Nuisance complaint trends between 2007 and 2008 in these aggregates were fairly stable suggesting the season length has been adequate to keep beaver numbers in check. The proposed season dates will align well with the preferences expressed by trappers for increased opportunity during times of open water.

The beaver season in the Great Lakes Plain and the North Appalachian Hills in Western New York will be increased from thirteen days to eighty-three days. The Central Appalachian Plateau beaver season will be increased from thirty days to eighty-three days. Public tolerance for beaver in these WMUs is very low, because of land use. The number of beaver taken on nuisance permits has regularly exceeded the trapping season harvest. (Nuisance take over the past five years averages 45 percent to 76 percent of the legal trapping harvest.). The Department of Environmental Conservation seeks to provide season dates that will increase the proportion of beaver taken in the regular trapping season when the pelts can be readily used, and decrease the number that are taken on nuisance permits when the trapping season is closed. Trappers in these areas have requested more opportunity during better weather conditions, and trappers strongly support removing beaver during a regular trapping season so that the pelts may be used in the fur market.

The West Appalachian Plateau beaver season will be increased from seventy-eight days to one hundred-ten days. This season will provide an earlier opening date to better address the peak nuisance problems which have historically occurred in the fall. Nuisance complaints in this unit have remained high despite increasing beaver harvests.

The Department of Environmental Conservation proposes to lengthen the mink and muskrat trapping season in Southeastern New York to align with the beaver trapping season. Lengthening the mink and muskrat season is not anticipated to have an adverse impact on the population of these animals, as both species are common in suitable habitats and trapping

pressure is relatively low at this time. Also, late winter/spring muskrat and mink trapping provide an excellent opportunity to introduce young people to trapping under the new ''trapping mentoring law.'' Young trappers commonly seek muskrat when they first learn to trap, and the proposed later season for muskrat and mink will provide an opportunity when weather conditions can be very pleasant, and the chances of success are high.

Trap check duration:

The Department of Environmental Conservation proposes to extend the trap check interval in one WMU in the Northern Zone for traps set in water only. There are 14 WMUs in the Northern Zone. In thirteen of those WMUs, trappers must visit their traps set in water for beaver, otter, mink and muskrat once in each 48 hours. In WMU 6K (Tug Hill Transition), trappers pursuing these same species are required to visit their traps once in each 24 hours.

The proposed change will standardize trap checking regulations for traps set in water in the Northern Zone. A consistent regulation for this entire area will eliminate confusion among trappers over differing regulations and will improve law enforcement activities. Animals caught in water are killed in a short time period. From an animal welfare consideration, there are no differences between a 24 versus 48 hour trap check regime for traps set in water. A longer trap check period for this one WMU will provide greater convenience for trappers, and more uniform regulations for enforcement.

Body-gripping Trap Regulations for Beaver Trapping:

The Department of Environmental Conservation implemented regulations governing the use of large body-gripping traps for beaver trapping three years ago. After evaluating the regulation for the past three trapping seasons, DEC proposes to make some minor changes to the regulation. The Department of Environmental Conservation believes these changes will improve compliance while still providing protection for river otter. Trappers will appreciate the greater convenience associated with this proposal.

Specifically, DEC proposes to change the definition of a ''tension adjustable/parallel trigger'' to that of a ''two-way/parallel trigger.'' Two of the design features described in the current regulation would be repealed: (1) the requirement for a ''tensioning device'' on the trigger, and (2) the requirement for a ''stop'' to prevent the trigger mechanism from moving toward the middle of the trap.

The Department of Environmental Conservation has found that even though most trappers are using ''tension adjustable triggers,'' they are not actually applying tension to the triggers. (The department has promoted a range of tension levels found to be most beneficial, but have not required a specific tension threshold because of the difficulty of enforcing this requirement.) Based on field assessments of this regulation, the accidental take of otter has been minimal even with triggers that are used without any tension. Other design attributes of these triggers (e.g., set off to the side, and pivoting in only one plane) are greatly lowering the chances that river otter will be caught in traps set for taking beaver.

Body-gripping traps set on land:

The Department of Environmental Conservation implemented regulations governing the use of body gripping traps set on land in 2007. However, a technical error was identified soon after the implementation of this regulation: ''110'' size body-gripping traps were inadvertently restricted when set between eight inches and four feet off the ground.

The original regulation was not designed to regulate these small traps, and they have not been implicated in the capture, injury, or death of a dog in New York State. (These traps are used to capture small furbearers such as mink and weasel, and in particular, they are commonly used on ''cross-over'' sets where logs bridge small streams.)

With the current regulation, these small traps may be set with baits in an unrestricted manner. Yet, the current regulation restricts their use when set without baits. (The use of baits potentially increases the chances that a dog may visit a trap.) Therefore, the proposed change has no impact on the chances that a dog may be caught or injured in one of these small traps.

The Department of Environmental Conservation proposes to correct this error by allowing small, un-baited traps to be set without restrictions. This would be consistent with the current regulation allowing these small traps to be set with baits in an unrestricted manner.

4. Costs:

None, beyond normal administrative costs.

5. Local government mandates:

There are no local governmental mandates associated with trapping regulations.

6. Paperwork:

The proposed rules do not impose additional reporting requirements upon the regulated public (trappers).

7. Duplication:

There are no other local, state or federal trapping regulations.

8. Alternatives:

An alternative to making the proposed changes is to leave the trapping regulations unchanged. However, the department rejected this alternative because the proposed revisions are needed to improve trapping regulations and to establish more appropriate trapping seasons for beaver, otter, mink, and muskrat.

9. Federal standards:

There are no federal government standards for trapping methods and season dates.

10. Compliance schedule:

Trappers will be required to comply with the new rule as soon as it takes effect.

Regulatory Flexibility Analysis

The proposed regulation only affects trapping season dates for beaver, otter, mink, and muskrat; as well as specific trapping procedures. The Department of Environmental Conservation (DEC) has historically made regular revisions to its trapping regulations. Based on DEC's experience in promulgating those revisions and the familiarity of regional DEC staff with the specific areas of the state impacted by this proposal, DEC has determined that this proposal will not impose an adverse economic impact on small businesses or local governments. The proposal does not apply directly to local governments. Few, if any, persons actually trap as a means of employment; therefore the regulations do not directly apply to small businesses. The proposed regulations are not expected to significantly change the number of participants or the frequency of participation in the regulated activities. The Department of Environmental Conservation further determined that these amendments will not impose any reporting, record-keeping, or other compliance requirements on small businesses or local governments. All reporting or record-keeping requirements associated with trapping are administered by DEC. Therefore, DEC has concluded that a regulatory flexibility analysis for small businesses and local governments is not required.

Rural Area Flexibility Analysis

The proposed regulation only affects trapping season dates for beaver, otter, mink, and muskrat; as well as specific trapping procedures. The Department of Environmental Conservation (DEC) has historically made regular revisions to its trapping regulations. Based on DEC's experience in promulgating those revisions and the familiarity of regional DEC staff with the specific areas of the state impacted by this proposal, DEC has determined that this proposal will not impose an adverse economic impact on rural areas. The proposed revisions are not expected to significantly change the number of participants or the frequency of participation in the regulated activities. The Department of Environmental Conservation has also determined that this rule will not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. All reporting or record-keeping requirements associated with trapping are administered by DEC. Therefore, DEC has concluded that a rural area flexibility analysis is not required.

Job Impact Statement

The proposed regulation only affects trapping season dates for beaver, otter, mink, and muskrat; as well as specific trapping procedures. The Department of Environmental Conservation (DEC) has historically made regular revisions to its trapping regulations. Based on DEC's experience in promulgating those revisions and the familiarity of regional DEC staff with the specific areas of the state impacted by this proposed rulemaking, DEC has determined that this proposal will not have a substantial adverse impact on jobs and employment opportunities. Few, if any, persons actually trap as a means of employment. Trappers will not experience a substantial adverse impact as a result of this proposal because it is not expected to significantly change the number of participants or the frequency of participation in the regulated activities. For this reason, DEC anticipates that this proposal will have no impact on jobs and employment opportunities. Therefore, DEC has concluded that a job impact statement is not required.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Allow Fishing at DEC Boat Launching Facilities; Increase Opportunities and Ease Conditions for the Use of Bait Fish

I.D. No. ENV-33-09-00005-P

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

Proposed Action: Amendment of sections 19.2, 35.3, 35.4, 59.1 and 190.24 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 9-0105, 11-0303, 11-0305, 11-1301, 11-1303, 11-0317, 11-1316 and 11-0325

Subject: Allow fishing at DEC boat launching facilities; increase opportunities and ease conditions for the use of bait fish.

Purpose: Increase opportunities for fishing at DEC boat launching sites; increase opportunities & ease conditions for the use of bait.

Text of proposed rule: Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), Part 19 ''USE OF BAIT, FISH FOR BAIT, AND BAIT FISH'' is amended as follows:

Subdivision 19.2(b) is amended to read as follows:

(b) Except as provided for in subdivisions (c) and (d) of this section, the following fish, or parts thereof, provided they meet the fish health inspection requirements as contained in Part 188 of this Title, shall not be used as bait for fishing except in the water*s* [bodies] *and their tributaries up to the first barrier impassable by fish as* identified in this subdivision:

Paragraphs 19.2(b)(1) and 19.2(b)(2) are amended to read as follows:

(1) Alewife (Alosa pseudoharengus): Canandaigua Lake; Cannonsville Reservoir; Cayuga Lake; Cayuta Lake; Conesus Lake; *Hemlock Lake; Canadice Lake; Waneta Lake;* Hudson River [and tidal portion of Hudson River tributaries]*downstream from the Federal Dam at Troy to the Battery at the southern tip of Manhattan Island* [(Albany, Rensselaer, Greene, Columbia, Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester Counties)]; Keuka Lake; Otsego Lake; Otisco Lake; Owasco Lake; Lake Ontario; Lake Erie; Lamoka Lake; Pepacton Reservoir; Seneca Lake; St. Lawrence River[and tributaries to the first barrier impassable by fish]; Niagara River[and tributaries to the first barrier impassable by fish]; Mohawk River; and all waters in Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester Counties).

(2) Rainbow smelt (Osmerus mordax): Canandaigua Lake; Cayuga Lake; Lake; Cayuta Lake; *Hemlock Lake; Canadice Lake; Honeoye Lake;* Conesus Lake; First, Second, Third, Fourth, and Fifth Lakes of the Fulton Chain; Keuka Lake; Owasco Lake; Lake Champlain; Lamoka Lake; Lake Ontario; Lake Erie; Seneca Lake; Star Lake (St. Lawrence County); Waneta Lake; the St. Lawrence River[and tributaries to the first barrier impassable by fish]; and the Niagara River[and tributaries to the first barrier impassable by fish].

Paragraphs 19.2(b)(3) remains the same.

(3) Mummichog (Fundulus heteroclitus): Hudson River [and tidal portion of Hudson River tributaries] *downstream from the Federal Dam at Troy to the Battery at the southern tip of Manhattan Island* [(Albany, Rensselaer, Greene, Columbia, Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester Counties)];and all waters in Nassau and Suffolk Counties.

Paragraphs 19.2(b)(4) and 19.2(b)(5) are amended to read as follows:

(4) Blueback herring (Alosa aestivalis) and Atlantic menhaden (Brevoortia tyrannus): Hudson River [and tidal portion of Hudson River tributaries]*downstream from the Federal Dam at Troy to the Battery at the southern tip of Manhattan Island* [(Albany, Rensselaer, Greene, Columbia, Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester Counties)]; and the Mohawk River[and tributaries to the first barrier impassable by fish].

(5) American eel (Anguilla rostrata): Delaware River[and tributaries to the first barrier impassable by fish], 6 inch minimum size limit; and the Hudson River [and tidal portion of Hudson River tributaries] *downstream from the Federal Dam at Troy to the Battery at the southern tip of Manhattan Island*[(Albany, Rensselaer, Greene, Columbia, Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster and Westchester Counties)], between 6 and 14 inches.

Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), Part 35 ''LICENSES'' is amended as follows:

Clause 35.3(c)(3)(iii)(a) is amended to read as follows:

(a) retail sale of bait fish; receipt required. When engaging in the retail sale of bait fish, the seller shall issue a receipt to the purchaser pursuant to subdivision (f) of this section. The receipt shall be retained by the purchaser while in possession of the bait fish, and shall be valid for [seven]*ten* days from the date of the retail sale, including the date of sale;

Clause 35.4(b)(3)(iii)(a) is amended to read as follows:

(a) retail sale of bait fish; receipt required. When engaging in the retail sale of bait fish, the seller shall issue a receipt to the purchaser pursuant to subdivision (d) of this section. The receipt shall be retained by the purchaser while in possession of the bait fish, and shall be valid for [seven]*ten* days from the date of the retail sale, including the date of sale;

Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), Part 59 ''STATE BOAT-LAUNCHING SITES, FISHING-ACCESS SITES AND FISHING RIGHTS AREAS'' is amended as follows:

Subdivision 59.1(d) is amended as follows:

(d) No person shall use any boat-launching site, or any fishing-access site from which boats may be launched, or any adjacent waters within 100 feet from the shore of a boat-launching ramp or ramp area, including offshore and inshore approaches, for any purpose other than the launching and [hauling]*retrieval* of boats, *fishing and, where provided, ice fishing access,* unless a written permit is obtained from the Department.

Existing subdivisions 59.1(e) through 59.1(l) are renumbered as subdivisions 59.1(f) through 59.1(m), and new subdivision 59.1(e) is amended to read as follows:

(e) Fishing, or other permitted non-boating use of these facilities, may in no way impair the launching or retrieval of boats, use of boarding docks by boaters, or navigation to and from the launch ramp.

Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR), Section 190 ''USE OF STATE LANDS'' is amended as follows:

Section 190.24(a) is repealed and a new section 190.24(a) is adopted to read as follows:

[(a) No person shall use any boat launching site or any adjacent waters within 100 feet from the shore of a boat launching or ramp area for any purpose other than hauling, launching, or loading of boats.]

No person shall use any boat launching site or any adjacent waters within 100 feet from the shore of a boat launching ramp or ramp area, including offshore and inshore approaches, for any purpose other than the launching, retrieval, hauling or loading of boats, fishing and, where provided, ice fishing access, unless a written permit is obtained by the Department. Fishing, or other permitted non-boating use of these facilities, may in no way impair the launching or retrieval of boats, use of boarding docks by boaters, or navigation to and from the launch ramp.

Text of proposed rule and any required statements and analyses may be obtained from: Shaun Keeler, N.Y.S. Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8928, email: sxkeeler@gw.dec.state.ny.us

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

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

Additional matter required by statute: Programmatic Impact Statements pertaining to these actions are on file with the Department of Environmental Conservation.

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

Regulatory Impact Statement

1. Statutory Authority

Section 3-0301 of the Environmental Conservation Law (ECL) establishes the general functions, powers and duties of the Department of Environmental Conservation (DEC or department) and the Commissioner, including general authority to adopt regulations. Sections 9-0105, 11-0303 and 11-0305 of the ECL authorize the department to provide for the management and protection of the State's fisheries resources, taking into consideration ecological factors, public safety, and the safety and protection of private property. Section 9-0105 of the ECL exercises care, custody, and control of several preserves, parks and other State lands. Sections 11-1301 and 11-1303 of the ECL empower the department to fix by regulation open seasons, size and catch limits, and the manner of taking of all species of fish, except certain species of marine fish (listed in section 13-0339 of the ECL), in all waters of the State. Section 11-0317 of the ECL empowers the department to adopt regulations, after consultation with the appropriate agencies of the neighboring states and the Province of Ontario, establishing open seasons, minimum size limits, manner of taking, and creel and seasonal limits for the taking of fish in the waters of Lake Erie, Lake Ontario, the Niagara River and the St. Lawrence River. Section 11-1316 of the ECL empowers the department to designate by regulation waters in which the use of bait fish is prohibited. The Commissioner of the Department of Environmental Conservation, pursuant to ECL sections 3-0301, 11-0303, and 11-0305, has authority to protect the fish and wildlife resources of New York State. Environmental Conservation Law section 11-0325 provides the department the authority to take action necessary to protect fish and wildlife from dangerous diseases.

Section 11-2101 of the ECL empowers the department to adopt regulations for the use of State-owned boat-launching sites and State-owned boat-access sites.

2. Legislative Objectives

Placing restrictions on the possession, sale and use of bait is part of comprehensive effort towards protecting against the spread of pathogens from the movement of fish between water bodies. Putting in place restrictions on the use of bait fish that can be used throughout the State (i.e. establishing a green list) is an effort to protect against: the spread of disease, introduction of exotics, and use of rare fish species (e.g. members of the minnow family) as bait. The authority for these actions (i.e. to protect fish and wildlife from dangerous diseases) is cited above. Also cited above

are the sections of the ECL that provide the authority to provide for the management and protection of the State's fisheries resources: fix by regulation open seasons, size and catch limits, regulate the manner of taking of all species of fish (except certain species of marine fish) including restricting the use of bait fish. The management amendments proposed here will reduce earlier restrictions established for the use of bait fish as well as allow for the additional use of bait fish in some waters, both while still safeguarding the resource from dangerous diseases.

Expanding upon the activities that can be provided for at State-owned boat-launching sites and State-owned boat-access sites is within the authority of the department to adopt regulations for the use of these sites, and will provide angling opportunity and benefit angler use of these State boat-launch and State boat-access sites.

3. Needs and Benefits

Adding to the list of waters where certain bait fish species may be used (Part 19) will provide for additional opportunities for anglers to use bait fish, a common practice in freshwater fishing. It has been a common practice of anglers to use smelt and/or alewife at these specific waters, and allowing their use presents no danger to the fishery. Amending Part 35 will accommodate anglers using bait fish by extending the time period that required receipts are valid and purchased bait fish can be possessed. This will enable anglers to hold and utilize bait longer including over two consecutive weekends.

Pertaining to the use of DEC boat launch facilities, use of these facilities for fishing and for ice fishing access are currently not permitted under department regulations. Originally prohibited to avoid conflicts with boaters, many of these boat launch and fishing access sites have sufficient space to allow for both uses without conflict. Use of these sites for ice fishing access is also restricted, despite the fact that conflicts with boaters would not occur during the ice fishing season. This amendment will allow for fishing and for ice fishing access at DEC boat launch facilities. Secondly, the department's ability to post sites against fishing should it be determined that it is incompatible with the primary use of the site as a boating access facility is provided for.

4. Costs

Enactment of the rules and regulations described herein will not result in increased expenditures by the State, local governments, or the general public.

5. Local Government Mandates

These amendments of 6 NYCRR will not impose any programs, services, duties or responsibilities upon any county, city, town, village, school district, or fire district, nor will this rule, pursuant to Executive Order 17, impose any mandates upon local governments.

6. Paperwork

No additional paperwork will be required as a result of these proposed changes in regulations.

7. Duplication

There are no other State or federal regulations which govern the use of bait fish in New York or pertain to allowable uses of State boat launch sites.

8. Alternatives

The primary alternative to the proposed regulations would be to retain current regulations pertaining to the use of bait fish and the use of State-owned boat-launching sites and State-owned boat-access sites. In the absence of the proposed changes, opportunities to enhance the quality or public use and enjoyment of fisheries may be deferred or lost.

9. Federal Standards

There are no minimum federal standards that apply to the regulation of bait fish or use of State boat launch sites.

10. Compliance Schedule

These regulations, if adopted, will be in effect upon adoption.

Regulatory Flexibility Analysis

The purpose of this rule making is to amend and update the Department of Environmental Conservation's (department) general regulations governing State-administered boat launching sites and State boat access sites to allow for fishing; allow for additional uses of bait fish in select waters, and to ease current restrictions pertaining to use of bait fish. Changes to these regulations are intended to promote additional opportunity for public use consistent with resource conservation and without jeopardizing the resource.

The department has determined that the proposed regulations will not impose an adverse impact or any new or additional reporting, record-keeping or other compliance requirements on small businesses or local governments. Since small businesses and local governments have no management or compliance role in the regulation of state boat launches or with where bait fish are allowed to be used, there is no impact upon these entities. While this amendment includes changes to receipt requirements for the possession of bait fish, this will not result in any additional reporting or record keeping.

Based on the above, the department has determined that a Regulatory Flexibility Analysis is not required.

Rural Area Flexibility Analysis

The purpose of this rule making is to amend and update the Department of Environmental Conservation's (department) general regulations governing State-administered boat launch sites and State boat access sites to allow for fishing; allow for additional uses of bait fish in select waters, and to ease current restrictions pertaining to use of bait fish. Changes to these regulations are intended to promote additional opportunity for public use consistent with resource conservation and without jeopardizing the resource.

The department has determined that the proposed regulations will not impose an adverse impact or any new or additional reporting, record-keeping or other compliance requirements on public or private entities in rural areas. While this amendment includes changes to receipt requirements for the possession of bait fish, this will not result in any additional reporting or record keeping. The proposed regulations are not anticipated to negatively change the number of participants or the frequency of participation in regulated activities. Rather, positive impacts are anticipated for these businesses because the proposed regulations would enhance angling opportunities as well as fishing-related businesses.

Since the department's proposed rule making will not impose an adverse impact on public or private entities in rural areas and will have no effect on current reporting, record-keeping, or other compliance requirements, the department has concluded that a Rural Area Flexibility Analysis is not required for this regulatory proposal.

Job Impact Statement

The purpose of this rule making is to amend and update the Department of Environmental Conservation's (department) general regulations governing State-administered boat launch sites and State boat access sites to allow for fishing; allow for additional uses of bait fish in select waters, and to ease current restrictions pertaining to use of bait fish. Changes to these regulations are intended to promote additional opportunity for public use consistent with resource conservation and without jeopardizing the resource.

The proposed regulations are not anticipated to negatively change the number of participants or the frequency of participation in regulated activities. No loss of jobs is expected. Rather, positive impacts are anticipated for these businesses because the proposed regulations would enhance angling opportunities as well as fishing-related businesses.

Since the department's proposed rule making will not impose an adverse impact on public or private entities in rural areas and will have no effect on current reporting, record-keeping, or other compliance requirements, the department has concluded that a rural area flexibility analysis is not required for this regulatory proposal.

Based on the above, the department has concluded that the proposed regulatory changes will not have an adverse impact on jobs or employment opportunities in New York, and that a Job Impact Statement is not required.

Insurance Department

EMERGENCY RULE MAKING

Minimum Standards for Determining Reserve Liabilities and Nonforfeiture Values for Preneed Life Insurance

I.D. No. INS-33-09-00006-E

Filing No. 910

Filing Date: 2009-08-05

Effective Date: 2009-08-05

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

Action taken: Addition of Part 102 (Regulation No. 192) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4221, 4240 and 4517

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

Specific reasons underlying the finding of necessity: This regulation was previously promulgated on an emergency basis on November 12, 2008, February 9, 2009, and May 7, 2009. The emergency regulation will expire on August 6, 2009. Regulation No. 192 needs to remain effective for the general welfare.

Based on research conducted by the Deloitte University of Connecticut Actuarial Center and commissioned by the Society of Actuaries as a part of a study of preneed mortality, it was determined that reserves calculated using the 2001 CSO Mortality Table were inadequate for preneed policies. Development of a new valuation mortality table specifically designed for and based on preneed life insurance experience is currently being developed by the Society of Actuaries, but will not be ready for adoption prior to the mandatory use for both statutory and federal tax purposes of the 2001 CSO Mortality Table beginning on January 1, 2009. This regulation, which requires the use of the Ultimate 1980 CSO Mortality Table, subject to the conditions in the regulation, therefore is intended as an intermediate solution until such time that an adequate mortality table can be adopted. Adoption of this regulation will require insurers to hold statutory reserves at a level that are more appropriate for preneed life insurance products. Adoption of similar provisions by at least 25 other states will permit the alternative use of the Ultimate 1980 CSO Mortality Table for federal tax purposes as well.

If this regulation is not adopted by year-end, New York residents will be adversely affected, particularly those residents who have or will purchase policies to fund out-of-state burials, often near other members of their families. Without this regulation, it is likely that the higher reserves maintained to adequately fund these policies will result in a failure of these policies to qualify as life insurance for federal tax purposes, with the consequence that the death benefit will be taxable to the beneficiary and the insurer will face a higher tax burden.

This difficulty arises from the tension between the states' interest in ensuring solvency and adequate capital and the federal tax law's interest in limiting the maximum deduction for reserves supporting life insurance contracts. States generally require high reserves, while the federal tax law mandates standards that produce lower reserves (and thus deductions). Further, under the federal Internal Revenue Code (IRC), reserves for life insurance policies can only fund standard mortality charges. Higher mortality charges are permitted for federal tax purposes only if the individual insured is determined to be substandard. Because preneed life insurance policies are generally purchased by individuals who feel funeral costs may well be imminent, the entire category of insureds is felt to be substandard and thus to require uniformly higher charges.

If a special (higher charge) mortality table becomes the prevailing mortality table for federal tax purposes for this specific category of life insurance, then federal tax law will allow the higher reserves that the states feel are necessary for preneed life insurance policies. The exception to the 2001 CSO Mortality Table can only be used for federal tax purposes, however, if it is adopted by 26 or more states before January 1, 2009. If the mortality table is timely adopted, then the reserves permitted by both New York and the IRC will be high enough to pay for the higher future mortality charges. Further, insurers no longer will face the higher taxes that would result from a mismatch between statutory and tax reserves.

For all of the reasons stated above, an emergency adoption of Regulation No. 192 is necessary for the general welfare.

Subject: Minimum standards for determining reserve liabilities and nonforfeiture values for preneed life insurance.

Purpose: To establish minimum standards for determining reserve liabilities and nonforfeiture values for preneed life insurance.

Text of emergency rule: A new Part 102 is added to read as follows:

Section 102.1 Purpose

The purpose of this Part is to prescribe rules establishing minimum standards for reserves and nonforfeiture values for preneed life insurance in accordance with statutory reserve formulae.

Section 102.2 Applicability

This Part shall apply to every authorized life insurance company and licensed fraternal benefit society in this State and every insurer holding a certificate from the superintendent as being accredited for the reinsurance of life insurance (all hereafter referred to as insurers). This Part shall be applicable to such insurers for all statements filed after the effective date of this Part.

Section 102.3 Definitions

(a) 2001 CSO Mortality Table has the meaning contained in section 100.3(a) of Part 100 of this Title (Regulation 179).

(b) Actuarial Opinion has the meaning contained in section 95.4(a)(1) of Part 95 of this Title (Regulation 126).

(c) Actuarial Memorandum means the memorandum filed in support of the actuarial opinion. The form and substance of the actuarial memorandum shall be the same as that described in section 95.9 of this Title.

(d) Appointed Actuary has the meaning contained in section 95.4(e) of this Title.

(e) Preneed life insurance means any life insurance policy or certificate that is issued in combination with, in support of, with an assignment to, or as a guarantee for, a prearrangement agreement for goods and services, or other benefits, to be provided at the time of and immediately following the death of the insured. Goods and services may include embalming, cremation, body preparation, viewing or visitation, coffin or urn, memorial stone, and transportation of the deceased. The status of the policy or certificate as preneed life insurance is determined at the time of issue in accordance with the policy form filing.

(f) Ultimate 1980 CSO Mortality Table means the mortality table without ten-year select mortality factors, consisting of separate rates of mortality for male and female lives, developed by the Society of Actuaries Committee to Recommend New Mortality Tables for Valuation of Standard Individual Ordinary Life Insurance, incorporated in the 1980 National Association of Insurance Commissioners (NAIC) Amendments to the Model Standard Nonforfeiture Law and Standards Valuation Law for Life Insurance, and referred to in those models as the Commissioners 1980 Standard Ordinary Mortality Table without ten-year select mortality factors.

Section 102.4 Minimum Valuation Standards

(a) Minimum valuation mortality standard:

For preneed life insurance, the minimum standard for determining reserve liabilities and nonforfeiture values for both male and female insureds shall be the Ultimate 1980 CSO Mortality Table subject to the transition rules provided in section 102.5 of this Part.

(b) Minimum valuation interest rate standards:

(1) The interest rates used in determining the minimum standard for valuation shall be the calendar year statutory valuation interest rates as defined in section 4217(c)(4) of the Insurance Law.

(2) The interest rates used in determining the minimum standard for nonforfeiture values shall be the nonforfeiture interest rates as defined in section 4221(k)(10) of the Insurance Law.

(c) Minimum valuation method standards:

(1) The method used in determining the standard for the minimum valuation of reserves shall be the Commissioners Reserve Valuation Method as defined in section 98.3(b) of Part 98 of this Title (Regulation No. 147).

(2) The method used in determining the standard for the minimum nonforfeiture values shall be the method defined in section 4221(l)(3) of the Insurance Law.

Section 102.5 Transition Rules

(a) For a preneed policy or certificate issued on or after January 1, 2009 and before January 1, 2012, the 2001 CSO Mortality Table may be used as the minimum standard for reserves and nonforfeiture benefits for both male and female insureds.

(b) If an insurer elects to use the 2001 CSO Mortality Table as a minimum standard for any preneed policy or certificate issued on or after January 1, 2009 and prior to January 1, 2012, the insurer shall provide, as part of the actuarial opinion and memorandum submitted in support of the insurer's asset adequacy testing as specified in Part 95 of this Title, an annual written notification of such use to the superintendent. The notification shall include:

(1) A complete list of all preneed life insurance policy forms that use the 2001 CSO Mortality Table as a minimum standard;

(2) A certification signed by the appointed actuary stating that the reserve methodology, which is employed by the insurer in determining reserves for preneed life insurance issued after January 1, 2009 and using the 2001 CSO Mortality Table as a minimum standard, develops adequate reserves. For the purposes of this certification, the preneed life insurance using the 2001 CSO Mortality Table as a minimum standard cannot be aggregated with any other policies and certificates; and

(3) Supporting information regarding the adequacy of reserves for preneed life insurance issued on or after January 1, 2009 and using the 2001 CSO Mortality Table as a minimum standard for reserves.

(c) A preneed life insurance policy or certificate issued on or after January 1, 2012 shall use the Ultimate 1980 CSO Mortality Table in the calculation of minimum reserves and minimum nonforfeiture values.

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 November 2, 2009.

Text of rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

Regulatory Impact Statement

1. Statutory authority:

The Superintendent's authority derives from sections 201, 301, 1304, 1308, 4217, 4218, 4221, 4240 and 4517 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies. Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Section 1304 of the Insurance Law enables the Superintendent to require any additional reserves as necessary on account of life insurers' policies and certificates.

Section 1308 of the Insurance Law describes when reinsurance is permitted, and the effect that reinsurance will have on reserves.

Section 4217 requires the Superintendent to annually value, or cause to be valued, the reserve liabilities (''reserves'') for all outstanding policies of every life insurance company doing business in New York. Section 4217(a)(1) specifies that the Superintendent may certify the amount of any such reserves, in particular the mortality table or tables, rate or rates of interest and methods used in the calculation of the reserves.

Section 4217(c)(6)(C) provides that reserves according to the commissioners reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of section 4217(c)(6).

Section 4217(c)(6)(D) permits the Superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for section 4217 to such policies as the Superintendent deems appropriate.

Section 4217(c)(9) requires that, in the case of any plan of life insurance that provides for future premium determination, the amounts of which are to be determined by the insurance company based on then estimates of future experience, or in the case of any plan of life insurance that is of such a nature that the minimum reserves cannot be determined by the methods described in section 4217(c)(6) and section 4218, the reserves that are held under the plan must be appropriate in relation to the benefits and the pattern of premiums for that plan, and be computed by a method that is consistent with the principles of sections 4217 and 4218, as determined by the Superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for the policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for the policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which the modified net premium exceeds the actual premium.

Section 4221(k)(9)(B)(vi) permits, for policies of ordinary insurance, the use of any ordinary mortality table, adopted by the National Association of Insurance Commissioners after 1980, and approved by the Superintendent, for use in determining the minimum nonforfeiture standard.

Section 4517(b)(2) provides, for fraternal benefit societies, that reserves according to the commissioners reserve valuation method for life insurance certificates providing for a varying amount of benefits, or requiring the payment of varying premiums, shall be calculated by a method consistent with the principles of subsection (b).

2. Legislative objectives:

Maintaining solvency of insurers doing business in New York is a principal focus of the Insurance Law. Solvency serves several critical functions. One purpose of the Insurance Law is to ensure that all insurers and fraternal benefit societies authorized to do business in New York State, and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance, hold the necessary reserve funds to the obligations made to policyholders. Insurers and policyholders also benefit from the Insurance Law's mandate to maintain adequate capital for company uses such as expansion, product development, and other forms of business development.

3. Needs and benefits:

Prior to 2004, the 1980 CSO Mortality Table was the minimum standard for calculating life insurance reserves and nonforfeiture values. Regulation No. 179 (11 NYCRR Part 100), adopted in 2004, established new minimum standards for both life insurance reserves and nonforfeiture values. That regulation allows the optional use of the 2001 CSO Mortality Table for all policies issued on or after January 1, 2004 and prior to January 1, 2009, and requires the use of the 2001 CSO Mortality Table for all policies issued on or after January 1, 2009. As of January 1, 2009, use of the 2001 CSO Mortality Table will be mandatory for both statutory and tax purposes.

This regulation establishes minimum reserve and nonforfeiture standards for preneed life insurance policies and certificates. Preneed life insurance provides a prearrangement agreement for goods and services to be provided at the time of death of the insured.

Based on research conducted by the Deloitte University of Connecticut Actuarial Center and commissioned by the Society of Actuaries as a part of a study of preneed mortality, it was determined that reserves calculated using the 2001 CSO Mortality Table were inadequate for preneed policies. Development of a new valuation mortality table specifically designed for and based on preneed life insurance experience is currently being developed by the Society of Actuaries, but will not be ready for adoption prior to the mandatory use of the 2001 CSO Mortality Table on January 1, 2009. This regulation therefore is intended as an intermediate solution until such time that an adequate mortality table can be adopted.

The regulation allows for the continued use of the 2001 CSO Mortality Table on an optional basis for preneed life insurance policies and certificates issued on or after January 1, 2009 and through December 31, 2011. For all preneed life insurance policies and certificates issued on or after January 1, 2012, the minimum standard will be the Ultimate 1980 CSO Mortality Table. This transition period allows those insurers currently using the Ultimate 1980 CSO Mortality Table as the minimum standard to continue using that table. Reserves produced under the table are more conservative than those calculated under the 2001 CSO Mortality Table.

As an additional safeguard during the transition period, any insurer using the 2001 CSO Mortality Table will need to provide an annual certification and supporting analysis that the reserves calculated on that basis are adequate on a stand-alone basis. The transition period also allows those insurers that have already converted their policy forms and valuation systems to reflect the 2001 CSO Mortality Table ample time to have revised policy forms approved by the various state insurance departments in which the insurers write business.

The regulation is necessary to help ensure the solvency of life insurers and fraternal benefit societies doing business in New York by providing an appropriate mortality table to be used for valuing reserves for preneed life insurance policies and certificates.

4. Costs:

Administrative costs to most life insurers, fraternal benefit societies, and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance (hereafter, ''insurers'') will be minimal, since many insurers already have made modifications to allow the use of the 2001 CSO Mortality Table with the adoption of Regulation No. 179 in 2004. Nevertheless, the adoption of the special use table may require minimal costs associated with the revision of policy forms. Based on correspondence with an insurer that is a major writer of preneed insurance, the Department estimates the cost to be approximately $1,000, plus any filing fees charged by the state in which the form is filed.

Costs to the Insurance Department will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers. There are no costs to other government agencies or local governments.

5. Local government mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The regulation imposes reporting requirements related to the actuarial opinion and memorandum required for insurers using the 2001 CSO Mortality Table as the minimum standard for preneed life insurance policies and certificates issued on or after January 1, 2009 and prior to January 1, 2012.

7. Duplication:

The regulation does not duplicate any existing law or regulation.

8. Alternatives:

The only significant alternative considered was to allow the 2001 CSO Mortality Table to become the mandatory basis for minimum standards for reserves and nonforfeiture benefits, which would produce inadequate reserves for some insurers.

A copy of the draft regulation was distributed to the Life Insurance Council of New York (LICONY) in July 2008. LICONY is a trade association representing life insurance companies domiciled in the state of New York. LICONY suggested that the original definition of preneed insurance was too broad because it included references to annuity contracts and other insurance contracts. The Department agreed with LICONY and removed both references from the definition. A revised draft of the regulation, reflecting such changes was sent to LICONY in August 2008, and LICONY had no objections to the revised draft regulation.

A copy of the draft regulation was sent to the National Fraternal Congress of America (NFCA) in September 2008. NFCA is a trade association representing fraternal benefit societies in the United States and Canada. NFCA commented that the requirements in the proposed regulation appear to be reasonable.

9. Federal standards:

There are no federal standards in this subject area other than the general requirement under federal tax law to use 2001 CSO Mortality Tables to calculate federal tax reserves for all life insurance contracts on or after January 1, 2009. Implementation of this emergency regulation will, in conjunction with similar actions by at least 25 other states, create an exception to this general rule for preneed contracts.

10. Compliance schedule:

Compliance with this regulation with respect to the 2001 CSO Mortality Table is voluntary for all preneed life insurance policies and certificates issued on or after January 1, 2009 and prior to January 1, 2012. Insur-

ers that are currently using the more conservative Ultimate 1980 CSO table may continue to do so for policies issued on or after January 1, 2009 and prior to January 1, 2012. Insurers must use the Ultimate 1980 CSO Mortality Table for all preneed life insurance policies and certificates issued on or after January 1, 2012, which will allow insurers subject to the regulation ample time to achieve full compliance.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department believes that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this belief is that this rule is directed at all life insurers and fraternal benefit societies authorized to do business in New York State and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance, none of which falls within the definition of ''small business'' set forth in section 102(8) of the State Administrative Procedure Act. Indeed, the Insurance Department has reviewed filed Reports on Examination and Annual Statements of these insurers, and believes that none of them falls within the definition of ''small business'', because there are none that are both independently owned and have under one hundred employees.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

The Insurance Department finds that this rule does not impose any significant burden on persons located in rural areas, and the Insurance Department finds that it will not have an adverse impact on rural areas.

The entities covered by this regulation, life insurers and fraternal benefit societies licensed to do business in New York State, do business in every county in this state, including rural areas as defined under SAPA 102(10). Administrative costs to most life insurers, fraternal benefit societies, and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance will be minimal, since many insurers began to use all versions of the 2001 CSO Mortality Table with the adoption of Regulation No. 179 in 2004. Nevertheless, the adoption of this special use table may require minimal costs associated with the revision of policy forms. Based on correspondence with an insurer that is a major writer of preneed insurance, the Department estimates each insurer's costs to be approximately $1,000, plus any filing fees charged by the state in which the form is filed.

Job Impact Statement

Adoption of Regulation 192 will not adversely impact job or employment opportunities in New York. The rule is likely to have no measurable impact on jobs and employment opportunities because existing personnel should be able to monitor the insurer's compliance with the new requirements. There should be no region in New York which would experience an adverse impact on jobs and employment opportunities. This rule would not have a measurable impact on self-employment opportunities.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Minimum Standards for Determining Reserve Liabilities and Nonforfeiture Values for Preneed Life Insurance

I.D. No. INS-33-09-00001-P

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

Proposed Action: Addition of Part 102 (Regulation 192) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1304, 1308, 4217, 4218, 4221, 4240 and 4517

Subject: Minimum standards for determining reserve liabilities and nonforfeiture values for preneed life insurance.

Purpose: To establish minimum standards for determining reserve liabilities and nonforfeiture values for preneed life insurance.

Text of proposed rule: *A new Part 102 is added to read as follows:*

Section 102.1 Purpose

The purpose of this Part is to prescribe rules establishing minimum standards for reserves and nonforfeiture values for preneed life insurance in accordance with statutory reserve formulae.

Section 102.2 Applicability

This Part shall apply to every authorized life insurance company and licensed fraternal benefit society in this State and every insurer holding a certificate from the superintendent as being accredited for the reinsurance of life insurance (all hereafter referred to as insurers). This Part shall be applicable to such insurers for all statements filed after the effective date of this Part.

Section 102.3 Definitions

(a) 2001 CSO Mortality Table has the meaning contained in section 100.3(a) of Part 100 of this Title (Regulation 179).

(b) Actuarial Opinion has the meaning contained in section 95.4(a)(1) of Part 95 of this Title (Regulation 126).

(c) Actuarial Memorandum means the memorandum filed in support of the actuarial opinion. The form and substance of the actuarial memorandum shall be the same as that described in section 95.9 of this Title.

(d) Appointed Actuary has the meaning contained in section 95.4(e) of this Title.

(e) Preneed life insurance means any life insurance policy or certificate that is issued in combination with, in support of, with an assignment to, or as a guarantee for, a prearrangement agreement for goods and services, or other benefits, to be provided at the time of and immediately following the death of the insured. Goods and services may include embalming, cremation, body preparation, viewing or visitation, coffin or urn, memorial stone, and transportation of the deceased. The status of the policy or certificate as preneed life insurance is determined at the time of issue in accordance with the policy form filing.

(f) Ultimate 1980 CSO Mortality Table means the mortality table without ten-year select mortality factors, consisting of separate rates of mortality for male and female lives, developed by the Society of Actuaries Committee to Recommend New Mortality Tables for Valuation of Standard Individual Ordinary Life Insurance, incorporated in the 1980 National Association of Insurance Commissioners (NAIC) Amendments to the Model Standard Nonforfeiture Law and Standards Valuation Law for Life Insurance, and referred to in those models as the Commissioners 1980 Standard Ordinary Mortality Table without ten-year select mortality factors.

Section 102.4 Minimum Valuation Standards

(a) Minimum valuation mortality standard:

For preneed life insurance, the minimum standard for determining reserve liabilities and nonforfeiture values for both male and female insureds shall be the Ultimate 1980 CSO Mortality Table subject to the transition rules provided in section 102.5 of this Part.

(b) Minimum valuation interest rate standards:

(1) The interest rates used in determining the minimum standard for valuation shall be the calendar year statutory valuation interest rates as defined in section 4217(c)(4) of the Insurance Law.

(2) The interest rates used in determining the minimum standard for nonforfeiture values shall be the nonforfeiture interest rates as defined in section 4221(k)(10) of the Insurance Law.

(c) Minimum valuation method standards:

(1) The method used in determining the standard for the minimum valuation of reserves shall be the Commissioners Reserve Valuation Method as defined in section 98.3(b) of Part 98 of this Title (Regulation No. 147).

(2) The method used in determining the standard for the minimum nonforfeiture values shall be the method defined in section 4221(l)(3) of the Insurance Law.

Section 102.5 Transition Rules

(a) For a preneed policy or certificate issued on or after January 1, 2009 and before January 1, 2012, the 2001 CSO Mortality Table may be used as the minimum standard for reserves and nonforfeiture benefits for both male and female insureds.

(b) If an insurer elects to use the 2001 CSO Mortality Table as a minimum standard for any preneed policy or certificate issued on or after January 1, 2009 and prior to January 1, 2012, the insurer shall provide, as part of the actuarial opinion and memorandum submitted in support of the insurer's asset adequacy testing as specified in Part 95 of this Title, an annual written notification of such use to the superintendent. The notification shall include:

(1) A complete list of all preneed life insurance policy forms that use the 2001 CSO Mortality Table as a minimum standard;

(2) A certification signed by the appointed actuary stating that the reserve methodology, which is employed by the insurer in determining reserves for preneed life insurance issued after January 1, 2009 and using the 2001 CSO Mortality Table as a minimum standard, develops adequate reserves. For the purposes of this certification, the preneed life insurance using the 2001 CSO Mortality Table as a minimum standard cannot be aggregated with any other policies and certificates; and

(3) Supporting information regarding the adequacy of reserves for preneed life insurance issued on or after January 1, 2009 and using the 2001 CSO Mortality Table as a minimum standard for reserves.

(c) A preneed life insurance policy or certificate issued on or after January 1, 2012 shall use the Ultimate 1980 CSO Mortality Table in the calculation of minimum reserves and minimum nonforfeiture values.

Text of proposed rule and any required statements and analyses may be obtained from: Andrew Mais, Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

Data, views or arguments may be submitted to: Frederick Andersen, Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 474-7929, email: fanderse@ins.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority:

The Superintendent's authority derives from sections 201, 301, 1304, 1308, 4217, 4218, 4221, 4240 and 4517 of the Insurance Law.

These sections establish the Superintendent's authority to promulgate regulations governing reserve requirements for life insurers and fraternal benefit societies. Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Section 1304 of the Insurance Law enables the Superintendent to require any additional reserves as necessary on account of life insurers' policies and certificates.

Section 1308 of the Insurance Law describes when reinsurance is permitted, and the effect that reinsurance will have on reserves.

Section 4217 requires the Superintendent to annually value, or cause to be valued, the reserve liabilities (''reserves'') for all outstanding policies of every life insurance company doing business in New York. Section 4217(a)(1) specifies that the Superintendent may certify the amount of any such reserves, in particular the mortality table or tables, rate or rates of interest and methods used in the calculation of the reserves.

Section 4217(c)(6)(C) provides that reserves according to the commissioners reserve valuation method for life insurance policies providing for a varying amount of insurance or requiring the payment of varying premiums shall be calculated by a method consistent with the principles of section 4217(c)(6).

Section 4217(c)(6)(D) permits the Superintendent to issue, by regulation, guidelines for the application of the reserve valuation provisions for section 4217 to such policies as the Superintendent deems appropriate.

Section 4217(c)(9) requires that, in the case of any plan of life insurance that provides for future premium determination, the amounts of which are to be determined by the insurance company based on then estimates of future experience, or in the case of any plan of life insurance that is of such a nature that the minimum reserves cannot be determined by the methods described in section 4217(c)(6) and section 4218, the reserves that are held under the plan must be appropriate in relation to the benefits and the pattern of premiums for that plan, and be computed by a method that is consistent with the principles of sections 4217 and 4218, as determined by the Superintendent.

Section 4218 requires that when the actual premium charged for life insurance under any life insurance policy is less than the modified net premium calculated on the basis of the commissioners reserve valuation method, the minimum reserve required for the policy shall be the greater of either the reserve calculated according to the mortality table, rate of interest, and method actually used for the policy, or the reserve calculated by the commissioners reserve valuation method replacing the modified net premium by the actual premium charged for the policy in each contract year for which the modified net premium exceeds the actual premium.

Section 4221(k)(9)(B)(vi) permits, for policies of ordinary insurance, the use of any ordinary mortality table, adopted by the National Association of Insurance Commissioners after 1980, and approved by the Superintendent, for use in determining the minimum nonforfeiture standard.

Section 4517(b)(2) provides, for fraternal benefit societies, that reserves according to the commissioners reserve valuation method for life insurance certificates providing for a varying amount of benefits, or requiring the payment of varying premiums, shall be calculated by a method consistent with the principles of subsection (b).

2. Legislative objectives:

Maintaining solvency of insurers doing business in New York is a principal focus of the Insurance Law. Solvency serves several critical functions. One purpose of the Insurance Law is to ensure that all insurers and fraternal benefit societies authorized to do business in New York State, and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance, hold the necessary reserve funds to the obligations made to policyholders. Insurers and policyholders also benefit from the Insurance Law's mandate to maintain adequate capital for company uses such as expansion, product development, and other forms of business development.

3. Needs and benefits:

Prior to 2004, the 1980 CSO Mortality Table was the minimum standard for calculating life insurance reserves and nonforfeiture values. Regulation No. 179 (11 NYCRR Part 100), adopted in 2004, established new minimum standards for both life insurance reserves and nonforfeiture values. That regulation allows the optional use of the 2001 CSO Mortality Table for all policies issued on or after January 1, 2004 and prior to January 1, 2009, and requires the use of the 2001 CSO Mortality Table for all policies issued on or after January 1, 2009. As of January 1, 2009, use of the 2001 CSO Mortality Table will be mandatory for both statutory and tax purposes.

This regulation establishes minimum reserve and nonforfeiture standards for preneed life insurance policies and certificates. Preneed life insurance provides a prearrangement agreement for goods and services to be provided at the time of death of the insured.

Based on research conducted by the Deloitte University of Connecticut Actuarial Center and commissioned by the Society of Actuaries as a part of a study of preneed mortality, it was determined that reserves calculated using the 2001 CSO Mortality Table were inadequate for preneed policies. Development of a new valuation mortality table specifically designed for and based on preneed life insurance experience is currently being developed by the Society of Actuaries, but will not be ready for adoption prior to the mandatory use of the 2001 CSO Mortality Table on January 1, 2009. This regulation therefore is intended as an intermediate solution until such time that an adequate mortality table can be adopted.

The regulation allows for the continued use of the 2001 CSO Mortality Table on an optional basis for preneed life insurance policies and certificates issued on or after January 1, 2009 and through December 31, 2011. For all preneed life insurance policies and certificates issued on or after January 1, 2012, the minimum standard will be the Ultimate 1980 CSO Mortality Table. This transition period allows those insurers currently using the Ultimate 1980 CSO Mortality Table as the minimum standard to continue using that table. Reserves produced under the table are more conservative than those calculated under the 2001 CSO Mortality Table.

As an additional safeguard during the transition period, any insurer using the 2001 CSO Mortality Table will need to provide an annual certification and supporting analysis that the reserves calculated on that basis are adequate on a stand-alone basis. The transition period also allows those insurers that have already converted their policy forms and valuation systems to reflect the 2001 CSO Mortality Table ample time to have revised policy forms approved by the various state insurance departments in which the insurers write business.

The regulation is necessary to help ensure the solvency of life insurers and fraternal benefit societies doing business in New York by providing an appropriate mortality table to be used for valuing reserves for preneed life insurance policies and certificates.

4. Costs:

Administrative costs to most life insurers, fraternal benefit societies, and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance (hereafter, ''insurers'') will be minimal, since many insurers already have made modifications to allow the use of the 2001 CSO Mortality Table with the adoption of Regulation No. 179 in 2004. Nevertheless, the adoption of the special use table may require minimal costs associated with the revision of policy forms. Based on correspondence with an insurer that is a major writer of preneed insurance, the Department estimates the cost to be approximately $1,000, plus any filing fees charged by the state in which the form is filed.

Costs to the Insurance Department will be minimal, as existing personnel are available to verify that the appropriate reserves are held by insurers. There are no costs to other government agencies or local governments.

5. Local government mandates:

The regulation imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district, fire district or other special district.

6. Paperwork:

The regulation imposes reporting requirements related to the actuarial opinion and memorandum required for insurers using the 2001 CSO Mortality Table as the minimum standard for preneed life insurance policies and certificates issued on or after January 1, 2009 and prior to January 1, 2012.

7. Duplication:

The regulation does not duplicate any existing law or regulation.

8. Alternatives:

The only significant alternative considered was to allow the 2001 CSO Mortality Table to become the mandatory basis for minimum standards for reserves and nonforfeiture benefits, which would produce inadequate reserves for some insurers.

A copy of the draft regulation was distributed to the Life Insurance Council of New York (LICONY) in July 2008. LICONY is a trade association representing life insurance companies domiciled in the state of New York. LICONY suggested that the original definition of preneed insurance was too broad because it included references to annuity contracts and other insurance contracts. The Department agreed with LICONY and removed both references from the definition. A revised draft of the regula-

tion, reflecting such changes was sent to LICONY in August 2008, and LICONY had no objections to the revised draft regulation.

A copy of the draft regulation was sent to the National Fraternal Congress of America (NFCA) in September 2008. NFCA is a trade association representing fraternal benefit societies in the United States and Canada. NFCA commented that the requirements in the proposed regulation appear to be reasonable.

9. Federal standards:

There are no federal standards in this subject area other than the general requirement under federal tax law to use 2001 CSO Mortality Tables to calculate federal tax reserves for all life insurance contracts on or after January 1, 2009. Implementation of this emergency regulation will, in conjunction with similar actions by at least 25 other states, create an exception to this general rule for preneed contracts.

10. Compliance schedule:

Compliance with this regulation with respect to the 2001 CSO Mortality Table is voluntary for all preneed life insurance policies and certificates issued on or after January 1, 2009 and prior to January 1, 2012. Insurers that are currently using the more conservative Ultimate 1980 CSO table may continue to do so for policies issued on or after January 1, 2009 and prior to January 1, 2012. Insurers must use the Ultimate 1980 CSO Mortality Table for all preneed life insurance policies and certificates issued on or after January 1, 2012, which will allow insurers subject to the regulation ample time to achieve full compliance.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department believes that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this belief is that this rule is directed at all life insurers and fraternal benefit societies authorized to do business in New York State and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance, none of which falls within the definition of "small business" set forth in section 102(8) of the State Administrative Procedure Act. Indeed, the Insurance Department has reviewed filed Reports on Examination and Annual Statements of these insurers, and believes that none of them falls within the definition of "small business", because there are none that are both independently owned and have under one hundred employees.

2. Local governments:

The regulation does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments.

Rural Area Flexibility Analysis

The Insurance Department finds that this rule does not impose any significant burden on persons located in rural areas, and the Insurance Department finds that it will not have an adverse impact on rural areas.

The entities covered by this regulation, life insurers and fraternal benefit societies licensed to do business in New York State, do business in every county in this state, including rural areas as defined under SAPA 102(10). Administrative costs to most life insurers, fraternal benefit societies, and insurers holding a certificate from the Superintendent that allows them to reinsure life insurance will be minimal, since many insurers began to use all versions of the 2001 CSO Mortality Table with the adoption of Regulation No. 179 in 2004. Nevertheless, the adoption of this special use table may require minimal costs associated with the revision of policy forms. Based on correspondence with an insurer that is a major writer of preneed insurance, the Department estimates each insurer's costs to be approximately $1,000, plus any filing fees charged by the state in which the form is filed.

Job Impact Statement

Adoption of Regulation 192 will not adversely impact job or employment opportunities in New York. The rule is likely to have no measurable impact on jobs and employment opportunities because existing personnel should be able to monitor the insurer's compliance with the new requirements. There should be no region in New York which would experience an adverse impact on jobs and employment opportunities. This rule would not have a measurable impact on self-employment opportunities.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Flexible Rating for Nonbusiness Automobile Insurance Policies

I.D. No. INS-33-09-00007-P

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

Proposed Action: Repeal of Part 163 and addition of new Part 163 (Regulation 153) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 2350 and art. 23

Subject: Flexible Rating for Nonbusiness Automobile Insurance Policies.

Purpose: This rule re-establishes flexible rating for nonbusiness automobile insurance policies required by section 2350 of the Insurance Law.

Text of proposed rule: A new Part 163 is added to read as follows:

§ 163.0 Preamble.

On June 30, 2008, the Governor signed Chapter 136 of the Laws of 2008 into law to enhance competition in the nonbusiness motor vehicle market, by adding a new Insurance Law section 2350. Chapter 136 replaces the prior approval system, in effect since 2001 for nonbusiness motor vehicle insurance rates, with a flexible rating (flex-rating) system. The new system, which takes effect on January 1, 2009, is a blend of prior approval and competitive rating. The system allows periodic overall average rate changes up to five percent on a file and use basis, and requires the superintendent's prior approval of overall average rate increases above five percent in any twelve-month period. The new section 2350 requires the superintendent to promulgate rules and regulations implementing the new flex-rating system.

§ 163.1 Definitions.

For the purpose of this Part, the following definitions shall apply:

(a) Base rate means the dollar charge for a given coverage for one car year prior to the application of rating factors.

(b) Car year means insuring a motor vehicle for one year.

(c) Coverage means the following motor vehicle insurance coverages:

(1) no-fault (personal injury protection), residual bodily injury liability, property damage liability, statutory uninsured motorists, supplementary uninsured/underinsured motorists, comprehensive, and collision; and

(2) any other motor vehicle coverage.

(d) Current average rate for a given coverage means the weighted average of an insurer's latest filed base rates modified by the applicable rating factors for each motor vehicle for the given coverage with the weights proportional to the latest available number of car years associated with each rating factor, or any materially equivalent calculation.

(e) Current overall average rate means:

(1) the weighted average of the current average rate for:

(i) all coverages listed in paragraph (1) of subdivision (a) of this section; and

(ii) any other motor vehicle coverages not listed in paragraph (1) of subdivision (a) of this section, if the insurer proposes a change in the rate for that coverage, with the weights proportional to the latest available number of car years for the respective coverages; or

(2) any materially equivalent calculation.

(f) Effective date means the date a revised set of base rates or rating factors shall apply to all existing nonbusiness automobile insurance policies as such policies are renewed. If a filing only applies to new business, then the effective date means the date that an insurer may first write new business.

(g) File and use means the process by which an insurer files with the superintendent a proposed overall average rate change that is within the flex-band, and then uses the proposed overall average rate change without having to obtain the superintendent's prior approval.

(h) Flexibility band or flex-band means the range of overall average rate increase or decrease (up to +5%) within which an insurer may change its motor vehicle insurance rates without having to obtain the superintendent's prior approval.

(i) Motor vehicle has the meaning set forth in section 5102(f) of the Insurance Law.

(j) Nonbusiness automobile insurance policy means a contract of insurance covering losses or liabilities arising out of the ownership, operation or use of a motor vehicle that is predominately used for nonbusiness purposes, when a natural person is the named insured.

(k) Proposed average rate for a given coverage means the weighted

average of an insurer's proposed base rates modified by the applicable rating factors for each motor vehicle for the given coverage with the weights proportional to the latest available number of car years associated with each rating factor, or any materially equivalent calculation.

(l) Proposed overall average rate means:

(1) the weighted average of the proposed average rate for:

(i) each coverage listed in paragraph (1) of subdivision (a) of this section regardless of whether the insurer is filing a change for that coverage; and

(ii) any other motor vehicle coverages not listed in paragraph (1) of subdivision (a) of this section if the insurer proposes a change in the rate for that coverage, with the weights proportional to the latest available number of car years for the respective coverages; or

(2) any materially equivalent calculation.

(m) Proposed overall average rate change means the percentage difference between the proposed overall average rate and the current overall average rate. For example, if the proposed overall average rate is $1,200 and the current overall average rate is $1,000, then the proposed overall average rate change is 20% (((1,200/1,000)-1) × 100).

(n) Rating factors means the various elements that are applied or added to the base rates to obtain the actual nonbusiness automobile insurance policy premiums. These include classification factors based on the age, sex, and marital status of the insured, territorial rating factors, merit rating factors based on the driving record of the insured, increased limit factors, motor vehicle symbol and model year rating factors, and multi-tier rating factors.

§ 163.2 Rules and standards governing proposed file and use overall average rate changes for nonbusiness automobile insurance policies.

(a) An insurer may implement a proposed overall average rate increase on a file and use basis provided that the change is within the five percent flex-band. If the proposed overall average rate increase exceeds the five percent flex-band, then the insurer shall obtain the superintendent's prior approval before implementing the change.

(b) During any twelve-month period, an insurer may implement no more than two overall average rate increases on a file and use basis provided that the cumulative effect of the increases shall be within the five percent flex-band. If a proposed overall average rate increase combined with a prior rate increase implemented within a twelve-month period of the proposed effective date of the request exceeds the five percent flex-band, then the insurer shall obtain the superintendent's prior approval before implementing the change. The cumulative effect of two or more rate changes in a twelve-month period is derived in a multiplicative manner. For example, if an insurer implements on a file and use basis a +2.9% overall average rate increase effective February 1, 2009 and a +2% overall average rate increase effective August 1, 2009, then the insurer may not implement another file and use overall average rate increase before February 1, 2010. However, at such time, the insurer may implement an overall average rate increase up to a maximum of +2.9%.

(c) An insurer may implement an overall average rate decrease on a file and use basis up to a maximum of five percent at any one time from the overall average rate currently in effect.

(d) Notwithstanding any provision of this Part, an insurer shall not implement an overall average rate increase on a file and use basis subsequent to an overall average rate increase greater than the five percent flex-band that the superintendent has already prior approved in the twelve-month period immediately preceding the effective date of the proposed increase.

§ 163.3 Rules and standards governing changes in rating factors.

(a) An insurer may adjust its rating factors as part of a file and use change. The insurer shall incorporate the rate impact of these adjustments in the overall average rate change. These changes shall be consistent with the rate change limitations for individual insureds contained in section 163.4 of this Part.

(b) An insurer may adjust its rating factors in separate and distinct filings independent of an overall average rate change. If these filings have no overall average rate impact, then the insurer may implement them on a file and use basis and the insurer shall not be precluded from implementing a file and use change for an overall average rate increase within the time periods specified in section 163.2(b) of this Part. For example, the introduction of a physical damage coverage's model year rating factor for a new model year that is consistent with an existing model year rating rule is not subject to prior approval. These filings shall be consistent with the rate change limitations for individual insureds contained in section 163.4 of this Part.

§ 163.4 Rules and standards governing nonbusiness automobile insurance policy premium change limitations for individual insureds as a consequence of file and use filings.

(a) In any twelve-month period, the total premium on any nonbusiness automobile insurance policy shall not change by more than 30% as a consequence of file and use filings. An insurer shall meet this requirement by adjusting the base rates or rating factors in the file and use filing. An insurer shall not cap an individual insured's premium as a final step. If a filing produces an annual total premium change on an insurance policy that exceeds the 30% maximum, then the filing shall be subject to the superintendent's prior approval.

(b) Changes in the premium of a nonbusiness automobile insurance policy as a consequence of changes in an insured's rating characteristics or changes in the coverages or the amounts of coverage being purchased shall not be considered within the calculation of the individual insured premium limitation contained in subdivision (a) of this section. For example, if an insured has an accident during the prior year and incurs a 25% surcharge or uptier, then this 25% surcharge/uptier shall not be considered within the individual premium limitation. Similarly, if a change in the age of an insured results in the application of a different classification factor, the rate effect attributable to that classification change shall also not be considered within the individual premium limitation.

§ 163.5 Support for filings submitted on a file and use basis.

An insurer shall include support for all proposed changes specified in each filing submitted on a file and use basis. The support shall include the specific reasons for the proposed changes, and any other material information required by section 2304 of the Insurance Law (e.g., the underlying data upon which the change is based). Filings submitted on a file and use basis shall be subject to the superintendent's review in accordance with Article 23 of the Insurance Law.

§ 163.6 Support for filings subject to prior approval.

(a) An insurer shall include support for all proposed changes specified in each filing subject to the superintendent's prior approval. The support shall include the specific reasons for the proposed changes, and any other material information as required by section 2304 of the Insurance Law.

(b) Subject to all other requirements of this Part and article 23 of the Insurance Law, an insurer may adjust rating factors associated with territories or classifications as part of its file and use filing, provided that there are no changes to the underlying definitions which remain subject to the superintendent's prior approval pursuant to article 23 of the Insurance Law. Examples of rating classifications include discounts, surcharges, merit rating plans or multi-tier programs.

(c) If any one element of a filing is subject to prior approval, then the entire filing shall be subject to prior approval.

§ 163.7 Notification to insureds of rate changes.

(a) An insurer shall mail or deliver to every named insured affected by a rate increase due to a flex-band rate filing, at least 30 but not more than 60 days in advance of the end of the policy period, a notice of its intention to change the insured's rate. The notice shall set forth the specific reason or reasons for the rate change.

(b) An insurer shall not implement a rate increase due to a flex-band rate filing unless the insurer has mailed or delivered to the named insured affected by the rate increase the notice required by subdivision (a) of this section.

(c) An insurer shall submit a flex-band rate filing to the superintendent in a timely manner. An insurer shall not submit a flex-band rate

filing to the superintendent after insureds have received notification pursuant to subdivision (a) of this section.

Text of proposed rule and any required statements and analyses may be obtained from: Andrew Mais, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2285, email: amais@ins.state.ny.us

Data, views or arguments may be submitted to: Buffy Cheung, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-5587, email: bcheung@ins.state.ny.us

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

Regulatory Impact Statement

1. Statutory authority: Sections 201, 301, and Article 23 of the Insurance Law (most specifically, section 2350).

These sections establish the superintendent's authority to promulgate regulations establishing standards for flexible rating systems providing nonbusiness automobile insurance policies. Sections 201 and 301 of the Insurance Law authorize the superintendent to effectuate any power accorded to him by the Insurance Law, and prescribe regulations interpreting the Insurance Law.

Article 23 promotes the public welfare by regulating insurance rates to the end that they not be excessive, inadequate or unfairly discriminatory, to promote price competition and competitive behavior among insurers.

Chapter 136 of the Laws of 2008 adds a new section 2350 to the Insurance Law, which reintroduces flexible rating for nonbusiness automobile insurance rates.

2. Legislative objectives: The stated purpose of Article 23 of the Insurance Law is to ensure the availability and reliability of insurance, and to promote public welfare, by regulating insurance rates to assure that they are not excessive, inadequate or unfairly discriminatory and are responsive to competitive market conditions. Chapter 136 of the Laws of 2008 reestablished flexible rating for nonbusiness automobile insurance. It should strengthen the high level of competition that already exists in this market. The nonbusiness automobile market can benefit from the additional competitive impetus of a flexible rating system.

3. Needs and benefits: Flexible rating, which is a hybrid system borrowing elements from open competition and prior approval, has been applicable to commercial risk, professional liability and public entity insurance since 1986. In those markets, flexible rating has proved successful in restoring stability, promoting fair competition, and providing a firm foundation for long-term thinking and strategic planning, not only on the part of the insurance industry, but for the benefit of businesses and consumers that must rely upon, and budget for, insurance protection.

The above benefits are pertinent to the application of flex rating for the nonbusiness automobile market. Competition and market forces have always been strong determinants of rates for nonbusiness automobile coverages, and flex rating should strengthen the high level of competition that already exists in this market.

Chapter 113 of the Laws of 1995 first introduced flex rating to nonbusiness automobile insurance effective July 1, 1995 until it expired on August 2, 2001 and was replaced by prior approval requirements. However, section 13 of Chapter 136 of the Laws of 2008 adds a new section 2350 to the Insurance Law, which reintroduces flexible rating for nonbusiness automobile insurance rates. It permits insurers to place nonbusiness automobile insurance rates in effect without the superintendent's prior approval, provided that the overall average rate level does not result in an increase above five percent from the insurer's prior rate level in effect during the preceding 12 months. Section 2350 also limits the overall average rate level decreases without prior approval up to five percent from the insurer's current rate level regardless of when it went into effect. The prior regulation, which implemented the former flex rating system, is hereby being repealed pursuant to this new Part 163 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 153). In accordance with section 2350(c), Insurance Department Regulation No. 153 (11 NYCRR 163) is being promulgated to provide guidance to insurers in implementing the new law's requirements.

4. Costs: This rule imposes no compliance costs on state or local governments. There are no additional costs incurred by the Insurance Department. For regulated parties, the costs of submitting a flexible rate filing should be no different than the costs of submitting a rate filing under the prior law. Since insurers will be able to implement flexible rate changes without having to wait for the Insurance Department's formal approval, they will be able to respond more quickly to competitive forces in the marketplace. However, there is an additional requirement to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. Compliance with this notice requirement of premium increases pursuant to the flexible rating regulation will have a minimal cost, since the notice language may be included along with the renewal policy information sent to insureds. In any event, the notice requirement is imposed by the statute, not the regulation.

5. Local government mandates: This amendment does not impose any program, service, duty or responsibility upon a city, town or village, or school or fire district.

6. Paperwork: While the paperwork associated with the submission and monitoring of a flexible rate filing is essentially the same as that associated with private passenger automobile insurance rate filings under the prior law, there is an additional requirement imposed by the statute to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. This notice language may be included along with the renewal policy information sent to insureds.

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

8. Alternatives: The Department performed outreach with three property/casualty insurer trade organizations (individually ''insurer trade organization'') and two property/casualty insurance agents and brokers trade organizations (individually ''agents and brokers trade organization'') and received comments from four out of the five organizations.

a. The legislative intent was for any rate change that results in an overall rate increase above 5% during a 12-month period to require prior approval. The alternative approach would be not to consider any rate increase that exceeds the 5% overall flex band limit that has been prior approved during the same 12-month period. While this approach would require newer data to support any flex rate filing made subsequent to a prior approved rate filing, it still seems to be clearly against the legislative intent to keep significant automobile rate increases occurring within a 12-month period to be subject to prior approval. For example, if an insurer received approval for a rate increase of 7% effective February 1, 2009, the insurer may not implement an additional increase to be effective before February 1, 2010 on a flexible rating basis.

b. The Department considered reducing the limitation from the prior regulation standard of a 30% maximum individual premium change as a consequence of file and use filings to 25%, with the understanding that such maximum policyholder change bears some relationship to the overall flex band (which has decreased from 7% in the prior flex rating statute to 5% in the new statute). However, in consideration of comments received, the Department agreed that the maximum individual premium change is not truly relevant to the overall average rate change resulting from a flexible rate filing made by an insurer. It is quite common for rate filings with little or no overall rate effect to still produce significant individual policyholder impacts.

c. An insurer trade organization objected to the provision of Section 163.4, which precludes an insurer from capping an individual insured's premium to comply with the maximum individual premium change provision. This organization asserted that ''capping'' is a method that is considered acceptable in other states to achieve that result as opposed to making adjustments to base rates and factors for an entire class of policyholders. However, it has long been the Department's view that the capping of individual policy premiums is unfairly discriminatory to new policyholders with the same characteristics as current policyholders whose rates have been capped and therefore contrary to Article 23.

d. An insurer trade organization inquired as to whether the cumulative effect of two flexible rate increases would be measured, by simple

addition or by multiplication. In response to this comment, further clarification has been added to Section 163.2 of this regulation, stating that the cumulative effect is determined in a multiplicative manner and an example has been included.

e. Two insurer trade organizations commented that the regulation fails to specify the instances under which the superintendent may order an insurer to make a change in its rates filed under file and use basis. However, section 2320 of the Insurance Law provides procedures that must be followed by the superintendent and insurers in addressing issues related to rate filings that are not subject to prior approval. Thus, no change to the proposal was made in response to this comment.

f. An insurer trade organization and an agents and brokers trade organization suggested that the Department clarify that the maximum permitted increase for an individual insured's premium should be applied to the full coverage or total premium of a nonbusiness automobile insurance policy. Consequently, the Department modified section 163.4(a) of the regulation to clarify that the provision applies to an insured's total policy premium and not to a specific coverage.

g. Two insurer trade organizations and an agents and brokers trade organization requested a definition of the term ''predominantly'' with regard to the definition of ''nonbusiness automobile insurance policy'' and a revision to the definition of the term ''effective date'' with regard to new business and renewals. However, the term ''predominantly'' is not unique to the flexible rating statute, and is used elsewhere in the Insurance Law, such as section 3425. In addition, the term ''predominantly'' has been previously clarified through opinions of the Department's Office of General Counsel. Thus, the Department made no changes to the regulation in response to this comment. The Department considered the request for revision of the definition of the term ''effective date'' but determined that the current definition, contained in section 163.1 of the regulation, was appropriate.

h. An agents and brokers trade organization inquired if an insurer may increase the premium on a six month policy at each policy renewal. However, article 23 of the Insurance Law requires an insurer to use the rates in effect upon renewal of each policy, regardless of the rate filing system used to make the rate filing (i.e., regardless of whether the filing was made as file and use or in accordance with prior approval). Thus, the Department made no changes to the regulation in response to this comment.

i. An insurer trade organization commented on the fact that the regulation would allow an insurer to file multiple file and use rate reductions while being limited to only two file and use increases within any 12-month period. The flexible rating statute provides for a maximum of two file and use overall average rate increases within any 12-month period, up to an overall maximum increase of 5%. The statute does not, however, provide any restrictions on the number of file and use overall average rate decreases, provided that the overall average rate decrease does not exceed the 5% flex-band from the rate currently in effect. All rate filings must include support for the proposed changes as required by Article 23 of the Insurance Law, as the Department will monitor the cumulative effect of the decreases to ensure that the rates are not inadequate or otherwise in violation of the Insurance Law.

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

10. Compliance schedule: Insurers should be able to comply with the requirements of this rule as soon as they are effective.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses. The basis for this finding is that this rule is directed at property/casualty insurance companies licensed to do business in New York State, none of which falls within the definition of ''small business'' as found in section 102(8) of the State Administrative Procedure Act. The Insurance Department has monitored Annual Statements and Reports on Examination of authorized property/casualty insurers subject to this rule, and believes that none of the insurers falls within the definition of ''small business'', because there are none that are both independently owned and have fewer than one hundred employees.

2. Local governments:

The rule does not impose any impacts, including any adverse impacts, or reporting, recordkeeping, or other compliance requirements on any local governments. The basis for this finding is that this rule is directed at property/casualty insurance companies, none of which are local governments.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: This regulation applies to all property/casualty insurance companies licensed to write insurance in New York State (specifically, those writing automobile insurance). Property/casualty insurance companies do business throughout New York State, including rural areas as defined under State Administrative Procedure Act Section 102(10).

2. Reporting, recordkeeping and other compliance requirements, and professional services: This regulation is not expected to impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This regulation re-establishes flexible rating for nonbusiness automobile insurance policies, as required by section 2350 of the Insurance law. While the paperwork associated with the submission and monitoring of a flexible rate filing is essentially the same as that associated with private passenger automobile insurance rate filings under the prior law, there is an additional requirement imposed by the statute to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. This notice language may be included together with the renewal policy information that is sent to insureds.

3. Costs: The costs to regulated parties of submitting a flexible rate filing should be no different than the costs for submitting a rate filing under the prior law. Since insurers will be able to implement flexible rate changes without having to wait for the Insurance Department's formal approval, they will be able to respond more quickly to competitive forces in the marketplace. However, there is an additional requirement to provide notice to all policyholders affected by a rate increase due to a flexible rate filing. Compliance with this notice requirement of premium increases pursuant to the flexible rating regulation will have a minimal cost, since the notice language may be included along with the renewal policy information sent to insureds. In any event, the notice requirement is imposed by the statute, not the regulation.

4. Minimizing adverse impact: The regulation does not impose any impact unique to rural areas.

5. Rural area participation: This regulation is required by statute.

Job Impact Statement

The Insurance Department finds that this rule will have no adverse impact on jobs and employment opportunities. It merely implements section 2350 of the Insurance Law, which directs the superintendent to establish standards for flexible rating systems providing nonbusiness automobile insurance policies. The number of insurance company personnel necessary to submit a flexible rating filing should be no different than submitting a rate filing under the prior law.

Division of the Lottery

EMERGENCY RULE MAKING

Operation of the LOTTO Game and the New York Lottery Subscription Program

I.D. No. LTR-33-09-00002-E
Filing No. 903
Filing Date: 2009-07-31
Effective Date: 2009-07-31

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

Action taken: Repeal of sections 2804.14, 2804.15 and Part 2817; and addition of new sections 2804.14, 2804.15 and Part 2817 to Title 21 NYCRR.

Statutory authority: Tax Law, sections 1601, 1604 and 1612

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

Specific reasons underlying the finding of necessity: Emergency adoption of the new LOTTO regulations is necessary to counteract the budgetary crisis currently facing the State of New York. Governor Paterson discussed the severity of this crisis in his January 7, 2009 State of the State address:

New York faces an historic economic challenge, the gravest in nearly a century. For several months, events have shaken us to the core. Bank closures, job losses and stock market meltdowns have destabilized the foundations of our economy. Since January 2008, two million Americans have lost their jobs. During this recession, an estimated 225,000 New Yorkers will be laid off. Many others have lost their homes. The pillars of Wall Street have crumbled. The global economy is reeling. Trillions of dollars of wealth have vanished.

We still do not know the extent of the economic chaos that awaits us. We do know that this may be the worst economic contraction since the Great Depression. New York entered recession in August. Wall Street was hit the hardest. At least 60,000 jobs will be lost in the financial services sector, which is devastating to our state budget. Financial services provide 20% of state government revenues, so this year's budget will be exceptionally difficult.

Let me be clear – our state faces historic challenges. Our economy is damaged, our confidence is shaken, and the economic obstacles we face seem overwhelming. . . These problems may last for many more months or even years.

Since his State of the State address, the Governor has continued to underscore the importance of reversing New York State's ominous fiscal situation.

The New York Lottery (the "Lottery") has the unique ability to generate revenue for the State quickly and at a critical time when additional revenue is essential. By relaunching a new version of the LOTTO game in September, the Lottery hopes to reverse a downward trend in LOTTO sales and increase revenue earned for education in New York State.

The new regulations allow the Lottery to address the continuing decline in LOTTO sales. Over the course of State Fiscal Years 2004-05 through 2007-08, LOTTO sales have decreased by an average of 10.4% annually. LOTTO sales declined to only $208,400,000 in the fiscal year ending on March 31, 2008 compared to earlier levels of over $356,000,000 a year. If the 10.4% annual plunge in LOTTO sales continues through the fiscal year ending March 31, 2012, sales for that year will total only $134,420,000. The aid to education from this game will also drop from an estimated $109,858,000 in FY 2007-08 to only $70,860,000 in FY 2011-12, which is a difference of almost forty million dollars that will need to be subsidized from the General Fund. LOTTO sales even further declined in FY 2008-09 at a rate of 14.6% compared to the previous fiscal year. If this amplified downward trend continues, the consequential decline in aid to education will be even more significant than what is currently projected.

The declining sales of the LOTTO game must be addressed immediately to not only maintain current revenue earned for education, but to hopefully generate additional money for the State. The new game rules are intended to re-ignite interest in the game by providing for a more attractive prize structure with better odds of winning top prizes. Marketing research and consumer surveys indicate that interest in the new LOTTO game is high, which suggests that the State is likely to realize indispensable budgetary relief in the form of increased revenue for education earned through improved LOTTO sales.

In an effort to make the LOTTO game more attractive, the Lottery has further revised the LOTTO game rules to permit multiple variations of the game and to allow flexibility for the Lottery to adjust the game or games based on market trends and research. Such an ability to respond to the player market will also provide the Lottery with the opportunity to increase ticket sales for the LOTTO game or games and ultimately generate more revenue to the State for aid to education.

Due to the unprecedented need for revenue at this time, the Lottery and the State cannot afford to delay relaunch of the LOTTO game until completion of the Notice of Proposed Rulemaking process under the State Administrative Procedure Act. Therefore, the new LOTTO regulations must first be implemented through Emergency Adoption.

Subject: Operation of the LOTTO game and the New York Lottery subscription program.

Purpose: To revise the rules of the LOTTO game and related subscription provisions.

Substance of emergency rule: The repeal and replacement revises the New York Lottery's (the "Lottery's") LOTTO and Lottery Subscription regulations relating to the operation of the LOTTO game. Due to the consistent decline in popularity of the Lottery's flagship game, the Lottery is relaunching LOTTO to make it more appealing to consumers, which should ultimately generate more revenue to the State for aid to education. The revisions to the LOTTO game rules and subscription regulations accommodate the relaunch of the game that is planned for September 2009.

The revised game rules provide for a more attractive prize structure for players and are intended to re-ignite interest in the game. Provisions related to the distribution of prizes provide that the first prize for the game shall be $1,000,000 paid as a lump sum. Because the game structure will be changed to make odds of winning a first prize more favorable, players will be positively affected since there will be approximately three times as many top prizes as under the existing LOTTO game. The first prize will not be a shared prize unless a certain maximum number of game panels match the applicable numbers for a particular drawing. The revised regulations also address the second prize category through the fourth prize category.

Definitions were revised to accommodate the proposed design while also providing that certain specific game rules shall be publicly announced by the Lottery. The definition of the LOTTO game was revised to permit the Lottery to change the name of the game or to offer two or more versions of the LOTTO game with different fields of numbers and prize structures.

The LOTTO regulations were amended to permit minor changes in the game structure if marketing evidence suggests that alteration may result in greater interest in the game and increased revenue for the State. Specific game details not enumerated within the regulations will be communicated to players via the Lottery's official website, on which the Lottery will designate the odds of winning, the prize structure, including fixed prize amounts, and details about any additional version of the LOTTO game. The Lottery will also announce details regarding LOTTO in advertisements, news releases, play slips, brochures located at retailers, or in any other form that the Director may prescribe. Therefore, slight modifications to the game will not necessarily require amendment of the regulations. This ensures that the Lottery will be able to offer the best possible game, which will appeal to more customers and result in maximum sales and revenue for aid to education in New York State.

The Lottery's regulations relating to subscriptions were also amended to comply with revisions to the LOTTO game. The revised subscription regulations generally describe subscription costs and subscription application requirements. In addition to LOTTO, these regulations apply to any other game that the Lottery has or may have available under the subscription program.

Technical amendments were also made throughout the proposed regulations.

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 October 28, 2009.

Text of rule and any required statements and analyses may be obtained from: Julie B. Silverstein Barker, Associate Attorney, New York Lottery, One Broadway Center, PO Box 7500, Schenectady, New York 12301, (518) 388-3408, email: nylrules@lottery.state.ny.us

Regulatory Impact Statement

1. Statutory authority: Pursuant to the authority conferred in New York State Tax Law, Section 1601, 1604 and 1612, the following official rules shall take effect and shall remain in full force and effect for the New York Lottery's subscription program and the LOTTO game.

Tax Law § 1601 describes the purpose of the New York State Lottery for Education Law (Tax Law Article 34) as being to carry out the mandate of the State Constitution by establishing a lottery to be oper-

ated by the State, the net proceeds of which are to be applied exclusively for aid to education. In order to effectively administer the State-operated lottery authorized by the Constitution and the New York State Lottery for Education Law, Tax Law § 1604 authorizes the Division of the Lottery (the Lottery) ''to promulgate rules and regulations governing the establishment and operation thereof.'' Tax Law § 1612(a)(4) determines the percentages for revenue and prize disposition of LOTTO sales and describes the game as, '''Lotto', offered no more than once daily, a discrete game in which all participants select a specific subset of numbers to match a specific subset of numbers, as prescribed by rules and regulations promulgated and adopted by the division, from a larger specific field of numbers, as also prescribed by such rules and regulations.''

2. Legislative objectives: The purpose of operating Lottery games is to generate revenue for the support of education in the State. Repeal and replacement of these regulations forwards the mission of the Lottery to generate revenue for education by increasing consumer interest in the LOTTO game.

3. Needs and benefits: The Lottery has sustained competitive pressure from large jackpot lottery games in adjoining states. Additionally, the LOTTO game is experiencing a decline in sales and a loss of player interest. A comparison of LOTTO sales for 2004-05 to sales for 2007-08 shows an annual decline of 10.4%. For the fiscal year ending on March 31, 2008, sales declined to only $208,400,000 from earlier levels of over $356,000,000 a year. If the 10.4% annual plunge in sales continues through the fiscal year ending March 31, 2012, sales for that year will total only $134,420,000. The aid to education from this game will also drop from an estimated $109,858,000 in FY 2007-08 to only $70,860,000 in the fiscal year ending on March 31, 2012.

Repeal and replacement of the LOTTO regulations allows the Lottery to reverse this trend and continue its effort to keep and enlarge its market share of players (from within New York State and those visiting New York State from other states) who play lottery games. The revised game rules provide for a more attractive prize structure for players and are intended to re-ignite interest in the game. Because the game structure will be changed to make odds of winning a first prize more favorable, we expect sales to increase since we anticipate three times as many top prizes as under the existing LOTTO game.

Marketing research and consumer surveys indicate that interest in the new LOTTO game is high. Players are motivated by ''better odds,'' and many think the new game that is planned for September 2009 will be a great value. Research reveals that players find the improved odds of winning when compared to the current LOTTO game to be the single most exciting aspect of the new game. Survey participants also responded favorably to first prize being paid as a lump sum. Of those surveyed, 86% prefer jackpot winnings to be paid all at once in cash as opposed to installments. This evidence suggests that New Yorkers are intrigued by the new game, and the State is likely to realize a tangible benefit in the form of increased revenue for education.

4. Costs:

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

b. Costs to the agency, the State, and local governments for the implementation and continuation of the rule: No additional operating costs are anticipated, since funds originally appropriated for the expenses of operating the existing lottery games are expected to be sufficient to support this game relaunch. The relaunch of the LOTTO game will generate more revenue for aid to education. More revenue to education from the Lottery will have a positive effect on the State because less funds would then be required from the General Fund to aid education. Furthermore, if less funds are required from the General Fund to aid education, local governments will benefit because increased funding for local schools from Lottery revenues may ease the local tax burden. Local retailers will earn more commissions as the sales of LOTTO tickets increase and may result in more employment opportunities.

c. Sources of cost evaluations: The foregoing cost evaluations are based on the Lottery's experience in operating State Lottery games for more than 40 years.

5. Local government mandates: None.

6. Paperwork: There are no changes in paperwork requirements. Game information will be issued by the New York Lottery for public convenience on the Lottery's website and through Point of Sale materials at retailer locations.

7. Duplication: None.

8. Alternatives: The revised LOTTO regulations permit minor changes in the game structure if marketing evidence suggests that alteration may result in greater interest in the game and increased revenue for the State. Specific game details not enumerated within the regulations will be communicated to players via the Lottery's official website, on which the Lottery will designate the odds of winning, the prize structure, including fixed prize amounts, and details about any additional version of the LOTTO game. The Lottery will also announce details regarding LOTTO in advertisements, news releases, play slips, point of sale materials located at retailers, or in any other form that the Director may prescribe. Therefore, slight modifications to the game will not necessarily require amendment of the regulations. This ensures that the Lottery will be able to offer the best possible game or games, which will appeal to more customers and result in maximum sales and revenue for aid to education in New York State.

The alternative to amending the LOTTO game is to not address the declining revenues for the game and forfeit the investment already made by the Lottery in the game. As mentioned above, the annual LOTTO sales decline of 10.4% will likely continue, and the State will lose millions of dollars in revenue. The failure to proceed will also result in lost revenue to education that is anticipated to be earned following introduction of a new variation of the LOTTO game.

9. Federal standards: None.

10. Compliance schedule: None.

Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

This rulemaking does not require a Regulatory Flexibility Analysis or a Rural Area Flexibility Analysis. There will be no adverse impact on rural areas, small business or local governments.

The amendments to the New York Lottery's LOTTO game and subscription regulations will not impose any adverse economic or reporting, recordkeeping or other compliance requirements on small businesses or local governments. Small businesses will not have any additional recordkeeping requirements as a result of the amendments. Additionally, the proposed amendments are anticipated to have a positive affect on the revenue of small businesses that sell lottery tickets as more players will be interested in the game, which will increase sales commissions paid to retailers. Local governments are not regulated by the New York Lottery or its subscription regulations nor are any economic or recordkeeping requirements imposed on local governments as a result of the amendments to such regulations.

Job Impact Statement

The repeal and replacement of 21 NYCRR sections 2804.14 and 2804.15 and Part 2817 does not require a Job Impact Statement because there will be no adverse impact on jobs and employment opportunities in New York State. The repeal and replacement of the regulations is sought to relaunch the New York Lottery's LOTTO game to generate more revenue for the State for aid to education.

The revisions may have a positive effect on jobs or employment opportunities as a result of an increase in LOTTO ticket sales, which would increase sales commissions paid to Lottery retailers.

Public Service Commission

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Niagara Mohawk's Revised ''Fast Track'' Residential Electric HVAC Program Proposal

I.D. No. PSC-33-09-00008-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 the revised ''fast track'' residential electric HVAC program proposal submitted by Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk) in case 08-E-1014.

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

Subject: Niagara Mohawk's revised ''fast track'' residential electric HVAC program proposal.

Purpose: To consider Niagara Mohawk's revised ''fast track'' residential electric HVAC program proposal.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, the proposal set forth by Niagara Mohawk Power Corporation d/b/a National Grid in a petition entitled "Petition of Niagara Mohawk Power Corporation d/b/a National Grid for Approval of "Fast Track" Utiltiy-Administered Electric Energy Efficiency Program Consisting of a Residential High Efficiency Central Air Conditioning Program for 2010-2011" and dated April 1, 2009.

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

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

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.

(08-E-1014SP2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Rates and Charges

I.D. No. PSC-33-09-00009-P

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

Proposed Action: On July 23, 2009, National Aqueous Corporation (National Aqueous) filed a petition requesting authority to increase its annual revenues by approximately $38,523 or 125% to become effective November 1, 2009.

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

Subject: Water rates and charges.

Purpose: For approval to increase National Aqueous Corporation's annual revenues by about $38,523 or 125%.

Substance of proposed rule: On July 23, 2009, National Aqueous Corporation (National Aqueous or the company) filed, to become effective on November 1, 2009, a tariff amendment (Leaf No. 12, Revision 3) to its electronic tariff schedule P.S.C. No. 1 – Water. The filed amendment reflects new rates to produce additional annual revenues of about $38,523 or 125%. The company provides unmetered water service to approximately 63 customers, located in the Melody Lakes Estates Development in the Town of Thompson, Sullivan County. The company's tariff, along with its proposed changes, will be available on the Commission's Home Page on the World Wide Web (www.dps.state.ny.us) located under Commission Documents – Tariffs. The Commission may approve or reject, in whole or in part, or modify the company's request.

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

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

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-W-0579SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Wireless Antenna Attachments to Electric Transmission Facilities

I.D. No. PSC-33-09-00010-P

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

Proposed Action: The Public Service Commission is considering whether to approve, deny, or modify, in whole or in part, the filings made by Consolidated Edison Company of New York, Inc. seeking approval of preexisting wireless attachments to its transmission facilities.

Statutory authority: Public Service Law, section 70

Subject: Wireless antenna attachments to electric transmission facilities.

Purpose: To approve, reject or modify preexisting wireless antenna attachments to electric transmission facilities.

Substance of proposed rule: In a prior action, the Commission approved a Generic Proceeding for the processing of proposals for attaching wireless communication antennas to the transmission facilities of the Consolidated Edison Company of New York, Inc. (Con Ed). As part of that action, Con Ed was ordered to submit compliance filings for its preexisting wireless attachments.

Con Ed has now submitted filings for 13 of the preexisting attachments. The Commission is considering whether to accept or reject these filings, on the basis of whether they are in the public interest and whether or not they interfere with Con Ed's provision of safe and reliable electric service.

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

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

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.

(07-M-0744SP2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

O&R's Revised ''Fast Track'' Residential Electric HVAC Program Proposal

I.D. No. PSC-33-09-00011-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 the revised ''fast track'' residential electric HVAC program proposal submitted by Orange and Rockland Utilities, Inc. (O&R) in Case 08-E-1003.

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

Subject: O&R's revised ''fast track'' residential electric HVAC program proposal.

Purpose: To consider O&R's revised ''fast track'' residential electric HVAC program proposal.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, the proposal set forth by Orange and Rockland Utilities, Inc. in a petition entitled "Revised Residential HVAC Program Pursuant to the Commission's January 16, 2009 Order in Case 08-E-1003" and dated April 1, 2009. The proposal is to implement a revised "fast track" residential electric HVAC program for 2010 and 2011.

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

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

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.

(08-E-1003SP2)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Specific Commercial and Industrial Electric and Gas Energy Efficiency Programs

I.D. No. PSC-33-09-00012-P

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

Proposed Action: The Commission is considering commercial and industrial electric and gas energy efficiency program proposals as a component of the Energy Efficiency Portfolio Standard.

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

Subject: Specific commercial and industrial electric and gas energy efficiency programs.

Purpose: To encourage electric and gas energy conservation in the State.

Substance of proposed rule: The Commission is considering whether to adopt, modify, or reject, in whole or in part, (a) commercial and industrial electric energy efficiency program proposals made in response to an order in Case 07-M-0548 entitled "Order Establishing Energy Efficiency Portfolio Standard and Approving Programs" issued by the Public Service Commission on June 23, 2008 [see Ordering Clauses 8, 10 & 17]; and (b) commercial and industrial gas energy efficiency program proposals made in response to a notice in Case 07-M-0548 entitled "Notice Requesting Proposals'' issued by the Secretary to the Public Service Commission on April 20, 2009. For potential independent program administrators that submitted updated proposals for programs in accordance with Ordering Clause 8 of the aforementioned June 23, 2008 Order, such submissions shall be considered as pre-filed comments responsive to this notice to the degree that they relate to the provision of energy efficiency programs for commercial and industrial customers. The program proposals under consideration for this rule include the following:

1. Cases 08-E-1129/08-E-1130 and 09-G-0363 - New York State Electric & Gas Corporation/Rochester Gas and Electric Corporation, ''Electric Program Plan of New York State Electric & Gas Corporation and Rochester Gas and Electric Corporation'' dated September 22, 2008, Updates dated April 30, 2009, and Updates dated May 15, 2009 (corrected June 11, 2009) and August 4, 2009: (a) Non-residential Commercial & Industrial (C & I) Prescriptive Rebate Program (electric and gas).

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

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

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.

(08-E-1127SP6)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

The Financing and Lightened Regulation of Electric Operations

I.D. No. PSC-33-09-00013-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 petition dated August 4, 2009 from Stephentown Regulation Services LLC requesting financing approval and that the electric operations of its 20 MW energy storage facility in Stephentown, NY be subject to lighted regulation.

Statutory authority: Public Service Law, sections 2(13), 5(1)(b), 64, 65, 66, 67, 68, 69, 69-a, 70, 71, 72, 72-a, 75, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 114-a, 115, 117, 118, 119-b and 119-c

Subject: The financing and lightened regulation of electric operations.

Purpose: To protect the financial interests of ratepayers and to ensure safe and adequate electric service.

Substance of proposed rule: The Public Service Commission is considering whether to adopt, modify, or reject, in whole or in part, the relief proposed in a petition received August 4, 2009 from Stephentown Regulation Services LLC requesting (a) financing approval pursuant to Section 69 of the Public Service Law; and (b) a declaration that Stephentown Regulation Services LLC and its proposed electric energy storage facility is subject to a lightened regulatory regime.

Stephentown Regulation Services LLC is seeking approval to finance amounts up to approximately $69.3 million for the development, construction and start-up of a 20-megawatt energy storage facility and related facilities to be located in the Town of Stephentown, County of Rensselaer, State of New York. As proposed, the financing would consist of a loan from the Federal Financing Bank of approximately $43 million to be guaranteed by the U. S. Department of Energy, and an equity commitment of approximately $26 million to be funded through grants (including one sponsored by the New York State Energy Research and Development Authority for up to approximately $2 million), private investments, intercompany financings, and public offerings.

Regarding the requested declaration, Stephentown Regulation Services LLC states that it serves no retail customers and will operate solely in the wholesale competitive market and as such should only be required to comply with those statutory and regulatory provisions that pertain to wholesale generators.

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

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

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-E-0592SP1)

Department of State

NOTICE OF ADOPTION

Cease and Desist Zone for the Canarsie Area of Kings County

I.D. No. DOS-22-09-00003-A
Filing No. 904
Filing Date: 2009-07-30
Effective Date: 2009-08-19

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

Action taken: Amendment of section 175.17(c)(2) of Title 19 NYCRR.

Statutory authority: Real Property Law, section 442-h

Subject: Cease and desist zone for the Canarsie area of Kings County.

Purpose: To repeal a cease and desist zone that expired on May 31, 2008.

Text or summary was published in the June 3, 2009 issue of the Register, I.D. No. DOS-22-09-00003-P.

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

Text of rule and any required statements and analyses may be obtained from: Whitney A. Clark, NYS Department of State, Division of Licensing Services, 80 South Swan Street, Albany, NY 12231, (518) 473-2728, email: whitney.clark@dos.state.ny.us

Assessment of Public Comment
The agency received no public comment.