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.

Adirondack Park Agency

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Wetlands, Non-Conforming Shoreline Stuctures and On-Site Wastewater Treatment Systems, Floor Space, Hunting and Fishing Cabins

I.D. No. APA-35-08-00021-P

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

Proposed action: Amendment of Parts 570, 573, 575 and 578 of Title 9 NYCRR.

Statutory authority: Adirondack Park Agency Act, Executive Law, article 27; NYS Wild, Scenic and Recreational Rivers System Act (ECL section 15–2709); NYS Freshwater Wetlands Act (ECL section 24–0801)

Subject: Wetlands, non-conforming shoreline stuctures and on-site wastewater treatment systems, floor space, hunting and fishing cabins.

Purpose: To clarify, simplify and provide better environmental protection.

Public hearings: 6:00 p.m., October 14, 2008 at Adirondack Park Agency, Ray Brook, NY; 3:00 p.m., October 15, 2008 at Gore Mountain Ski Center, North Creek, NY; and 2:00 p.m., October 20, 2008 at Department of Environmental Conservation, Albany, NY.

Substance of proposed rule (Full text is posted at the following State website: www.apa.state.ny.us): The following summarizes the Adirondack Park Agency's Fifth proposed rulemaking pursuant to its FGEIS, January 2001. The Summary is organized by subject area.

SUBJECT: ''Involving Wetlands''
SECTIONS: 9 NYCRR 570.3, 573.3 and 4, and 578.3
STATUTORY AUTHORITY: Executive Law Article 27

Section 578.3(n) is proposed to be amended to delete ''subdivision'' under subsection one and to add a new section (3) which addresses when a subdivision or portion of a subdivision will require a wetland permit. This amendment completely revises Agency jurisdiction over subdivisions involving wetlands so as to include those lots, the creation of which may in fact adversely impact wetlands, but also to create criteria for a non-jurisdictional opportunity based on subdivision design. 570.3(x) is proposed to be amended to define ''involving wetlands'' under the APA Act as identical to ''regulated activity'' under the Agency regulations implementing the Freshwater Wetlands Act. Section 573.3 is amended to clarify that proposed wetland parcels being retained will be treated the same as those being sold, and to remove what would be conflicts with the new jurisdictional rules. Section 573.4 is amended to clarify how these rules affect the gift exemption provided by Executive Law Section 811(1)(c). Related to these amendments, the Agency also proposes a general permit which can be promptly issued based on specified parameters which are different than those established for the non-jurisdictional determination.

SUBJECT: Expansion of non-conforming shoreline structures
SECTION: 575.5 and 575.7
STATUTORY AUTHORITY: Executive Law Article 27

It is proposed that Section 575.5, subsection 2, of Agency regulations be amended to prohibit the expansion of pre-existing structures located within the shoreline setback area unless a variance is granted. This removes an exemption which gave non-conforming structures more opportunity to expand than existing structures. A companion Section 575.7, dealing with the shoreline setbacks for on-site wastewater treatment systems, is also proposed to be amended. A new subsection (c) will require that when a pre-existing non-conforming on-site wastewater treatment system is being replaced, it must be located to meet the shoreline setback requirements to the greatest extent possible. Also, a new subsection (d) is added to require a variance for the expansion of a non-conforming wastewater treatment system in conjunction with an actual or potential proposed increase in occupancy of the associated structure.

SUBJECT: Land division along roads or rights-of-way owned in fee
SECTION: 573.4
STATUTORY AUTHORITY: Executive Law Article 27

Section 573.4(b) is proposed to be removed. This will eliminate the automatic creation of separate parcels (available for sale without permit) due to the bisection of one large parcel by roads or rights-of-ways owned in fee, which division of lands often violated the overall intensity guidelines.

SUBJECT: ''Floor Space''
SECTION: 570.3
STATUTORY AUTHORITY: Executive Law Article 27

A new Section 570.3(bb) is added to provide a definition for ''square feet of floor space for a building''. A new Section 570.3(bc) is added to define the ''square footage of a structure other than a building''.

SUBJECT: ''Hunting and Fishing Cabin''
SECTION: 570.3
STATUTORY AUTHORITY: Executive Law Article 27

It is proposed to amend section 570.3(u) to create a new definition of ''hunting and fishing cabin and private club structure''. The definition focuses on physical attributes of the structure, but also retains the essential aspects of the existing definition relating to use requirements.

Text of proposed rule and any required statements and analyses may be obtained from: John S. Banta, Counsel, Adirondack Park Agency, P.O. Box 99, Ray Brook, NY 12977, (518) 891–4050, email: jsbanta@gw.dec.state.ny.us

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

Public comment will be received until: Five days after the last scheduled public hearing.

Regulatory Impact Statement

Statutory authority:

The Adirondack Park Agency Act, Executive Law Article 27, Section

804(9), authorizes the Agency ''to adopt, amend and repeal...such rules and regulations...as it deems necessary to administer this article and to do any and all things necessary or convenient to carry out the purposes and policies of this article....'' Similar authority is also found in the NYS Wild, Scenic and Recreational Rivers System Act (ECL Section 15-2709) and in the NYS Freshwater Wetlands Act (ECL Section 24-0801). The statutory authorities and procedures addressed in the revisions are: (1) Executive Law Article 27, Section 810(1)(a)(1); (1)(b)(1)(b); (1)(c)(1)(b); (1)(d)(1)(b); (1)(e)(1)(b) and ECL 24-0801 (subdivision ''involving wetlands''); (2) Executive Law Article 27; Sections 806 and 811(5) (expansion of non-conforming shoreline structures); (3) Executive Law Article 27, Sections 805, 810 (subdivision of parcels of record with areas separated by rights-of-way owned in fee by another); (4) Executive Law Article 27, Section 810 (''floor space'' and ''hunting and fishing cabin'').

Needs and benefits:

The Agency's analysis of regulation revision needs and benefits is grounded in the initial analysis undertaken by the Task Force on Expediting Adirondack Park Agency Operations and Simplifying its Procedures in its 1994 Report updated through consultation with the TAL and Agency Legal Affairs Committee deliberations and assessment of public comment. The Adirondack Park Agency www site, which now generates an average of 8,000 visits or 25,000 page views per week, also has been a primary vehicle for communication about potentials and priorities for regulatory revision.

a. ''Floor space.'' This definition is considered essential to consistent application and enforcement of Agency permit jurisdiction based on size of structure. ''Floor space'' will be added to provide a definition for ''square feet of floor space for a building.'' A new section 570.3(ah) will be added to define the ''square footage of a structure other than a building.''

The terms ''floor space,'' ''square feet of floor space'' and ''square footage'' are all used in the Act to establish various jurisdictional thresholds; that is, the point at which an Agency permit is required for new land use and development in the Park. Definitions are required to ensure consistency.

b. ''Hunting and fishing cabin''. The definition will be revised with a new definition that focuses on physical attributes of the structure, but also retains the essential aspects of the existing definition relating to hunting and fishing use.

The Task Force recommended that the definition of ''hunting and fishing cabin'' be updated, a recommendation that was embraced by the Agency. The Agency, over the course of years since that time, has consulted with both environmental groups and the industrial forest landowners on the issue of updating the definition. The Agency believes the Legislature intended that ''hunting and fishing cabins'' be small and rustic in nature, with only occasional occupancy. The radical difference in legal consequences between a ''hunting and fishing cabin'' and a ''single family dwelling'' with regard to jurisdictional thresholds and the application of the APA Act overall intensity guidelines is only justified if the two are functionally and physically different. Under the APA Act, most hunting and fishing cabins are exempt from project review and will not be considered a principal building. They are most commonly jurisdictional in the Resource Management land use area, and then, only if they involve 500 or more square feet of floor space. In contrast, seasonal dwellings are treated the same as any single family dwelling and utilize one principal building privilege under the APA Act intensity guidelines. In contrast to hunting and fishing cabins, permits are required for single family dwellings when a certain threshold number is proposed, or when small lot sizes are involved, and in all cases in Resource Management. Specific language has been discussed with stake holders on a number of occasions. This dialogue included the Empire State Forest Products Association; woodland managers from Finch, Pruyn and Company, International Paper Company and others; and, separately, representatives of the principal Adirondack Park environmental advocacy organizations. The proposed definition is a clarification of current Agency practice and is consistent with current jurisdictional determinations regarding hunting and fishing cabins. Existing jurisdictional determinations will stand as written if there has been detrimental reliance.

The proposed definition is also consistent with the NYS Building Code definition of Group U structures, as confirmed by advice given by the Department of State Codes Office. The Building Code creates a similar bright line between dwellings which require a range of safety and sanitary improvements and occasional use (Group U) structures.

c. Subdivision ''involving wetlands.'' A new definition for ''involving wetlands,'' 9 NYCRR 570.3, and new wetland subdivision review criteria in sections 573.3 and 4, and 578.3 will conform jurisdiction under the two statutes in the Agency's wetland regulations resulting in more consistent application to different proposals on the ground, eliminating inadvertent incentives to ''gerrymander'' lot configurations to avoid Agency wetland subdivision jurisdiction, and minimizing spillover impacts to wetlands from immediately adjacent new subdivision lots.

The major goal to be addressed by the ''involving wetlands'' subdivision revisions is to tailor subdivision jurisdiction based on the presence of wetlands more closely to the potential for wetland impacts. A number of specific goals were identified by the Agency board based on advice and analysis from the TAL:

(1) Make the permit jurisdiction under the APA Act and the Freshwater Wetlands Act identical with regard to wetlands (''involving wetlands'' to mean the same thing as ''regulated activity'').

(2) Assert the same jurisdiction over retained wetland lots as compared to wetland lots proposed for sale, to protect the wetland and remove incentive to gerrymander.

(3) Eliminate wetlands subdivision jurisdiction over large lots when certain criteria are met to avoid wetland impacts.

(4) Ensure wetland subdivision jurisdiction over wetland lots and lots adjacent to such lots, when standard criteria will not prevent wetland impacts.

(5) Encourage land developers to evaluate subdivision lot configurations as a whole in initial stages of design to create subdivisions that consider the long-term protection of wetlands.

(6) Reduce the enforcement workload from subdivisions recorded and undertaken involving lots with relatively small wetlands present, but not apparent to sellers or purchasers resulting in inadvertent violation of the present wetland subdivision rules where no significant wetland impact is involved.

d. Expansion of non-conforming shoreline structures. The proposed change to shoreline variance criteria in section 575.5 is motivated by Legal Affairs Committee guidance indicating a concern that the section is beyond the authority created by Section 811 of the APA Act. The change will bring Agency regulations into conformance with Executive Law Sections 806 and 811(5). The existing regulation allows significant expansions of structures already located within the shoreline setback area for which no statutory authority exists. Thus, the existing rule creates an anomaly which allows a non-conforming structure to increase its non-conformance without a variance, yet does not allow any non-conforming addition to a conforming structure.

Similarly, replacement of non-conforming on-site wastewater treatment systems is addressed by section 575.5 of the regulations. The present language allows non-jurisdictional replacement ''in the immediate vicinity'' of the non-conforming system provided the existing non-conformance is not increased. Under this regulation, the Agency has applied the same lateral expansion rule as we currently apply to dwellings: so long as the replacement is no closer to the water than the pre-existing system, it does not increase the non-conformance. However, there is no defensible reason to allow replacements in kind in the existing non-conforming location when other more conforming options are available. The proposed regulation does not create a mandate for replacement of a non-conforming system, but only requires use of the best option available under the circumstances when the owner chooses to replace or update his system. The proposal, therefore, recognizes the landowner's statutory option to replace in kind in the same location. Finally, expansions of non-conforming wastewater treatment systems in conjunction with an actual or potential proposed increase in occupancy of the structure should not be allowed without a variance unless the system is brought into compliance with the shoreline setback requirements and Appendix Q4.

e. Subdivision of parcels of record with areas separated by rights-of-way owned in fee by another. Revisions to 9 NYCRR 573.4(b) which allow the lawful sale without an Agency permit of a portion of a merged[1] ownership, if the parcel being conveyed is the entirety of the landholding located on one side of a road or right-of-way owned in fee, typically a highway or power line right-of-way, is also motivated by direction from the Legal Affairs Committee and a number of jurisdictional inquiries to the Agency which pointed out anomalies in the allocation of principal building privileges under the APA Act intensity guidelines. The regulation provides that such conveyance is not a ''subdivision'' under the APA Act.

The existing regulation does not address the application of the APA Act intensity guidelines when either the conveyed or retained portions of the original ownership are substandard in size; that is, would violate the APA Act intensity guidelines. (The intensity guidelines dictate the total number of principal building privileges allowed on a given parcel based on total acreage.) The practice implemented with the existing regulation allows the creation of substandard sized lots without permits, and, therefore, also allows additional principal buildings that would not have been possible applying the APA Act intensity guidelines and the creation of potentially unbuildable lots as artifacts of road relocation or the separation of a residence from shoreline by a public road. A resulting problem is that in the case where the subsequent development requires a permit, the Agency cannot make the necessary findings regarding the APA Act overall intensity guidelines for the lot created by a road or right-of-way (i.e., the lot is neither ''pre-existing'' nor of a sufficient size to meet the intensity

criterion), so the development cannot be approved. In such cases, it would be better to review the creation of the substandard lots in the first instance to ensure all such lots have building potential.

[1]Pursuant to section 811(1)(a) of the APA Act and 9 NYCRR 573.4(i) all adjacent lands owned by one party as of the May 22, 1973 Park Plan enactment date are merged as a matter of law, and each such "merged" lot is entitled to at least one single family dwelling or mobile home.

Regulatory Flexibility Analysis

The Adirondack Park Agency has determined that the proposed regulatory amendments are not expected to impose any new reporting, record keeping or other compliance requirements on small businesses or local governments.

Further, there are no initial costs on small businesses or local governments for compliance with these rules. Also, these proposed rules are not expected to have any adverse economic impact on small businesses or rural areas or impose any reporting, record keeping or other compliance requirements on public or private entities in rural areas.

The proposed amendments are not expected to have any adverse impact upon regulated small businesses nor upon persons or businesses located in or operating in rural areas nor will it have an adverse impact upon jobs or employment opportunities.

Rural Area Flexibility Analysis

The Adirondack Park Agency has determined that the proposed regulatory amendments are not expected to impose any reporting, record keeping or other compliance requirements on small businesses or rural areas.

Further, they are also not expected to have any adverse economic impact on small businesses or rural areas or impose any reporting, record keeping or other compliance requirements on public or private entities in rural areas.

The proposed amendments are not expected to have any adverse impact upon regulated small businesses nor upon persons or businesses located in or operating in rural areas nor will it have an adverse impact upon jobs or employment opportunities.

Discussion: No reporting requirements are imposed by any of the proposed regulations.

Job Impact Statement

A formal job impact statement is not submitted for these proposed regulatory amendments to the Adirondack Park Agency's regulations as these amendments are not expected to create any substantial adverse impact on jobs and employment opportunities in the Adirondack Park. These amendments do not make any significant substantive changes to the regulations, and will not impact employment opportunities in the Park, as explained below. The discussion is by subject area addressed, which is a more informative way to present the material.

''Involving wetlands.'' This proposal re-arranges Agency jurisdiction over subdivisions involving wetlands, and provides direction as to how to design a subdivision so as to become non-jurisdictional. These changes will likely create equal if not more opportunity for non-jurisdictional subdivisions as compared to the existing regulations. No change in employment opportunities is expected.

Expansion of non-conforming shoreline structures. This proposal would bring Agency regulations into conformance with the APA Act, and eliminates the existing anomalies which now exist that allow non-conforming shoreline structures to be significantly expanded within the setback area, while structures in compliance cannot expand at all within the shoreline setback area. The proposed rule will change how non-conforming structures may expand. This may eliminate certain expansions in favor of new construction outside the setback area. No change in employment opportunities is expected.

Land division along roads or right-of-ways owned in fee. The proposal is to remove an existing regulation which deems certain land divisions to not be ''subdivisions'' for purposes of Agency jurisdiction. Divisions of land along roads or right-of-ways owned in fee would be required to conform to the same jurisdictional rules applicable to all other land divisions. This may reduce the potential for subdivision which now exists for some parcels. This is not expected to impact the ongoing development in the Park in any significant way, and will, therefore, not impact employment opportunities.

Square feet of floor space and square footage. The proposed regulation provides definitions for these terms. The terms are used in various parts of the Act, and the definitions will ensure consistent application. No change in employment opportunities is expected from these proposed amendments.

''Hunting and fishing cabin.'' The proposed regulation establishes a clear definition for this land use, consistent with existing practice. The proposal is not expected to change the number of hunting and fishing cabins within the Park and will not have any impact on employment opportunities.

Department of Agriculture and Markets

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Certification of Seed

I.D. No. AAM-35-08-00011-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 96 and addition of new Part 96 to Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 141 and 142

Subject: Certification of seed.

Purpose: To establish general seed certification standards.

Public hearing(s) will be held at: 9:30 a.m., Oct. 1, 2008 at Experiment Station, Jordan Hall, 2nd Floor Auditorium, 630 West North St., Geneva, NY.

Interpreter Service: Interpreter services will be made available to hearing impaired persons, at no charge, upon written request submitted within reasonable time prior to the scheduled public hearing. The written request must be addressed to the agency representative designated in the paragraph below.

Accessibility: All public hearings have been scheduled at places reasonably accessible to persons with a mobility impairment.

Substance of proposed rule (Full text is posted at the following State website:www.agmkt.state.ny.us):

Part 96 of 1 NYCRR is repealed and a new Part 96 of 1 NYCRR is adopted to read as follows:

Section 96.1 incorporates by reference the 2007 edition of the Seed Certification Handbook published by the Association of Official Seed Certifying Agencies and sets forth definitions for ''variety,'' ''other varieties,'' ''off-type,'' ''inbred-line,'' ''single cross,'' ''foundation single cross,'' ''double cross,'' ''top cross,'' ''three-way cross,'' ''open pollination,'' ''lot of seed,'' ''in bulk,'' and ''Department.''

Section 96.2 sets forth eligibility requirements for the certification of crop varieties.

Section 96.3 sets forth the characteristics of the four classes and sources of certified seed: breeder seed, foundation seed, registered seed, and certified seed.

Section 96.4 sets forth the limitations of generations for certified seed.

Section 96.5 sets forth requirements for the production of all classes of certified seed including those relating to genetic purity and identity, the unit of certification, field inspections, identification of seed, samples and the analysis and tests of samples of seed. Said Section incorporates by reference the 2006 edition of the AASCO Handbook on Seed Sampling published by the Association of American Seed Control Officials and the 2007 edition of the Rules for Testing Seeds, published by the Association of Official Seed Analysts.

Section 96.6 sets forth requirements for processors of all classes of certified seed, including those relating to facilities, identity of seed, records, inspection, designated individuals, and seed lots.

Section 96.7 sets forth requirements for the labeling of all classes of certified seed, including those relating to official certification labels, seed sold in bulk and the labeling of containers.

Section 96.8 sets forth the requirements for training seed producers.

Section 96.9 sets forth the requirements for the handling of crops prior to inspection.

Section 96.10 sets forth the requirements for establishing the source of seed in order for such seed to be used for the production of foundation, registered or certified seed.

Section 96.11 provides that inspection work requiring training shall be performed only by individuals trained under the supervision of the certifying agency.

Section 96.12 sets forth the requirements for the management and condition of a field for which certification is requested.

Section 96.13 sets forth the requirements for certified seed sold in bulk.

Section 96.14 sets forth provisions for seed failing to meet regular certification standards in respect to mechanical purity and/or germination.

Section 96.15 sets forth the responsibility for complying with Federal and State seed laws.

Section 96.16 sets forth the requirements for carry-over seed.

Section 96.17 sets forth the conditions for the rejection of a certification.

Section 96.18 sets forth the requirements for phyto-inspected seed.

Section 96.19 provides for an advisory committee to the certifying agency and the Department on matters relating to seed certification.

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

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

Public comment will be received until: Five days after the last scheduled public hearing.

Summary of Regulatory Impact Statement

1. Statutory Authority:

Section 141 of the Agriculture and Markets Law provides, in part, that the Commissioner, after consultation with the Dean of the State College of Agriculture, or in the case of tree seeds with the President of the State University of New York College of Environmental Science and Forestry, shall adopt and promulgate appropriate standards for the certification of seed.

Section 142(1) of the Agriculture and Markets Law provides, in part, that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Agriculture and Markets Law Article 9 as he may deem necessary.

Section 136(20) of the Agriculture and Markets Law provides that ''certified,'' ''registered'', ''foundation,'' ''phtyo-inspected,'' or any other terms conveying similar meaning, when referring to seed, means seed which has been produced or collected, processed, and labeled in accordance with the procedures and in compliance with the rules and regulations of an officially recognized certification agency or agencies.

2. Legislative Objectives:

The proposed rule carries out the public policy objectives that the Legislature sought to advance in enacting Agriculture and Markets Law section 141(2) in that, after consultation with the Dean of the New York State College of Agriculture and Life Sciences, it establishes appropriate standards for certification of seed. In doing so, the rule supplements and gives full effect to the provisions of Agriculture and Markets Law Article 9 relating to the inspection and sale of seed, as provided by Agriculture and Markets Law section 142(1). The proposed rule also establishes procedures for the collection, processing and labeling of seed for certification by the officially recognized New York State seed certification agency, as provided by Agriculture and Markets Law section 136(20). Pursuant to said statutory provision, the proposed rule also defines terms such as certified seed, registered seed, foundation seed and phyto-inspected seed to be used in referring to seeds which have been produced or collected, processed and labeled in compliance with the rule.

In establishing appropriate standards and procedures for the certification of seed and defining the terms to be used in referring to seed that was produced in accordance with said procedures and that meets said standards, the proposed rule carries out the public policy objectives the Legislature sought to advance in enacting Agriculture and Markets Law sections 136(20), 141(2) and 142(1).

3. Needs and Benefits:

The accurate labeling of seeds is important to New York State's agricultural industry. Agriculture and Markets Law Article 9 governs the labeling of seeds and requires that characteristics such as the percentage of germination, the percentage of each seed component, the percentage of weed seeds, the percentage of inert matter and the name and number of seeds per pound of each kind of noxious weed seed present be set forth on the label of seeds. Pursuant to Agriculture and Markets Law section 136, the term ''certified'' on a seed label indicates that such seed has been produced or collected, processed and labeled in accordance with the procedures and in compliance with the rules and regulations of an officially recognized certification agency. As such, the designation of seed as certified is relied upon by the agricultural industry as an indicator of premium quality seed that has been grown, harvested and processed under specified conditions and that has been sampled, tested and found to meet the strict standards established for certified seed. Pursuant to section 141 of the Agriculture and Markets Law, the Commissioner has designated the New York State College of Agriculture and Life Sciences as the official seed certifying agency for the State of New York. Pursuant to sections 141 and 142 of the Agriculture and Markets Law, the Commissioner has adopted and promulgated appropriate standards for the certification of seed in 1 NYCRR Part 96, ''General Seed Certification Standards.''

In order for seed to be eligible for labeling as certified seed it must be planted, grown, harvested and processed under special conditions. It is inspected in the field by representatives of the certifying agency and, after harvesting and processing, representative samples of each lot are taken and submitted to a seed laboratory, such as the New York State Testing Laboratory at Geneva, New York or another laboratory approved by the official seed certifying agency, for analysis. If the results of the analysis verify that the seed meets the certified seed standards for varietal purity, inert matter, weed seeds and germination, the certifying agency issues tags to the grower for use in labeling the seed as certified.

The proposed rule repeals existing 1 NYCRR Part 96, which was last amended in 1978 and adopts a new 1 NYCRR Part 96 which revises and updates New York State's General Seed Certification Standards by incorporating the latest nationally recognized standards and practices for seed certification and conforming New York State's standards to the Federal Seed Act (7 U.S.C § § 1551-1611) and the Federal Seed Act Regulations (7 C.F.R. Part 201). In so doing, the proposed rule will provide an up to date, efficient and effective seed certification program that will help to ensure the continued availability of premium New York certified seed to agricultural producers.

The proposed rule retains relevant provisions of the existing standards, repeals provisions that are obsolete and adds provisions that conform New York State's seed certification standards to the Federal Seed Act and the Federal Seed Act Regulations.

4. Cost:

a. Costs to regulated parties:

Seed certification fees for spring grains are $5.50 per acre for fields 200 acres or less in size, plus $5.00 per field entered. Fees for fields over 200 acres in size are $5.25 per acre plus $5.00 per field entered. If reinspection of a field is requested the cost is $25.00 for the first field and $25.00 for any additional fields. If a second reinspection is required the cost is $50.00 for the first field and $25.00 for any additional fields. If a third and subsequent reinspections are requested the cost is $100.00 for the first field and $25.00 for any additional fields. The estimated cost for an average field of 12.4 acres would be $73.20.

The cost of having seed tested for purity and germination for certification purposes depends upon the variety of seed tested and ranges from $16.00 to $22.00 per sample. The estimated cost of testing the approximately 200 samples that will be required would be approximately $3,200 to $4,400.

It is anticipated that the smaller sample size required by the rule and the Federal Seed Act will reduce the amount of time required to draw a sample and the resulting cost by as much as 50%. The actual savings will depend on the number of samples submitted by a particular seed producer.

The costs associated with the training required by the regulation include the cost of the AASCO Handbook for Seed Sampling which is $30.00 plus $5.00 shipping and handling when obtained through the New York State Seed Improvement Project and approximately $500.00 per person in training costs including registration fee, labor and travel expenses. It is estimated that at least 16 persons will require training, resulting in training costs of at least $8,000.

b. Costs to agency, state and local governments:

It is anticipated that the smaller sample size provided for by the rule and the Federal Seed Act will reduce the amount of time and labor required to perform analyses on certified seed samples and increase the number of purity analyses the New York State Seed Testing Laboratory can perform per day from two to between 10-12 samples per day. This will enable the laboratory to make the results of the analyses available to producers sooner, allowing for the more rapid movement of certified seed to market.

The inspection of seed cleaning facilities and examination of records required by the rule and the Federal Seed Act will increase program costs by approximately $3,000.00 for labor and travel.

c. Source:

The cost analysis is based on information provided by the New York Seed Improvement Project and the New York Seed Testing Laboratory.

5. Local Government Mandates:

The proposed amendments would not impose any program service, duty or other responsibility upon any county, city, town, village, school district or other special district.

6. Paperwork:

Section 96.2 of the proposed rule requires the certifying agency to require the originator, developer, or owner of the variety, or agent thereof to make the information listed therein available when eligibility for certification is requested.

Section 96.6 of the proposed rule requires that all classes of seed when offered for sale shall have an official certification label affixed to each container setting forth the information specified therein. Said Section also requires that in the case of seed sold in bulk, the invoice or accompanying document shall set forth certain information.

Section 96.10 of the proposed rule provides that in order to establish the source of seed used for the production of foundation, registered or certified seed the grower shall furnish certain documentary evidence to the certifying agency at the time of making application for field inspection.

7. Duplication:

None. The proposed rule conforms to the Federal Seed Act and the

Federal Seed Act Regulations, but the federal regulations generally govern interstate transactions, rather than intrastate transactions.

8. Alternatives:

Various alternatives were considered to establishing specific training, sampling and testing requirements.

Consideration was given to not requiring that the growers of certified seed be trained in the production and processing of certified seed. This alternative was rejected in light of the complex requirements for the production and processing of certified seed under both the proposed rule and the Federal Seed Act and the Federal Seed Act Regulations. To help ensure that seed producers have access to such training the proposed rule provides that the seed certifying agency will conduct educational programs to aid producers in the successful production and processing of certified seed.

Consideration was given to not establishing specific sampling standards for certified seed. This alternative was rejected, given the need to ensure that all samples are taken in a uniform manner and are truly representative of each lot of see din the condition it is sold. To achieve this goal, the proposed rule incorporates by reference the procedures set for the Association of American Seed Control Officials Handbook on Seed Sampling.

Consideration was given to not establishing specific testing standards for certified seed. This alternative was rejected, given the need to ensure that the samples that are taken are tested in a uniform and accurate manner so that it can be determined that the seed is eligible for certification and is labeled properly. To achieve this goal the proposed rule requires that the analysis and tests of samples of seed must be in accordance with the Rules for Testing Seeds of the Association of Official Seed Analysts.

9. Federal Standards:

The rule does not exceed any minimum standards of the federal government for the same or similar subject areas. It conforms New York State's seed certification standards to the Federal Seed Act and the Federal Seed Act Regulations.

10. Compliance Schedule:

It is anticipated that regulated parties can immediately comply with the rule.

Regulatory Flexibility Analysis

1. Effect of rule:

The small businesses affected by the rule include the approximately twelve New York State producers of certified seed, hundreds of dealers and retailers of certified seed and thousands of farmers and other consumers who purchase certified seed. The rule would have no impact on local government.

2. Compliance requirements:

The reporting, recordkeeping and other affirmative acts that a small business will have to undertake to comply with the proposed rule are as follows:

As required by section 96.2, the originator, developer or owner of a variety, or agent thereof, must make available the information set forth in said Section whenever eligibility for certification is requested.

As required in section 96.5(e), seed from inspected fields must be positively identified at all times.

As required by section 96.5(f), all samples from each cleaned lot of seed eligible for certification shall be drawn by a person approved by the certifying agency and the Department as demonstrated by an approved compliance agreement. In addition, samples shall be taken according to the procedures set forth in the AASCO Handbook on Seed Sampling and shall be taken from and be truly representative of the entire lot which has been recleaned and is in condition for sale.

As required by section 96.5(g), the analysis and tests of samples of seed must be in accordance with the Rules for Testing Seeds, 2007 edition published by the Association of Official Seed Analysts. Testing shall be by laboratories approved by the certifying agency in consultation with the Department.

As required by section 96.6, facilities of processors must be available to perform processing without introducing admixtures. The identity of seed must be maintained at all times. Records of all operations relating to certification must be complete and adequate to account for all incoming seed and final disposition of seed. Processors must permit inspection by the certifying agency of all records pertaining to all classes of certified seed.

As required by section 96.6(f), the blending of lots of different classes may only be done when authorized by the certifying agency and the lowest class shall be applied to the resultant blend. Seed lots for a specific crop must be limited to a quantity characterized as uniform by the certifying agency and from which a representative sample may be obtained.

As required by section 96.7, certified seed offered for sale must have an official certification label affixed to each container clearly identifying the certifying agency, the lot number or other identification, the variety name (if certified as to variety) and the kind and class of seed. In the case of seed sold in bulk, the invoice or accompanying document shall identify the invoice or accompanying document must identify the certifying agency, the crop kind, variety (if certified as to variety), class of seed, and the lot number or other identification. Labels other than those printed on the containers must be attached to containers in a manner that prevents removal and reattachment without tampering being obvious.

As provided by section 96.8, only growers or firms approved by the certifying agency shall be eligible to produce certified seed.

As provided by section 96.10, seed growers are required at the time of making application for field inspection, to furnish documentary evidence to the certifying agency to establish the source of seed used for the production of foundation, registered or certified seed.

As provided by section 96.12, every field for which certification is requested shall show evidence of proper management and shall show that reasonable precaution has been taken to control contaminating crops and varieties and objectionable weeds.

As provided in section 96.13, a grower must obtain approval from the certifying agency before selling certified seed in bulk. Bulk handled seed, in addition to being properly identified by stencil, label, or tag, when sold, must be accompanied by a bulk sale certification in lieu of an official tag.

As provided in section 96.14, when certified seed is in short supply due to circumstances beyond the control of certified seed growers, seed meeting all certification requirements in respect to variety purity, but failing to meet other standards, may be certified under conditions jointly prescribed by the certifying agency and the Commissioner. Seeds so certified shall be tagged with a green certification by which shall clearly show the class of certified seed. Foundation and registered seed failing to meet certification standards other than those affecting genetic purity may be identified as approved planting stock for the production of certified seed in New York State upon the approval of the certifying agency. The tag attached to such seed shall clearly show the class of certified seed and the respects in which the seed does not meet regular certification standards.

As provided in section 96.15, responsibility for any obligations relating to proper labeling of seed, other than those concerned with certification (e.g. proper techniques in establishing genetic identity of seed), arising from the sale or shipment of seed which has been certified rests with the grower or subsequent handler making the sale or shipment.

As provided in section 96.16, all carry-over seed for which certification has not been completed but which is eligible for certification must be reported to the certifying agency by August 15th of the year following the production season. Carry-over certified seed must have a current laboratory report from an approved laboratory based on a newly taken representative sample of the seed lot and shall meet all applicable certification standards.

As provided in section 96.18, an application entered for phytoinspection for a new variety or crop must be submitted to the certifying agency at least 12 months prior to the stated deadline dates for the application for field inspection.

3. Professional services:

The type of professional services that a small business is likely to need to comply with the proposed rule are the services of an approved seed testing laboratory. Local governments are not affected.

4. Compliance costs:

It is not anticipated that initial capital costs will be incurred by a regulated business to comply with the proposed rule. The annual costs for continuing compliance with the proposed rule will depend on the amount of seed that a grower submits for certification. Seed certification fees for spring grains are $5.50 per acre for fields 200 acres or less in size, plus $5.00 per field entered. Fees for fields over 200 acres in size are $5.25 per acre plus $5.00 per field entered. If reinspection of a field is requested the cost is $25.00 for the first field and $25.00 for any additional fields. If a second reinspection is required the cost is $50.00 for the first field and $25.00 for any additional fields. If a third and subsequent reinspections are requested the cost is $100.00 for the first field and $25.00 for any additional fields. The estimated inspection cost for an average field of 12.4 acres would be $73.20.

The cost of having seed tested for purity and germination for certification purposes depends upon the variety of seed tested and ranges from $16.00 to $22.00 per sample. The estimated cost of testing the approximately 200 samples that will be required would be approximately $3,200 to $4,400.

It is anticipated that the smaller sample size required by the rule and the Federal Seed Act will reduce the amount of time required to draw a sample and the resulting cost of doing so by as much as 50%. The actual savings will depend on the number of samples drawn and submitted by a particular seed producer.

The costs associated with the training required by the rule include the cost of the AASCO Handbook for Seed Sampling which is $30.00 plus $5.00 for shipping and handling when obtained through the New York State Seed Improvement Project and approximately $500.00 per person in training costs including registration fee, labor and travel expenses. It is estimated that at least 16 persons will require training, resulting in training costs of at least $8,000.

The continuing compliance costs will vary for small businesses depending on the size of such business and the number of seed lots submitted for certification.

5. Economic and technological feasibility:

Compliance with the rule by small businesses is technologically feasible. Small businesses engaged in growing certified seed are already sampling seed and submitting it to certified laboratories for testing.

6. Minimizing adverse impact:

The proposed rule is designed to minimize any adverse economic impact on small businesses by limiting the requirements to those necessary to incorporate the latest nationally recognized standards and practices for seed certification and conforming New York State's standards to the Federal Seed Act (7 U.S.C. § 1551-1611) and the Federal Seed Act Regulations (7 C.F.R. Part 201).

7. Small business and local government participation:

The Department complied with SAPA § 202-b(6) by meeting with growers of certified seed, representatives of the Cornell Seed Improvement Project and representatives of the New York Seed Testing Laboratory to discuss the proposed rule.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The approximately twelve producers growing certified seed are located throughout the rural areas of New York State.

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

The reporting, recordkeeping and other compliance requirements of the proposed rule and the kinds of professional services likely to be needed in a rural area to comply with the proposed rule are as follows:

As required by section 96.2, the originator, developer or owner of a variety, or agent thereof, must make available the information set forth in said Section whenever eligibility for certification is requested.

As required in section 96.5(e), seed from inspected fields must be positively identified at all times.

As required by section 96.5(f), all samples from each cleaned lot of seed eligible for certification shall be drawn by a person approved by the certifying agency and the Department as demonstrated by an approved compliance agreement. In addition, samples shall be taken according to the procedures set forth in the AASCO Handbook on Seed Sampling and shall be taken from and be truly representative of the entire lot which has been recleaned and is in condition for sale.

As required by section 96.5(g), the analysis and tests of samples of seed must be in accordance with the Rules for Testing Seeds, 2007 edition published by the Association of Official Seed Analysts. Testing shall be by laboratories approved by the certifying agency in consultation with the Department.

As required by section 96.6, facilities of processors must be available to perform processing without introducing admixtures. The identity of seed must be maintained at all times. Records of all operations relating to certification must be complete and adequate to account for all incoming seed and final disposition of seed. Processors must permit inspection by the certifying agency of all records pertaining to all classes of certified seed.

As required by section 96.6(f), the blending of lots of different classes may only be done when authorized by the certifying agency and the lowest class shall be applied to the resultant blend. Seed lots for a specific crop must be limited to a quantity characterized as uniform by the certifying agency and from which a representative sample may be obtained.

As required by section 96.7, certified seed offered for sale must have an official certification label affixed to each container clearly identifying the certifying agency, the lot number or other identification, the variety name (if certified as to variety) and the kind and class of seed. In the case of seed sold in bulk, the invoice or accompanying document shall identify the invoice or accompanying document must identify the certifying agency, the crop kind, variety (if certified as to variety), class of seed, and the lot number or other identification. Labels other than those printed on the containers must be attached to containers in a manner that prevents removal and reattachment without tampering being obvious.

As provided by section 96.8, only growers or firms approved by the certifying agency shall be eligible to produce certified seed.

As provided by section 96.10, seed growers are required at the time of making application for field inspection, to furnish documentary evidence to the certifying agency to establish the source of seed used for the production of foundation, registered or certified seed.

As provided by section 96.12, every field for which certification is requested shall show evidence of proper management and shall show that reasonable precaution has been taken to control contaminating crops and varieties and objectionable weeds.

As provided in section 96.13, a grower must obtain approval from the certifying agency before selling certified seed in bulk. Bulk handled seed, in addition to being properly identified by stencil, label, or tag, when sold, must be accompanied by a bulk sale certification in lieu of an official tag.

As provided in section 96.14, when certified seed is in short supply due to circumstances beyond the control of certified seed growers, seed meeting all certification requirements in respect to variety purity, but failing to meet other standards, may be certified under conditions jointly prescribed by the certifying agency and the Commissioner. Seeds so certified shall be tagged with a green certification by which shall clearly show the class of certified seed. Foundation and registered seed failing to meet certification standards other than those affecting genetic purity may be identified as approved planting stock for the production of certified seed in New York State upon the approval of the certifying agency. The tag attached to such seed shall clearly show the class of certified seed and the respects in which the seed does not meet regular certification standards.

As provided in section 96.15, responsibility for any obligations relating to proper labeling of seed, other than those concerned with certification (e.g. proper techniques in establishing genetic identity of seed), arising from the sale or shipment of seed which has been certified rests with the grower or subsequent handler making the sale or shipment.

As provided in section 96.16, all carry-over seed for which certification has not been completed but which is eligible for certification must be reported to the certifying agency by August 15th of the year following the production season. Carry-over certified seed must have a current laboratory report from an approved laboratory based on a newly taken representative sample of the seed lot and shall meet all applicable certification standards.

As provided in section 96.18, an application entered for phytoinspection for a new variety or crop must be submitted to the certifying agency at least 12 months prior to the stated deadline dates for the application for field inspection.

The type of professional services likely to be needed in a rural area to comply with the proposed rule are the services of an approved seed testing laboratory.

3. Costs:

It is not anticipated that initial capital costs will be incurred in order to comply with the proposed rule. The annual cost for continuing compliance with the proposed rule will depend on the amount of seed that a grower submits for certification. These costs include the cost of inspection and the cost of laboratory analysis. It is not anticipated that there will be any variation in such costs for different types of public and private entities in rural areas.

4. Minimizing adverse impact:

The rule is designed to minimize any adverse impact on rural areas by limiting the requirements to those necessary to incorporate the latest nationally recognized standards and practices for seed certification and conforming New York State's standards to the Federal Seed Act (7 U.S.C § 1551-1611) and the Federal Seed Act Regulations (7 C.F.R. Part 201). The approaches suggested by SAPA § 202-bb(2) and similar approaches were considered.

5. Rural area participation:

The Department complied with SAPA § 202-bb(7) by meeting with growers of certified seed, who reside in rural areas within the State, representatives of the Cornell Seed Improvement Project and representatives of the New York Seed Testing Laboratory to discuss the proposed rule.

Job Impact Statement

1. Nature of impact:

It is not anticipated that the rule will have an impact on jobs and employment opportunities.

2. Categories and numbers affected:

The number of persons employed by the approximately twelve producers of certified seed in New York State is unknown.

3. Regions of adverse impact:

It is not anticipated that the rule would have a disproportionate adverse impact on jobs or employment opportunities in any region of the State.

4. Minimizing adverse impact:

The Department has attempted to minimize any unnecessary adverse impacts on existing jobs and to promote the development of new employment opportunities by limiting the requirements to those necessary to incorporate the latest nationally recognized standards and practices for seed certification and conforming New York State's standards to the Federal Seed Act (7 U.S.C § 1551-1611) and the Federal Seed Act Regulations (7 C.F.R. Part 201).

5. Self-employment opportunities:

The rule would not have a measurable impact on opportunities for self-employment.

Department of Civil Service

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-35-08-00001-P

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

Proposed Action: Amendment of Appendix 1 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To delete a position from and add a subheading and classify a position in the exempt class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of State under the subheading "State Ethics Commission," by decreasing the number of positions of Associate Counsel from 4 to 3; and in the Department of State by adding thereto the subheading "Commission on Public Integrity," and the position of Manager of Training.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-35-08-00002-P

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

Proposed Action: Amendment of Appendix 1 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To classify a position in the exempt class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Transportation, by increasing the number of positions of Assistant Counsel from 3 to 4.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-35-08-00003-P

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

Proposed Action: Amendment of Appendix 1 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To delete positions from and classify positions in the exempt class.

Text of proposed rule: Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office of Employee Relations," by decreasing the number of positions of Assistant Director from 12 to 10, Confidential Stenographer from 13 to 10, Employee Program Assistant from 11 to 3, Employee Relations Assistant from 6 to 3 and Employee Relations Associate from 10 to 8; and, in the Labor Management Committees, by increasing the number of positions of Assistant Director from 1 to 3, Confidential Stenographer from 9 to 14, Employee Program Assistant from 15 to 31, Employee Program Associate from 11 to 31, Employee Relations Assistant from 3 to 6 and Employee Relations Associate from 5 to 6.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Job Impact Statement
A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-35-08-00004-P

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

Proposed Action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To classify a position in the non-competitive class.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Education Department, by adding thereto the position of øAssociate Counsel (1).

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

Regulatory Impact Statement
A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Regulatory Flexibility Analysis
A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Rural Area Flexibility Analysis
A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Job Impact Statement
A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-35-08-00005-P

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

Proposed Action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To classify positions in the non-competitive class.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of General Services," by adding thereto the positions of øAssistant Director, Energy Planning and Procurement (1) and øDirector, Energy Planning and Procurement (1).

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

Regulatory Impact Statement
A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Regulatory Flexibility Analysis
A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Rural Area Flexibility Analysis
A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Job Impact Statement
A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-35-08-00006-P

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

Proposed Action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To delete positions from and classify positions in the non-competitive class.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Division of Criminal Justice Services," by deleting therefrom the positions of Highway Safety Equipment Technician and by adding thereto the positions of Highway Safety Equipment Technician 1.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

Regulatory Impact Statement
A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Regulatory Flexibility Analysis
A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Rural Area Flexibility Analysis
A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Job Impact Statement
A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-35-08-00007-P

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

Proposed Action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To delete positions from and classify positions in the non-competitive class.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Labor, by deleting therefrom the positions of øAssistant Commissioner of Labor (2) and by increasing the number of positions of øRegional Administrator Labor from 8 to 10.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Jurisdictional Classification

I.D. No. CVS-35-08-00008-P

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

Proposed Action: Amendment of Appendix 2 of Title 4 NYCRR.

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

Subject: Jurisdictional Classification.

Purpose: To delete positions from and classify positions in the non-competitive class.

Text of proposed rule: Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Taxation and Finance, by deleting therefrom the positions of Revenue Crimes Specialist 1 (18) and by adding thereto the positions of Revenue Crimes Specialist 1.

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

Data, views or arguments may be submitted to: Judith I. Ratner, Deputy Commissioner and Counsel, NYS Department of Civil Service, Albany, NY 12239, (518) 473-2624, email: judith.ratner@cs.state.ny.us

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

Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

Education Department

REVISED RULE MAKING
NO HEARING(S) SCHEDULED

Special Education Programs and Services

I.D. No. EDU-19-08-00006-RP

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

Proposed Action: Addition of section 177.2 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided) and 3602-c(7); and section 4 of chapter 378 of the Laws of 2007

Subject: Special education programs and services.

Purpose: To prescribe a dispute resolution mechanism.

Text of revised rule: Section 177.2 of the Regulations of the Commissioner of Education is added, effective November 13, 2008, as follows:

§ 177.2 Claim by a school district to recover costs for special education provided to non-resident students pursuant to Education Law section 3602-c(2).

(a) Definitions. For purposes of this section:

(1) ''Non-resident student'' means a student with a disability who is a legal resident of a school district in New York State, who is placed by the student's parent, guardian or person having legal custody of the student, in a nonpublic elementary or secondary school located in another school district in New York State.

(2) ''School district of residence'' means the school district in which the non-resident student legally resides.

(3) ''School district of location'' means the school district in which the nonpublic elementary or secondary school attended by the non-resident student is located.

(b) A school district of location may recover from the school district of residence the special education services costs, evaluation costs and committee on special education administrative costs for a nonresident student in accordance with the following procedures:

(1) Where the parent, guardian or person legally having custody of a non-resident student has provided written consent to the sharing between the school district of location and the school district of residence, of personally identifiable information concerning such student from records collected or maintained pursuant to Part B of the Individuals with Disabilities Education Act, the school district of location may submit a claim, subject to the requirements of paragraph (3) of this subdivision, to the school district of residence for the evaluation costs, committee on special education administrative costs and special education services costs for the non-resident student. The school district of residence shall pay the school district of location the costs claimed, unless the school district of residence disagrees with such costs and submits an application for administrative review to the State Education Department pursuant to paragraph (4)

of this subdivision; provided that nothing in this section shall be construed to authorize a school district of residence, during pendency of such administrative review, to withhold reimbursement to a school district of location of any part of a claim amount that is not disputed, and provided further that nothing in this section shall be construed to preclude the submission of an application for administrative review of a claim that has been paid but is still disputed.

(2) Where the parent, guardian or person legally having custody of a non-resident student has refused to provide written consent to the sharing between the school district of location and the school district of residence, of personally identifiable information concerning such student from records collected or maintained pursuant to Part B of the Individuals with Disabilities Education Act, the school district of location may submit a claim to the State Education Department, on a form prescribed by the Commissioner and subject to the requirements of paragraph (3) of this subdivision, for reimbursement of evaluation costs, committee on special education administrative costs and special education services for the non-resident student. Upon verification of the amount of such claim, the Commissioner shall certify the amount of the claim to the State Comptroller and request an intercept of funds from the school district of residence to the school district of location.

(3) The amount charged by the school district of location for the costs attributable to providing special education services to the non-resident student, the costs of conducting evaluation(s) of such student and the committee on special education administrative costs attributable to such student shall not exceed the actual cost to the school district of location, after deducting costs attributable to such student that are paid with federal or state funds. The state aid attributable to such a student with a disability shall be determined in accordance with a methodology set forth in guidelines of the Commissioner. The federal aid attributable to such a student with a disability shall be the per capita amount of funds received by the school district pursuant to sections 611 and 619 of Part B of the Individuals with Disabilities Education Act, 20 U.S.C.§ § 1411 and 1419 (United States Code, 2000 edition, Supplement V, Volume 3; Superintendent of Documents, U. S. Government Printing Office, Stop SSOP, Washington, D.C. 20402-0001: 2007 - available at the Office of Vocational and Educational Services for Individuals with Disabilities, Room 1624, One Commerce Plaza, Albany, New York 12234), as determined pursuant to guidelines of the Commissioner.

(4) Administrative review of claim.

(i) Application.

(a) A school district of residence that disagrees with the amount of costs charged by the school district of location may, after documented efforts to resolve the dispute with the district of location, submit an application for administrative review of such claim to the State Education Department on a form prescribed by the Department.

(1) Claim concerning student residency. A school district shall not submit an application for administrative review of a claim pursuant to this section for the purpose of determining the residency of a parentally placed nonpublic school student for whom a claim to such school district is made by the school district of location. If such school district disputes that such student is a legal resident, the school district shall make a residency determination in accordance with the provisions of section 100.2(y) of this Title and this subclause. The school district shall provide the district of location with an opportunity to submit evidence of the student's residence and shall consider such evidence, if any, in making its residency determination. If the school district determines that the student is neither a resident of such district nor entitled to attend its schools pursuant to section 100.2(x) of this Title, such school district shall, within two business days, also provide written notice of its determination to the school district of location, consistent with the requirements in section 100.2(y) of this Title. The school district of location may seek review of such residency determination in accordance with the procedures in section 100.2(y) of this Title, and may appeal such residency determination to the Commissioner of Education pursuant to Education Law section 310.

(2) Claim concerning special education services. A school district of residence shall not submit an application for administrative review of a claim pursuant to this section for the purpose of disputing the type or amount of special education services provided to a student with a disability pursuant to the student's individualized education services program developed by the school district of location.

(b) An application for administrative review by the Department, shall specify the reason(s) the school district of residence disagrees with the amount of costs charged by the school district of location and shall include documentation of its attempts to resolve the dispute prior to submission of the application for administrative review by the Department.

(c) The application for administrative review shall be submitted not later than one year from the date of receipt of the claim or 30 days after final residency determination pursuant to section 100.2(y) of this Title and subclause (1) of clause (a) of subparagraph (i) of this paragraph, whichever shall occur later.

(d) An administrative review of a claim pursuant to this section shall be the exclusive remedy for resolution of disputes concerning such claim, and the determination of the Commissioner or the Commissioner's designee upon such review shall be the final determination of the Department.

(ii) Review process.

(a) Upon receipt of an application for administrative review of a claim, the Department shall require the school district of location to provide the following information where relevant to the reasons for the dispute of the claim: (a) certification that the costs attributable to such student represent the actual costs to the school district of location; and (b) a detailed accounting of such claim including, but not limited to, when the costs were incurred and their relationship to the reimbursable activities. Upon request of the Department, the school district of location shall provide any applicable source documents to verify the claim.

(b) The review shall culminate in a determination by the Commissioner or the Commissioner's designee and shall be limited to a determination of whether the claimed costs were attributable to the non-resident student and reflect the actual cost to the school district of location pursuant to paragraph (3) of this subdivision. The school district of residence shall pay the costs to the school district of location, in accordance with the determination of the Commissioner or the Commissioner's designee. The Commissioner or the Commissioner's designee may modify the amount claimed by the school district of location, as necessary, to reflect the actual cost to such school district.

Revised rule compared with proposed rule: Substantial revisions were made in section 177.2(b)(1) and (4).

Text of revised proposed rule and any required statements and analyses may be obtained from Anne Marie Koschnick, Legal Assistant, Education Department, Office of Counsel, Education Bldg., Rm. 148, Albany, NY 12234, (518) 473-8296, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Rebecca H. Cort, Deputy Commissioner, VESID, Education Department, One Commerce Plaza, Rm. 1606, Albany, NY 12234, (518) 473-2714, email: rcort@mail.nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on May 7, 2008, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement filed herewith:

Section 177.2(b)(1) is revised to clarify that nothing in the section shall be construed to authorize a school district of residence, during pendency of an administrative review, to withhold reimbursement to a school district of location of any part of a claim amount that is not disputed, and to clarify that nothing in the section shall be construed to preclude the submission of an application for administrative review of a claim that has been paid but is still disputed.

Section 177.2(b)(4) is revised to expressly preclude a school district of residence from seeking an administrative review of a claim for purposes of disputing a student's residency, and to require the school district of residence to resolve residency disputes consistent with the requirements in section 100.2(y) of the Regulations of the Commissioner of Education, with additional requirements that documentation submitted by the district of location be considered in the district's residency determination, and that the district of location may seek a review by the district of residence and appeal to the Commissioner pursuant to Education Law section 310.

Section 177.2(b)(4)(i)(a) and (b) are revised to provide that a school district of residence may only submit a request for an administrative review of a claim after documented efforts to resolve the dispute with the district of location.

Section 177.2(b)(4)(i)(a)(2) is revised to provide that a school district of residence shall not submit an application for administrative review of a claim pursuant to this section for the purpose of disputing the type or amount of special education services provided to a student with a disability pursuant to the student's individualized education services program developed by the school district of location.

Section 177.2(b)(4)(i)(b) is revised to: (1) require the district of residence to state the specific objections to the claim in its submission of an administrative review by the Department; and (2) require the district of location to provide information relevant to the reasons for the dispute of the claim.

Section 177.2(b)(4)(i)(c) is revised to provide that the application for administrative review shall be submitted not later than one year from the date of receipt of the claim or 30 days after final residency determination pursuant to 8 NYCRR section 100.2(y) and section 177.2(b)(4)(i)(a)(1), whichever shall occur later.

In paragraph (1) of subdivision (b) of section 177.2, the phrase ''between the school district of location and the school district of residence''

inadvertently appears twice in the first sentence, with brackets indicating deletion placed around the phrase the second instance it appears. The bracketed phrase has been deleted as redundant.

These revisions require that the Paperwork section of the previously published Regulatory Impact Statement be revised to read as follows:

PAPERWORK:

The proposed regulation would require that, in instances where parental consent to share personally identifiable special education information about the student is not provided, the school district of location shall submit its reimbursement claim to the State Education Department, on a form prescribed by the Commissioner for reimbursement of evaluation costs, committee on special education administrative costs and special education services for the non-resident student. Upon verification of the amount of such claim, the Commissioner shall certify the amount of the claim to the State Comptroller and request an intercept of funds from the school district of residence to the school district of location. In instances where parental consent to share personally identifiable special education information is provided, the school district of location is entitled to directly recover its costs from the school district of location.

The proposed regulation also requires that applications for administrative review by the State Education Department of disputed claim amounts be submitted on forms prescribed by the Department not later than one year from the date of receipt of the claim or 30 days after final residency determination pursuant to 8 NYCRR section 100.2(y), whichever shall occur later. Upon receipt of such claim, the Department shall require, where relevant to the reasons for the dispute of the claim: (1) certification that the costs attributable to such student represent the actual costs to the school district of location; and (2) a detailed accounting of such claim including, but not limited to, when the costs were incurred and their relationship to the reimbursable activities. Upon request of the Department, the school district of location shall provide any applicable source documents to verify the claim.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on May 7, 2008, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement filed herewith:

The revisions to the proposed rule require that the Compliance section of the previously published Regulatory Flexibility Analysis be revised to read as follows:

COMPLIANCE REQUIREMENTS:

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, which became effective June 30, 2007, and does not impose any additional compliance requirements upon local governments beyond those imposed by the statute. The claiming of reimbursable cost by a school district of location, or the initiating of administrative review by the Commissioner of disputed costs by a school district of residence, is at the discretion of each school district.

The proposed regulation would add a new Commissioner's Regulation section 177.2 to establish the process by which a claim by a school district of location for reimbursement of its costs to provide special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district may be made to the school district where that student resides; and describes the process for an administrative review by the Commissioner when the school district of residence disputes the amount of the claim by the district of location for such services.

The proposed regulation would require that, in instances where parental consent to share personally identifiable special education information about the student is not provided, the school district of location shall submit its reimbursement claim to the State Education Department, on a form prescribed by the Commissioner for reimbursement of evaluation costs, committee on special education administrative costs and special education services for the non-resident student. Upon verification of the amount of such claim, the Commissioner shall certify the amount of the claim to the State Comptroller and request an intercept of funds from the school district of residence to the school district of location. In instances where parental consent to share personally identifiable special education information is provided, the school district of location is entitled to directly recover its costs from the school district of location.

The proposed regulation also requires that applications for administrative review by the State Education Department of disputed claim amounts be submitted on forms prescribed by the Department not later than one year from the date of receipt of the claim or 30 days after final residency determination pursuant to 8 NYCRR section 100.2(y), whichever shall occur later. Upon receipt of such claim, the Department shall require, where relevant to the reasons for the dispute of the claim: (1) certification that the costs attributable to such student represent the actual costs to the school district of location; and (2) a detailed accounting of such claim including, but not limited to, when the costs were incurred and their relationship to the reimbursable activities. Upon request of the Department, the school district of location shall provide any applicable source documents to verify the claim.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on May 7, 2008, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement filed herewith.

The revisions to the proposed rule require that the Reporting, Recordkeeping and Other Compliance Requirements; and Professional Services section of the previously published Rural Area Flexibility Analysis be revised to read as follows:

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

The proposed regulation is necessary to implement Education Law section 3602-c(7), as amended by Chapter 378 of the Laws of 2007, which became effective June 30, 2007, and does not impose any additional reporting, recordkeeping and other compliance requirements upon rural areas beyond those imposed by the statute.

The proposed regulation would add a new Commissioner's Regulation section 177.2 to establish the process by which a claim by a school district of location for reimbursement of its costs to provide special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district may be made to the school district where that student resides; and describes the process for an administrative review by the Commissioner when the school district of residence disputes the amount of the claim by the district of location for such services.

The proposed regulation would require that, in instances where parental consent to share personally identifiable special education information about the student is not provided, the school district of location shall submit its reimbursement claim to the State Education Department, on a form prescribed by the Commissioner for reimbursement of evaluation costs, committee on special education administrative costs and special education services for the non-resident student. Upon verification of the amount of such claim, the Commissioner shall certify the amount of the claim to the State Comptroller and request an intercept of funds from the school district of residence to the school district of location. In instances where parental consent to share personally identifiable special education information is provided, the school district of location is entitled to directly recover its costs from the school district of location.

The proposed regulation also requires that applications for administrative review by the State Education Department of disputed claim amounts be submitted on forms prescribed by the Department not later than one year from the date of receipt of the claim or 30 days after final residency determination pursuant to 8 NYCRR section 100.2(y), whichever shall occur later. Upon receipt of such claim, the Department shall require, where relevant to the reasons for the dispute of the claim: (1) certification that the costs attributable to such student represent the actual costs to the school district of location; and (2) a detailed accounting of such claim including, but not limited to, when the costs were incurred and their relationship to the reimbursable activities. Upon request of the Department, the school district of location shall provide any applicable source documents to verify the claim.

The proposed regulation does not impose any additional professional service requirements on local governments.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on May 7, 2008, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed rule, as revised, is necessary to implement Education Law section 3602-c(7), as amended by Section 4 of Chapter 378 of the Laws of 2007, which entitles the school district of location to recover its costs of providing special education services to a New York State resident student with a disability who is parentally placed in a nonpublic school located in such district, from the student's school district of residence; and requires the Commissioner to adopt regulations prescribing a dispute resolution mechanism regarding the amount of charges for special education services provided to a nonresident parentally-placed student with a disability. The proposed revised rule will not have a substantial impact on jobs and employment opportunities. Because it is evident from the nature of the revised rule that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on May 7, 2008, the State Education Department received the following comments on the proposed rule. Other comments received were unrelated to the proposed rule and are not included in the Assessment of Public Comment.

General

1. COMMENT:

Equity in payment for administrative costs should be factored into the formula for reimbursement. Clarify whether a fee schedule for the provision of services that exceed state aid will be established or if the costs will be solely determined at the discretion of the district of location (DOL).

DEPARTMENT RESPONSE:

Education Law section 3602-c does not authorize rates to be established for committee on special education (CSE) administrative costs. Therefore, the costs will vary by school district, but must be calculated to ensure that they do not exceed the actual costs incurred by the district for each student.

2. COMMENT:

Clarify whether the CSE administrative costs which may be recovered include child find and consultation expenses.

DEPARTMENT RESPONSE:

The amount to be charged to the district cannot include the costs for child find and consultation, since those costs cannot be attributed to a specific student.

3. COMMENT:

Add that the district of residence (DOR) should have the ability to verify the ''residence'' of any child for whom a claim for reimbursement is being made. The inability of the DOR to challenge such a claim may result in a loss of state revenues for claims being made by the other district.

DEPARTMENT RESPONSE:

Section 177.2(b)(4) has been revised to clarify that a dispute regarding residency of the student must be addressed pursuant to section 100.2(y) of the Commissioner's Regulations with additional procedures added for documentation from the school district of location to be considered in the residency determination and for the right of the district of location to seek a review of a residency determination.

4. COMMENT:

Clarify whether transportation costs are reimbursable.

DEPARTMENT RESPONSE

Department guidelines clarify that costs of the services provided to the student could include transportation costs for the direct purpose of providing such services.

5. COMMENT:

Clarify whether a DOL could recommend transportation to a nonpublic school further than the 50 mile limit stated in Education Law section 4402(4)(d), and as such, require the DOR to provide that transportation.

DEPARTMENT RESPONSE:

Section 4402(4)(d) pertains only to a recommendation of the DOR and not to a DOL. Therefore, a DOL could not recommend such transportation.

6. COMMENT:

Clarify reimbursement for claims for out-of-state students placed in nonpublic schools in New York State.

DEPARTMENT RESPONSE:

The provision of services to out-of-state students is limited to services based on a proportionate share of federal IDEA funds. Federal and State law provide no authority for interstate billing,

7. COMMENT:

Clarify whether reimbursement for special education services means the same as special education programs and services, and whether special education programs provided in a DOL's buildings or in an out-of-district facility would be reimbursable.

DEPARTMENT RESPONSE:

The term special education services means those special education programs or services recommended on a student's individualized education services program (IESP) regardless of the location where such programs/services are provided.

8. COMMENT:

Parentally-placed nonpublic school students will now have a choice of districts from which they may seek services and this proposed process may inadvertently promote ''de facto segregation'' as it may favor the children of more affluent families whose parents can afford to place their children in private schools.

DEPARTMENT RESPONSE:

This comment is beyond the scope of the proposed rulemaking, which is to prescribe by regulation a dispute resolution mechanism that will be available to a DOR where such district disagrees with the amount of tuition or costs charged by the DOL. The proposed rule is consistent with Education Law section 3602-c, as amended by Chapter 378 of the Laws of 2007, which establishes the process for providing services to students with disabilities who attend nonpublic schools located outside the DOR.

9. COMMENT:

Since the proposed dispute resolution process does not require DOLs to consider the cost of services, which will be billed back to the DOR, parents may demand and receive more services from the DOL than from the DOR.

DEPARTMENT RESPONSE:

A parent participates as a member of the CSE and the CSE must consider the concerns of the parent for the education of their child. However, it is the responsibility of the CSE to develop recommendations for services based on the individual needs of the student. Services to parentally-placed nonpublic school students must be provided in an equitable manner. The term ''equitable basis'' means that special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district.

10. COMMENT:

The DOL appears to have the authority to expend tax levy funds for the DOR without oversight or approval from the fiscally responsible Board of Education. The provisions of section 3602-c and the ''bill back'' process provide for no oversight for the expenditures associated with disabled students in nonpublic school unless the costs are contested. The provisions for dispute resolution focus on costs for services and do not address the ''equitable'' factor. Regulations should allow the DOR to challenge the level of service(s) being offered to ensure that a DOL is not just ''giving away services'' at the expense of the DOR. Regulations should include a mechanism for the DOR to challenge a DOL recommendation regarding the intensity of services.

DEPARTMENT RESPONSE

The authority of school districts to bill back other districts for the cost of special education services does not exclusively pertain to parentally-placed nonpublic school students. Each CSE makes its recommendations for services in accordance with federal and State law and regulation and without regard to costs. The DOL may only charge the DOR for the actual costs incurred. Section 177.2(b)(4) has been revised to preclude use of administrative review procedures to dispute the amount or type of special education services recommended by the DOL on a student's individualized education services program.

11. COMMENT:

Section 3602-c indicates that due process costs are recoverable from the DOR, yet there is no mention of these costs in the proposed set of procedures. If due process costs are to be included and the DOL does not prevail, the DOR may be forced to pay for special education services and all legal fees as well. Without cost controls in place, the DOR is at risk for exorbitant costs as a result of the actions of another school district. Rather than place themselves in financial risk should the due process costs not be recoverable, in situations where the DOL does not agree with parents' recommendations for individual education services program (IESP), the DOL would likely agree to the IESP knowing that the costs can be billed back to the DOR.

DEPARTMENT RESPONSE:

There are no allowable due process costs that a DOL may charge to a DOR. Education Law section 3602-c(7)(b) establishes an entitlement to recover ''costs of services, costs of evaluation, and costs of committee on special education administration'' directly from the district of residence of the student, and does not include due process costs within the entitlement. Education Law section 3602-c(7)(c) establishes that the costs shall not exceed the actual cost to the school district of location, after deducting any costs paid with federal or state funds, and while there is mention of ''eligible due process costs,'' the Department believes that this is a drafting anomaly in the statute because there is no entitlement to recover such costs pursuant to section 3602-c(7)(b).

12. COMMENT:

If parents do not give permission to the DOL to communicate with the DOR, an active IEP can exist along with an IESP for each child. In a due process situation, parents may try to use one district's recommendations against another's.

DEPARTMENT RESPONSE:

This comment is beyond the scope of the proposed rulemaking, which is to prescribe by regulation a dispute resolution mechanism that will be available to a DOR where such district disagrees with the amount of tuition or costs charged by the DOL. The proposed rule is consistent with Education Law section 3602-c, as amended by Chapter 378 of the Laws of 2007, which requires parental permission.

14. COMMENT:

A district may desire to file a claim solely because it disputes the legal residence of the student in question and may have no particular disagreement with the costs asserted.

DEPARTMENT RESPONSE:

The proposed rule has been revised to expressly preclude a DOR from seeking an administrative review of a claim for purposes of disputing a student's residency, and to require the DOR to resolve residency disputes consistent with the requirements in section 100.2(y) of the Regulations of the Commissioner of Education, with additional requirements that documentation submitted by the DOL be considered in the district's residency determination, and that the DOL may seek a review by the DOR and an appeal to the Commissioner pursuant to section 310 of the Education Law.

15. COMMENT:

The proposed rule is likely to result in excessive and unnecessary paperwork in requiring the DOL to certify the actual costs involved and provide a detailed accounting of the claim, in all instances and even when not relevant to the particular claim in dispute. The proposed rule should be revised to require the DOR submitting a request for an administrative review of a claim to indicate the specific reason or reasons for the object to the claim and require the district of location to respond appropriately.

DEPARTMENT RESPONSE:

Section 177.2(b)(4)(i)(b) has been revised to: (1) require the DOR to state the specific objections to the claim in its submission of an administrative review by the Department; and (2) to require the DOL to provide information relevant to the reasons for the dispute of the claim.

16. COMMENT:

The proposed section 177.2(b)(1) and (4) seem to encourage prolonged deferral of any payments and may encourage frivolous requests for review. Consider adding measures to encourage districts to act more diligently, for example, by allowing requests for review to be submitted on paid claims, requiring payment of items not under dispute, authorizing dismissal of frivolous requests, and encouraging districts to attempt to work out disagreements on their own before invoking the administrative review process.

DEPARTMENT RESPONSE:

The proposed rule has been revised to add that a DOR may only submit a request for an administrative review of a claim after documented efforts to resolve the dispute with the DOL; and that nothing in the proposed section shall be construed to preclude a DOR from submitting a request for an administrative review when such claims have been paid or to authorize a DOR to withhold reimbursement to a DOL for any party of a claim amount that is not the subject of the dispute.

Department of Environmental Conservation

NOTICE OF ADOPTION

Recreational and Commercial Harvest of American Shad (Hudson and Marine Waters), Hudson R. Recreational Harvest of Hickory Shad

I.D. No. ENV-14-08-00002-A

Filing No. 790

Filing Date: 2008-08-12

Effective Date: 2008-08-27

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

Action taken: Amendment of Parts 10, 35, 36 and 40 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 11-0303, 11-0305, 11-0306, 11-0315, 11-0317, 11-0319, 11-1301, 11-1303, 11-1305, 11-1501, 11-1503, 11-1505, 13-0105 and 13-0339

Subject: Recreational and commercial harvest of American shad (Hudson and Marine waters), Hudson R. recreational harvest of hickory shad.

Purpose: Reduce harvest of Hudson River American shad and hickory shad consistent with protecting the resource.

Text or summary was published in the April 2, 2008 issue of the Register, I.D. No. ENV-14-08-00002-EP.

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

Text of rule and any required statements and analyses may be obtained from: Kathryn A. Hattala, Department of Environmental Conservation, 21 S. Putt Corners Road, New Paltz, NY 12561, (845) 256-3071, email: kahattal@gw.dec.state.ny.us.

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

Assessment of Public Comment

The agency received no public comment.

Department of Health

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

External Appeals of Adverse Determinations

I.D. No. HLT-35-08-00010-P

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

Proposed Action: Amendment of sections 98-2.2, 98-2.6 and 98-2.10 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 4910 - 4916

Subject: External Appeals of Adverse Determinations.

Purpose: Provides that external appeal agents shall not be subject to legal proceedings to review their determinations.

Text of proposed rule: Pursuant to the authority vested in the Commissioner of Health by Chapter 586 of the Laws of 1998, Subpart 98-2 of Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended, to be effective upon publication of a Notice of Adoption in the New York State *Register*, to read as follows:

Subdivision (c) of Section 98-2.2 is hereby repealed.

Subdivisions (d), (e), (f), (g), (h) and (i) of Section 98-2.2 are relettered (c), (d), (e), (f), (g) and (h).

Paragraph (1) of subdivision (b) of Section 98-2.6 is amended to read as follows:

(1) has no material familial, financial or professional affiliation, as those terms are defined in subdivisions [(e) through (g)] *(d) through (f)* of section 98-2.2 of this Subpart, with any person or entity listed in subparagraphs (i) through (v) of paragraph (2) of this subdivision; or

A new subdivision (l) is added to Section 98-2.10 to read as follows:

(l)(1) Upon requesting an external appeal, the enrollee, the enrollee's designee or the enrollee's health care provider shall acknowledge that the determination of the external appeal is binding on the plan and the enrollee, and shall agree not to commence any legal proceeding against an external appeal agent or clinical peer reviewer to review a determination made by such external appeal agent or clinical peer reviewer pursuant to Article 49 of the Public Health Law or Article 49 of the Insurance Law; provided, however, that the foregoing shall not limit any rights the enrollee, the enrollee's designee or the enrollee's health care provider may have with respect to bringing an action for damages for bad faith or gross negligence or with respect to bringing an action against the enrollee's health care plan.

(2) As specified in Public Health Law section 4914(3) and Insurance Law section 4914(c), no external appeal agent or clinical peer reviewer conducting an external appeal shall be liable in damages to any person for any opinions rendered by such external appeal agent or clinical peer reviewer upon completion of an external appeal conducted pursuant to Article 49 of the Public Health Law or Article 49 of the Insurance Law, unless such opinion was rendered in bad faith or involved gross negligence.

Text of proposed rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488

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

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

Regulatory Impact Statement

Statutory Authority:

The Commissioner's authority for this amendment to Subpart 98-2 of Title 10 NYCRR is derived from Sections 4910 - 4916 of the Public Health Law and Chapter 586 of the Laws of 1998.

Article 49 of the Public Health Law establishes utilization review and external review requirements for enrollees subject to Article 44 of the Public Health Law.

Chapter 586 of the Laws of 1998 amended the Public Health Law and Insurance Law in relation to authorizing external appeals of adverse determinations relating to health care services and Section 45 of Chapter 586 provides that the Commissioner may promulgate regulations to implement the external appeal program.

Legislative Objectives:

Article 49 of the Public Health Law and Article 49 of the Insurance Law, the external appeal law, provide an enrollee with the right to obtain an independent medical review by an external appeal agent when the enrollee's health plan denies a health care service as not medically necessary, experimental or investigational. Section 4914(c) of the Public Health Law and Section 4914(c) of the Insurance Law state that an external appeal agent and the agent's clinical peer reviewers shall not be held liable in damages for any opinions rendered pursuant to an external appeal unless such opinion was rendered in bad faith or involved gross negligence. The law neither permits nor contemplates that external appeal agents would otherwise be subject to court proceedings to defend their determinations. This amendment to Subpart 98-2 reiterates the statutory provisions of the Public Health Law and Insurance Law that the law does not permit an action against the external appeal agent or clinical peer reviewer on the merits of the determination. This is consistent with the legislative goal of having a meaningful and cost efficient external appeals process available to enrollees in New York State. The amendment furthers the legislative intent by also providing that upon requesting an external appeal, the enrollee shall acknowledge that the determination of the external appeal is binding on the plan and the enrollee, and shall agree not to commence any legal proceeding against an external appeal agent or clinical peer reviewer to review a determination made by such external appeal agent or clinical peer reviewer, other than an action for damages pursuant to Article 49 of the Public Health Law or Article 49 of the Insurance Law. Moreover, this amendment makes a technical correction to Subpart 98-2 by removing the definition of ''designee'' to conform with the decision rendered in Healthcare Association of *New York State et al. v. Serio* (Albany County 2002). The *Healthcare Association* case was an Article 78 proceeding against the Insurance Department and the Health Department challenging the external appeal regulations (11 NYCRR 410 and 10 NYCRR 98-2) on several grounds. The Court found in favor of the Departments on all grounds with the exception of the definition of ''designee'' set forth in Section 98-2.2(c) of Subpart 98-2, and declared the definition null and void.

Needs and Benefits:

The role of the external appeal agent is to provide a clinical opinion as to whether the medical treatment requested by the enrollee and denied by the health plan is medically necessary, experimental, or investigational. Recently, a number of lawsuits have been brought against external appeal agents either because the enrollee, or in one case the hospital that provided treatment to the enrollee, disagreed with the external appeal agent's decision. The purpose of the lawsuits is to require a health plan to pay for treatment pursuant to the enrollee's covered benefits, regardless of the external appeal agent's finding regarding the medical necessity of the treatment.

The external appeal legislation never intended that external appeal agents would have to defend their decisions in court proceedings. An external appeal agent does not have a particular interest to protect by defending its decisions, nor is the external appeal agent the appropriate party to determine how the enrollee's health plan benefits, or the Public Health Law or Insurance Law should be interpreted in a court proceeding. In addition, regardless of what a court decides with respect to the external appeal agent's decision, an enrollee will still have to file a lawsuit against his or her health plan in order to compel the health plan to pay for the health care service.

Subjecting external appeal agents to court proceedings for all decisions will increase health plan and consumer costs and threaten the viability of the external appeal program. The external appeal fees charged by agents are approved by the Health Department and the Insurance Department and do not include court costs. All three New York State certified external appeal agents have requested a fee increase to cover litigation expenses. Current approved fees range from several hundred to several thousand dollars per appeal, depending on whether the appeal is standard or expedited and how many clinical peer reviewers are assigned. Health plans are statutorily required to pay the fees, regardless of the outcome. If external appeal agent fees increase, health plan costs will also increase, and consumers could be adversely impacted if health plans pass the increased costs on to consumers in the form of premium rate increases. As an alternative to increased fees, external appeal agents have requested that a fund be set up to reimburse them for court costs relating to the defense of their external appeal decisions. However, an assessment on health plans to establish the fund is not authorized or contemplated by the external appeal law. The Department is very concerned that if external appeal agents continue to be subject to court proceedings, the agents may find the cost of doing business in New York to be prohibitive and withdraw from the external appeal program.

This amendment does not affect the rights of an enrollee to bring a legal action against the health plan who issued an adverse determination if the enrollee continues to disagree with the factual basis or clinical rationale for the health plan's adverse determination that has been reviewed by the external appeal agent. In addition, the amendment does not affect any remedy the enrollee may have with respect to the Health Department and Insurance Department regarding the Departments' oversight of the external appeal program. The amendment is also consistent with the language in Article 49 of the Public Health Law and Article 49 of the Insurance Law as it does not preclude an enrollee from seeking damages for an opinion rendered in bad faith or involving gross negligence. The amendment merely provides that upon requesting an external appeal, the enrollee shall acknowledge that the determination of the external appeal is binding on the plan and the enrollee, and shall agree not to commence any legal proceeding against an external appeal agent or clinical peer reviewer to review a determination made by such external appeal or clinical peer reviewer, other than an action for damages pursuant to Article 49 of the Public Health Law or Article 49 of the Insurance Law.

Striving to minimize the costs of health insurance and protecting the interests of consumers are important functions of the Commissioner. This amendment both minimizes costs and ensures the continued viability of the external appeal program, an important consumer protection.

Costs:

There should be no costs to insurers, managed care organizations, or individuals in order to comply with this amendment, nor should there be costs associated with this amendment to the Health Department, the Insurance Department, or state or local government. This amendment should serve to keep insurance costs from rising, which may be the case if lawsuits against external appeal agents or clinical peer reviewers continue to arise.

Local Government Mandates:

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

Paperwork:

The amendment does not impose any additional paperwork requirements on insurers, managed care organizations, or individuals, other than an acknowledgment by the enrollee.

Duplication:

The amendment does not duplicate standards of either the federal or other state governments. This amendment to Subpart 98-2 is a collaborative effort between the New York State Department of Health and the New York State Insurance Department. The New York State Insurance Department will also be filing an amendment to Regulation 166 of Title 11 of NYCRR that will apply to insurers.

Alternatives:

This amendment was developed through meetings with the New York State Insurance Department and interested parties, including the three New York certified external appeal agents. The three external appeal agents approached the Insurance Department to discuss the rising costs of legal fees associated with enrollees challenging external appeal decisions. The agents proposed a fee increase and/or a litigation fund, in the form of an escrow account. These alternatives were considered by the Health Department and Insurance Department, but it was determined that this amendment to Subpart 98-2 would be the best option, because it is the most cost-effective, and the most consistent with statutory intent not to permit an action against the external appeal agent or clinical peer reviewer on the merits of the determination.

Federal Standards:

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

Compliance Schedule:

The provisions of this amendment will take effect upon publication of a Notice of Adoption in the New York State Register, and regulated parties should be able comply with the amendment immediately. Regulated parties will not need to submit revised filings to the Health Department or to the Insurance Department.

Regulatory Flexibility Analysis

As fully discussed in the Regulatory Impact Statement, this amendment implements the Department's position with regard to relevant provisions of the New York State Public Health and Insurance Law. The amendment will not have any adverse economic impact and does not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments.

Rural Area Flexibility Analysis

The amendment implements the Department's position with regard to relevant provisions of the New York State Public Health and Insurance Law. The amendment will not have any adverse impact on rural areas and does not impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas; except that it requires the enrollee to acknowledge that the determination of the external appeal is binding on the plan and the enrollee, and to agree not to commence any legal proceeding against an external appeal agent or clinical peer reviewer to review a determination made by such external appeal agent or clinical peer

reviewer, other than an action for damages pursuant to Article 49 of the Public Health Law or Article 49 of the Insurance Law. Enrollees and managed care organizations to which the amendment applies do business in, and enrollees are located in, all counties of the state, including rural areas as defined under State Administrative Procedure Act Section 102(13). The amendment applies equally to rural and urban areas.

Job Impact Statement

This proposed amendment to Subpart 98-2 will not adversely impact job or employment opportunities in New York. The amendment implements the Department's position with regard to relevant provisions of the New York State Public Health Law and Insurance Law, and thus will have no job impact in New York.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Immunization Registry

I.D. No. HLT-35-08-00012-P

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

Proposed Action: Amendment of section 66-1.2 of Title 10 NYCRR.

Statutory authority: Public Health Law, section 2168

Subject: Immunization Registry.

Purpose: Establishment of a statewide immunization registry.

Substance of proposed rule (Full text is posted at the following State website:www.health.state.ny.us): Effective January 1, 2008, Section 2168 of the Public Health Law requires that a statewide immunization registry be implemented. In order to define requirements for establishment of this statewide immunization registry, including rules for submission of immunization information by health care providers and methods by which providers and others can access needed information, a revised Section 66-1.2 is proposed for Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York. This section will allow physicians and designated others to generate a child's immunization record in place of the nonspecific requirement previously in Section 66-1.2 for physicians or other authorized persons to prepare ''certificates of immunization.''

Section 66-1.2 will have the following subsections:

66-1.2 (a) Definitions, including statewide immunization registry (which will be the reporting vehicle for all health care providers practicing outside of New York City (NYC)), Citywide Immunization Registry (the pre-existing NYC registry that these regulations will affect only minimally), health care providers, schools, registrants (the patients whose immunizations are reported to the system), authorized users and timely reporting.

66-1.2 (b) Mandated reporting. Mandated reporters are health care providers ordering immunizations, and their designees.

66-1.2 (c) Information required to be reported to the statewide system. Such information includes the minimum data requirements for immunization registries, with the addition of patient address in order to allow for geographic tracking of immunization patterns in response to disease outbreaks and vaccine recall events.

66-1.2 (d) Levels of access and authorized uses of NYSIIS data. Such levels and uses vary by types of authorized users, with health care providers ordering immunizations allocated sole responsibility for submitting information, although they may in turn designate staff to submit information on their behalf. However, health care providers also receive significant benefits from use of the system, including the ability to print immunization histories for patients on demand, print reminder and recall notices and use the system to help with vaccine inventory. Other types of users will have read-only access, and only for registrants who fall under their administrative or clinical responsibilities.

66-1.2 (e) Methods of accessing NYSIIS data will be primarily electronic. Authorized users will be required to submit an application for access to the system, and have this application accepted, in order to log on to the system. These regulations will only permit users to access data for registrants within their scope of responsibility.

66-1.2 (f) Maintenance of security and confidentiality. This will be assured by following standard Department of Health security and confidentiality procedures for electronic data, requiring all individuals accessing the system to have pre-approved applications for access, with distinct passwords and system IDs that conform to the latest industry standards, and with level and type of access tied to the type of user, as defined in the regulations. All users will submit an attestation to maintain confidentiality, and will be required to update application information on an ongoing basis, as needed.

66-1.2 (g) Provision of NYSIIS information to registrant's family/guardian. All mandated reporters must provide the parent or legal guardian of each registrant with a copy of the appropriate department of health's informational brochure or letter at the time of each registrant's initial entry into the system.

Text of proposed rule and any required statements and analyses may be obtained from: Katherine Ceroalo, DOH, Bureau of House Counsel, Regulatory Affairs Unit, Room 2438, ESP, Tower Building, Albany, NY 12237, (518) 473-7488

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

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

Regulatory Impact Statement

Statutory Authority:

In 2006, Public Health Law section 2168 was enacted. This new law required the development and implementation of a statewide immunization registry by January 1, 2008. Public Health Law section 2168, subsection 13 specifically authorizes the commissioner to promulgate regulations as necessary to effectuate the provisions of Public Health Law section 2168. The regulations proposed set forth procedures and protocols assisting providers and consumers in utilizing the statewide system.

Legislative Objectives:

This section establishes a statewide immunization registry as required by Public Health Law section 2168. Physicians and others may now systematically generate a child's immunization record as needed by parents, schools, etc. The immunization information system permits population-based review and tracking of immunizations; critical markers of well-child care. A statewide system will also allow health care providers to track timeliness and receipt of important and potentially life-saving immunizations. It facilitates vaccine recall letters and allows the state to monitor patterns of immunizations related to infectious disease outbreaks.

Needs and Benefits:

The Centers for Disease Control and Prevention (CDC) cite the reduction of infectious diseases resulting from the use of vaccines as the greatest success story in public health. The virtual eradication of smallpox from the globe, near elimination of the wild polio virus, and the reduction of preventable infectious diseases to an all-time low are among the accomplishments of immunizations. However, CDC also cites the fact that vaccines are not 100 percent safe or effective as yet, that different immune systems react differently to different vaccines and, on rare occasions, side effects occur. For these reasons, CDC strongly advocates that all states collect and maintain immunization information. Immunization registries provide states with the ability to track administration of vaccines to children for public health purposes, monitor effectiveness and side effects of these vaccines, and respond quickly and effectively in case of outbreaks.

The system will be able to track which children have received immunizations, the vaccine manufacturer, and lot number. Previously, if it were discovered that a particular batch of vaccine was ineffective, tracking recipients of that lot would have been slow at best and incomplete at worst, leaving some children vulnerable to the disease the immunization was designed to prevent. With NYSIIS, recipients of ineffective vaccines could be quickly notified via their providers of the need for re-immunization to occur. The immunization information will also be used by schools, HMOs, local health departments, local districts of social services, the Office of Children and Family Services, and other entities responsible for providing services to children.

COSTS:

Costs to Private Regulated Parties:

The costs to regulated parties for the implementation of and continuing compliance with the rule are expected to be negligible, except in the initial implementation period. The system is expected to generate a long term savings. Equipment and service requirements needed by health care providers to access NYSIIS parallel current requirements needed by providers to order prescription pads from the Department, i.e., internet access and an HPN account. The costs associated with completing the initial entry of historical immunization information for all persons less than the age of 19 years who are administered immunizations after January 1, 2008 represent an obstacle, especially to small providers without existing data systems, and to those providers with data systems who do not have service contracts requiring the development of compliant software. While these costs represent a burden to providers, the overall system benefits are fully expected to outweigh initial burden once the implementation period is complete.

In September 2006, the American Academy of Pediatrics (AAP) Committee on Practice and Ambulatory Medicine issued a policy statement in Pediatrics strongly supporting the use of immunization information systems. The statement indicates that the savings to pediatricians of using an automated immunization information system are significant. The savings from not having to manually pull a chart for immunization records is

estimated to be $14.70 per chart. AAP's Policy Statement also mentions that in 2004 there was a reported increase in cost of $0.56 per shot after implementation of an immunization registry in the private sector, with nurses spending 3.4 minutes per shot on registry activities. Again, though, this would be sufficiently offset by the savings generated of $14.70 per chart that would no longer need to be manually pulled to generate an immunization history. It is impossible to estimate with any degree of certainty the cost to practices of entering historical immunization data on patients to populate the database of the system.

Costs to the Department of Health and Local Government:

All costs to the Department of Health for implementation and maintenance of the system will be offset by funds as part of the categorical grant from CDC. There will be no costs to local governments for implementation. Local government will access and submit limited immunization data through existing HIN connections. Significant time savings will be experienced by local health department staff by accessing the data in NYSIIS for assessment and quality activities.

Cost Information:

Cost information was developed based on estimated number of positions needed to implement the system. Expenses for initial hardware and software, ongoing system maintenance, help desk services, system changes, programming needed to download existing data systems for billing and charts into the system. The cost of development in year one is approximately $3.8 million. The cost of implementation and maintenance thereafter approximately $4 million per year.

Local Government Mandates:

No mandates for any local government entities are included in these regulations, separate and apart from their responsibilities as health care providers when the local health department administers vaccines to children. However, there are provisions made for local health departments, local districts of social services, schools, day care centers, the Office of Children and Family Services, and other agencies to access this system to obtain information required in performance of their duties. Accessing immunization information system data should facilitate performance of their duties, which include verifying immunization history for specific children who fall under their administrative or clinical responsibilities.

Paperwork:

While CDC has an extensive list of variables they recommend for inclusion in a state's immunization information system, only the minimum required elements will be included in NYSIIS, plus the address, which is critical to determining regional vaccine-preventable illness patterns. Although some providers may need to defer electronic submission pending availability of internet access, ultimately submission will be electronic for all providers. This will reduce data errors through use of automated error checking and value range monitoring during data entry.

Duplication:

Every effort is being made to minimize provider burden and avoid duplication of effort. However, a uniform collection method applied to all providers is essential to ensuring that the database is complete and effective for the required purposes. Where an existing registry already exists, i.e., the Citywide Immunization Registry, no additional registry submission is being required of providers. Where existing regional registries have been supplanted by the statewide immunization system, the information will be downloaded to the statewide system, making the transition as seamless as possible for current contributors to the registries. In addition, submission of information from existing electronic billing or clinical systems is available.

Alternatives Considered:

For the past ten years, regional prototype immunization registries have been tested in two areas of the state outside of New York City. These regulations allow regional prototype immunization registries to be incorporated, to the extent feasible in the statewide system. Providers may download immunization information from existing electronic data systems. A similar registry has also been in operation in NYC. In order to minimize impact on providers, this statewide system will not change the requirement for NYC providers to report immunizations to the NYC-DOHMH (''Citywide Immunization Registry'') registry. There is no viable alternative to the mandate for reporting of all immunizations to a centralized database, other than attempting, as stated above, to minimize the impact by permitting NYC's registry to co-exist and by utilizing downloads from other existing regional electronic systems.

Federal Standards:

The statewide immunization system conforms to minimum data set standards for immunization registries as published by the Centers for Disease Control and Prevention in their ''Recommended Core Data Set'' publication (http:///www/cdc/gov/nip/registry/st__terr/tech/stds/core.htm). The New York State data set includes less than half of the CDC-recommended data elements, including only the required data elements plus one federally recommended element (patient address). The benefit of conducting regional analyses of immunization status in the event of disease outbreaks or vaccine-related incidents necessitates the inclusion of one additional (recommended but not required) data element.

Compliance Schedule:

The law specifies a 1/1/08 implementation date for reporting. It is expected that a significant proportion of providers will come into compliance after training occurs in each region according to the established regional implementation plan through July 2008. The regulations permit deferrals for submission of electronic forms in order to minimize hardship to smaller providers who have equipment or internet access issues. Regionwide deferrals will be made available to providers who have not yet had interactive training in their areas. Also, the Department is making every effort to assist providers with existing electronic data systems to download this information into files that meet system specifications. In a further attempt to minimize provider burden and ensure accurate reporting, providers currently working on providing downloaded files will be granted deferrals, on request, providing that they document their efforts and present a realistic plan of their anticipated progress and start date.

Regulatory Flexibility Analysis

Effect of Rule:

The mandated statewide immunization system will affect only small businesses and local governments in New York State outside of NYC (hereinafter referred to as rest of state, or ROS), since the regulations allow for the continued operation of the City of New York's mandatory immunization registry that has been operating for the past decade. The primary type of business impacted by this new rule will be health care providers who deliver primary care to children from shortly after birth to the age of 18 years. The exact number of health care providers in the ROS who vaccinate children is unknown, but is estimated to be in excess of 2,000. While other types of providers are affected in that they will be able to access registry information if they so choose, such as schools, day care centers, local health departments, local districts of social services, etc., access will be voluntary and should decrease existing workload by ensuring a single point of access to immunization history information.

Compliance Requirements:

Health care providers will be required to submit information into the system. Such data entry will likely be less cumbersome than manually updating immunization histories for documents needed by parents or guardians. Providers will be able to download and print copies of immunization histories to give to parents, saving substantial time, and will be able to automatically generate reminder and recall notices, to notify parents when their child is due for an immunization or is being recalled to the office for immunization follow-up. This is expected to result in an overall reduction in time required. Another significant benefit of the system will be the ability to generate a report regarding vaccine accountability for the Vaccines for Children program. Two thousand, two hundred of the health care providers participate in this program.

While some of the system's data fields to be entered may not be currently recorded by providers, e.g. vaccine lot number, manufacturer, and mother's maiden name, these critical pieces of information should be maintained in a patient's record to ensure appropriate care to the particular patient.

Providers are required to submit information online. A minority of providers may find this difficult. However, Health Provider Network (HPN) accounts are used by a significant number of providers in order to obtain prescription pads. Deferrals for such providers are possible, although paper records will need to be submitted in a timely fashion while the change to electronic reporting occurs.

The major compliance requirement that might generate initial workload burden for providers is the need to enter immunization histories into the system for all children administered immunizations after the system implementation date of 1/1/08. For providers in many areas, this can be accomplished by migrating regional registry information into the statewide system. For providers not already participating in a regional registry, accommodations to allow use of existing electronic data sets for downloading information will be attempted wherever feasible, given adequate provider resources to generate compatible files.

Professional Services:

If providers have existing electronic data systems and access to the internet, no additional professional services will likely be needed for those providers entering records directly online. However, for providers who have existing electronic data systems and wish to submit historical immunization data directly from those systems rather than entering such information at the time the first immunization is given to each child after 1/1/08, the services of a programmer may be required to generate electronic downloads in the format prescribed by the system. The cost of such one-time programming might vary according to the number of providers using a given data system. For providers with unique electronic record keeping systems, such costs could exceed several thousand dollars. The Department of Health will assist providers, wherever possible. For small providers with no electronic systems, a computer professional may be needed to set up a new computer system.

Compliance Costs:

No detailed cost data is available based on the implementation of regional systems. However, it is expected that ongoing compliance costs for the new statewide system will be negligible for other than some small providers who may need to purchase a computer and obtain internet access. Providers will have the option of downloading historical immunization records from existing electronic systems, in a format compliant with the system. Providers pursuing this option will incur programming costs which will vary according to the extent to which the electronic data system is shared by other providers. However, a net savings will accrue once initial implementation is completed and backlogged data are entered. Retrieval of information will be more streamlined, saving support staff time. Data entry costs were reported in the journal Pediatrics to be $0.56 additional per record in 2004. The savings per each patient record generated electronically has estimated to be over $14 as opposed to manual efforts to pull the chart when immunization records were needed.

Economic and Technological Feasibility:

The feasibility of a registry has been tested using a regional approach. No economic or technological barriers emerged, aside from routine system download issues requiring programming time. However, since DOH contractors have addressed most downloading issues, the provider burden has been minimized.

Minimizing Adverse Impact:

In addition to the measures already mentioned, e.g., utilizing existing regional data systems for downloading backlogs of information and attempting to work with existing electronic systems to develop downloads, two other measures were taken to minimize adverse impact. In the regulations, providers are permitted to request an extension of the deadlines for submission of information, with adequate justification. This will allow providers with compliance issues additional time to come into compliance. Program staff will approve all reasonable requests. The deferral of the start date for immunization information data entry (of all immunizations occurring since 1/1/08) until interactive training has been made available to providers regionally, whether face-to-face or via webinars also minimizes adverse impact. Providers will be offered the option of deferring their implementation date until the first of the month following the last training session made available in their region, whether they have attended or not. This training-related deferral, in addition to the electronic download deferral and the internet access availability deferrals, should accommodate most of the providers wishing for an extension on the deadline for data entry.

Small Business and Local Government Participation:

A series of meetings have been held at various locations around the state to ensure that many affected individuals and entities have the opportunity to share their concerns with the Department. These concerns have been incorporated into the development of the regulations. In addition, the regulations have been drafted to reflect the maximum degree of flexibility and responsiveness to the regulated community, e.g., incorporating downloads of historical information from existing registries, using existing data systems that already gather information as vehicles for downloading of information into the system and incorporating extensions of the implementation deadline for various reasons.

Rural Area Flexibility Analysis

Types and Estimated Numbers of Rural Areas:

This rule will apply to health care providers throughout the state, including all 44 counties delineated in SAPA Section 102(10) as rural counties (Allegany, Cattaraugus, Cayuga, Chautauqua, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Genesee, Greene, Hamilton, Herkimer, Jefferson, Lewis, Livingston, Madison, Montgomery, Ontario, Orleans, Oswego, Otsego, Putnam, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Seneca, Steuben, Sullivan, Tioga, Tompkins, Ulster, Warren, Washington, Wayne, Wyoming, and Yates); and nine counties with a population density outside of townships of less than 150 persons per square mile (i.e., Albany, Broome, Dutchess, Erie, Monroe, Niagara, Oneida, Onondaga and Orange).

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

The system will require that all immunizations be reported to the statewide immunization system, outside of those performed in NYC (which must be reported to the citywide registry, in operation for almost a decade, and thus not a new requirement). The information reported to the registry, though, is equivalent to the information currently recorded by providers in the charts and, in some cases, via electronic billing systems. The ability to call up a patient's immunization record from the system and print the immunization history will save providers significant time and costs, more than exceeding costs required for reporting. Physicians and other health care providers are routinely asked to provide written immunization records for school entry, camp enrollment, sports physicals, etc. Printing out this information from the system will require far less staff time than copying the immunization history onto whatever form is required. The system is being designed to be used by nonprofessionals, with only minimal acquaintance with computers and the internet. No ongoing professional expertise or services should be required. The system will maintain a help desk to answer questions from providers, so that no rural professional should be negatively affected by this regulation. For small rural providers without existing computers, allowances will be made for delays in compliance as computer equipment and internet access are obtained. Every effort will be made to ensure that training is provided on a regional basis to provide an acceptable comfort level to all providers. Training will encompass a range of options, such as regional face-to-face sessions in every region, self-paced online training, webinars, online manuals, help buttons for use during data entry, range-checking to ensure valid information is entered online, and programmers to answer questions regarding downloading from existing data systems, such as billing and electronic chart systems. Informational materials will be available through the DOH website, as well as manuals, newsletters, and frequently asked questions to assist providers with implementing the system.

Costs:

For most health care providers, who already have computers and internet access, there will be no additional cost, unless they must engage the services of a programmer in order to execute downloads of historical immunization information from existing electronic data systems. For the few providers who need to obtain the equipment and engage an internet provider, start up costs will be approximately $800 for equipment, and the going rate for internet service in the region on an annual basis.

Minimizing Adverse Impact:

As mentioned, the ability to postpone electronic submission will be available to providers who can demonstrate a hardship with compliance, i.e., lack of a computer or internet access. DOH will allow providers to defer implementation based on regional readiness, judged by interactive training made available in each area, transition issues with regard to existing regional immunization registries, or lack of DOH resources to implement NYSIIS in a timely fashion. Where existing regional immunization registries exist, the ability of providers to authorize downloading of previously nonconsented historical immunization information, rather than having to input this information anew after 1/1/08, will be offered to minimize provider burden. Where such information has already been submitted to regional registries, there will be no need to re-enter this information.

Rural Area Participation:

All areas of the state have had the opportunity to provide input in this process. To date, regional meetings have been held with concerned stakeholders. A statewide meeting of stakeholders was held on July 16, 2007, and provider organizations were invited to attend this meeting to discuss implementation of the new system and all their concerns. To date, the major concerns expressed by providers have been the burden involved in entering historical immunization records into the system for clients receiving immunizations after 1/1/08, and the lack of a provision to opt out of the system. The statute requires that all providers participate in the system. However, the regulations permit deferral of participation in the system for providers experiencing hardship in complying with electronic transmission of records or who choose to wait until interactive training has been made available in their region. In addition, deferred participation is available for providers who are actively engaged in arranging for electronic downloads from existing systems. Further, deferrals of compliance deadlines will be granted to providers who have no access to the internet available in their region.

Job Impact Statement

Nature of Impact:

It is not expected that implementation of the statewide immunization system will have any impact on jobs, other than the creation of the system's basic infrastructure within the Department of Health. New York City has a preexisting immunization registry and the regulations will not impact the manner in which New York City administers their registry.

In the region outside of New York City, physicians and others currently providing immunizations within the scope of their duties and respective practice acts will be required to report immunizations to NYSIIS. However, the system will be pre-populated by birth certificates from 2004 on, which will reduce burden on health care providers by removing the necessity of filling in identifying information for the vast majority of children immunized, and requiring only a look-up function to locate individuals. Health care providers currently fill out immunization histories for patients multiple times, e.g., for parents' take home records, for schools when parents cannot locate records, for camps, for physicals required by schools, etc. The ability to print out a copy of a child's immunization history for the parents or caregivers, rather than manually copying the information, should more than compensate over time for the initial burden of entering a new child into the system.

Health care providers will also have the ability to delegate responsibility for immunization system entries to their staff members. All health care

providers and their designees will be required to apply for access to the system, and sign a confidentiality statement. However, these activities will be streamlined to minimize provider burden. Some providers with existing electronic data systems will be afforded the opportunity to download immunization information directly from their current data systems, as appropriate, virtually eliminating time required for reporting to the system.

Categories and Numbers Affected:

None. For some small providers, who elect not to use the electronic download from existing data systems option, initial entry of immunization histories for children receiving immunizations after 1/1/08 will require additional hours of staff time. This time is offset by savings at a later time in printing immunization records from the system.

Regions of Adverse Impact:

None.

Minimizing Adverse Impact:

No adverse impact expected. The program has gone to significant lengths to ensure that no additional manpower would be required in physician's offices, where system start-up would be most labor intensive, requiring that immunization histories of patients immunized after 1/1/08 were entered into the system. The program is encouraging download of data from the two existing regional immunization registries in lieu of entry of old records, and is going to extend the opportunity for downloading immunization information from existing electronic systems in providers' offices, e.g., billing systems, wherever possible. In addition, the regulations provide the providers with an opportunity to request an extension on full electronic submission, if needed.

Self-employment opportunities:

NOT APPLICABLE

Insurance Department

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

External Appeals of Adverse Determinations of Health Care Plans

I.D. No. INS-35-08-00009-P

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

Proposed Action: Amendment of Part 410 (Regulation 166) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1109, article 49, and chapter 586 of the Laws of 1998

Subject: External Appeals of Adverse Determinations of Health Care Plans.

Purpose: Provides that external appeal agents shall not be subject to legal proceedings to review their determinations.

Text of proposed rule: Section 410.2(d) is repealed.

Sections 410.2(e), (f), (g), (h), (i), and (j) are relettered (d), (e), (f), (g), (h), and (i).

Section 410.6(b)(1) is amended to read as follows:

(1) has no material familial, financial or professional affiliation, as those terms are defined in section [410.2(f)-(h)] *410.2(e)-(g)* of this Part, with any person or entity listed in subparagraphs (2)(i)-(v) of this subdivision; or

Section 410.11 is amended to add a new subdivision (e) to read as follows:

(e)(1) Upon requesting an external appeal, the insured, the insured's designee or the insured's health care provider shall acknowledge that the determination of the external appeal is binding on the plan and the insured, and shall agree not to commence any legal proceeding against an external appeal agent or clinical peer reviewer to review a determination made by such external appeal agent or clinical peer reviewer pursuant to Article 49 of the Insurance Law or Article 49 of the Public Health Law; provided, however, that the foregoing shall not limit any rights the insured, the insured's designee or the insured's health care provider may have with respect to bringing an action for damages for bad faith or gross negligence or with respect to bringing an action against the insured's health care plan.

(2) As specified in Insurance Law section 4914(c) and Public Health Law section 4914(3), no external appeal agent or clinical peer reviewer conducting an external appeal shall be liable in damages to any person for any opinions rendered by such external appeal agent or clinical peer reviewer upon completion of an external appeal conducted pursuant to Article 49 of the Insurance Law or Article 49 of the Public Health Law, unless such opinion was rendered in bad faith or involved gross negligence.

Text of proposed rule and any required statements and analyses may be obtained from: Andrew Mais, New York State 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: Lisette Johnson, New York State Insurance Department, One Commerce Plaza, Albany, NY 12257, (518) 474-4098, email: ljohnson@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 for the First Amendment to Regulation 166 of Title 11 NYCRR is derived from Sections 201, 301, 1109 and Article 49 of the Insurance Law and Chapter 586 of the Laws of 1998.

Sections 201 and 301 authorize the Superintendent to prescribe regulations interpreting the provisions of the Insurance Law to effectuate any power granted to the Superintendent under the Insurance Law and to prescribe forms or otherwise make regulations.

Section 1109 authorizes the Superintendent to promulgate regulations affecting health maintenance organizations (HMOs) and effectuate the purposes and provisions of the Insurance Law and Article 44 of the Public Health Law.

Article 49 establishes utilization review and external review requirements for all insurers subject to Article 32 or 43 of the Insurance Law.

Chapter 586 of the Laws of 1998 amended the Public Health Law and Insurance Law to authorize external appeals of adverse determinations relating to health care services, and section 45 of Chapter 586 provides that the superintendent may promulgate regulations to implement the external appeal program.

2. Legislative Objectives: Article 49 of the Insurance Law and Article 49 of the Public Health Law, the external appeal law, provides an insured with the right to obtain an independent medical review by an external appeal agent when the insured's health plan denies a health care service as not medically necessary, experimental or investigational. Section 4914(c) of the Insurance Law and Section 4914(3) of the Public Health Law state that an external appeal agent and the agent's clinical peer reviewers shall not be held liable in damages for any opinions rendered pursuant to an external appeal unless such opinion is rendered in bad faith or involved gross negligence. The law neither permits nor contemplates that external appeal agents would otherwise be subject to court proceedings to defend their determinations. This amendment to Regulation 166 reiterates the statutory provisions of the Insurance Law and Public Health Law by stating that the law does not permit an action against the external appeal agent or clinical peer reviewer on the merits of the determination. This is consistent with the legislative goal of having a meaningful and cost efficient external appeals process available to insureds in New York State. The amendment furthers the legislative intent by also providing that upon requesting an external appeal, the insured shall acknowledge that the determination of the external appeal is binding on the plan and the insured, and shall agree not to commence any legal proceeding against an external appeal agent or clinical peer reviewer to review a determination made by such external appeal agent or clinical peer reviewer, other than an action for damages pursuant to Article 49 of the Insurance Law or Article 49 of the Public Health Law. Moreover, this amendment makes a technical correction to Regulation 166 by removing the definition of ''designee'' to conform with the decision rendered in *Healthcare Association of New York State et al. v. Serio* (Albany County 2002), The *Healthcare Association* case was an Article 78 proceeding against the Insurance Department and the Health Department challenging the external appeal regulations (11 NYCRR 410 and 10 NYCRR 98-2) on several grounds. The Court found in favor of the Departments on all grounds with the exception of the definition of ''designee'' set forth in Section 410.2(d) of Part 410, and declared the definition null and void.

3. Needs and Benefits: The role of the external appeal agent is to provide a clinical opinion as to whether the medical treatment requested by the insured and denied by the health plan is medically necessary, experimental, or investigational. Recently, a number of lawsuits have been brought against external appeal agents either because the insured, or in one case the hospital that provided treatment to the insured, disagreed with the external appeal agent's decision. The purpose of the lawsuits is to require a health plan to pay for treatment pursuant to the insured's subscriber contract, regardless of the external appeal agent's finding regarding the medical necessity of the treatment.

The external appeal legislation never intended that external appeal

agents would have to defend their decisions in court proceedings. An external appeal agent does not have a particular interest to protect by defending its decisions, nor is the external appeal agent the appropriate party to determine how the insured's contract with the health plan, the Insurance Law, or the Public Health Law should be interpreted in a court proceeding. In addition, regardless of what a court decides with respect to the external appeal agent's decision, an insured will still have to file a lawsuit against his or her health plan in order to compel the health plan to pay for the health care service.

Subjecting external appeal agents to court proceedings for all decisions will increase health plan and consumer costs, and threaten the viability of the external appeal program. The external appeal fees charged by agents are approved by the Insurance Department and the Health Department and do not include court costs. All three New York State certified external appeal agents have requested a fee increase to cover litigation expenses. Current approved fees range from several hundred to several thousand dollars per appeal, depending on whether the appeal is standard or expedited and how many clinical peer reviewers are assigned. Health plans are statutorily required to pay the fees, regardless of the outcome. If external appeal agent fees increase, health plan costs will also increase, and consumers could be adversely impacted if health plans pass the increased costs on to consumers in the form of premium rate increases. In the alternative to increased fees, external appeal agents have requested that a fund be set up to reimburse them for court costs relating to the defense of their external appeal decisions. However, an assessment on health plans to establish the fund is not authorized or contemplated by the external appeal law. The Department is very concerned that if external appeal agents continue to be subject to court proceedings, the agents may find the cost of doing business in New York to be prohibitive and withdraw from the external appeal program.

This amendment does not impact the rights of an insured to bring a legal action against the health plan that issued an adverse determination if the insured continues to disagree with the factual basis or clinical rationale for the health plan's adverse determination that has been reviewed by the external appeal agent. In addition, the amendment does not impact any remedy an insured may have with respect to the Insurance Department and Health Department regarding the Departments' oversight of the external appeal program. The amendment is also consistent with the language in Article 49 of the Insurance Law and Article 49 of the Public Health Law as it does not preclude an insured from seeking damages for an opinion rendered in bad faith or involving gross negligence. The amendment merely provides that upon requesting an external appeal, the insured shall acknowledge that the determination of the external appeal is binding on the plan and the insured, and shall agree not to commence any legal proceeding against an external appeal agent or clinical peer reviewer to review a determination made by such external appeal agent or clinical peer reviewer, other than an action for damages pursuant to Article 49 of the Insurance Law or Article 49 of the Public Health Law.

Striving to minimize the costs of health insurance and protecting the interests of consumers who purchase health insurance are important functions of the superintendent. This amendment both minimizes costs and ensures the continued viability of the external appeal program, an important consumer protection.

4. Costs: There should be no costs to insurers, HMOs, or individuals in order to comply with this amendment, nor should there be costs associated with this amendment to the Insurance Department, the Health Department or state or local government. The amendment should serve to keep insurance costs from rising, which may be the case if lawsuits against external appeal agents or clinical peer reviewers continue to arise.

5. Local Government Mandates: The amendment imposes no new programs, services, duties or responsibilities on any county, city, town, village, school district or fire district.

6. Paperwork: The amendment does not impose any additional paperwork requirements on insurers, HMOs, or individuals, other than an acknowledgement by the insured.

7. Duplication: The amendment does not duplicate standards of either the federal or other state governments. This amendment to Regulation 166 is a collaborative effort between the New York State Insurance Department and the New York State Department of Health. The New York State Department of Health will also be filing an amendment to Subpart 98-2 of Title 10 of NYCRR that will apply to HMOs.

8. Alternatives: This amendment was developed through meetings with the New York State Department of Health and interested parties, including the three New York certified external appeal agents. The three external appeal agents approached the Insurance Department to discuss the rising costs of legal fees associated with insureds challenging external appeal decisions. The agents proposed a fee increase and/or a litigation fund, in the form of an escrow account. These alternatives were considered by the Insurance Department and Health Department, but it was determined that this amendment to Regulation 166 would be the best option, because it is the most cost-effective, and the most consistent with statutory intent not to permit an action against the external appeal agent or clinical peer reviewer on the merits of the determination.

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

10. Compliance Schedule: The provisions of this amendment will take effect immediately, and regulated parties should be able comply with the amendment immediately. Regulated parties will not need to submit revised filings to the Insurance Department or to the Health Department.

Regulatory Flexibility Analysis

As fully discussed in the Regulatory Impact Statement, this amendment implements the Department's position with regard to relevant provisions of the New York State Insurance Law and Public Health Law. The amendment will not have any adverse economic impact and does not impose reporting, recordkeeping or other compliance requirements on small businesses or local governments. It requires the insured to acknowledge that the determination of the external appeal is binding on the plan and the insured, and to agree not to commence any legal proceeding against an external appeal agent or clinical peer reviewer to review a determination made by such external appeal agent or clinical peer reviewer, other than an action for damages pursuant to Article 49 of the Insurance Law or Article 49 of the Public Health Law.

Insurers and health maintenance organizations do not fall within the definition of small business found in Section 102(8) of the State Administrative Procedure Act because there are none that are both independently owned and that employ fewer than 100 persons. Accordingly, there is no need to prepare any special guidance materials for small businesses with regard to this rule.

Rural Area Flexibility Analysis

The amendment implements the Department's position with regard to relevant provisions of the New York State Insurance Law and Public Health Law. The amendment will not have any adverse impact on rural areas and does not impose reporting, recordkeeping or other compliance requirements on public or private entities in rural areas; except that it requires the insured to acknowledge that the determination of the external appeal is binding on the plan and the insured, and to agree not to commence any legal proceeding against an external appeal agent or clinical peer reviewer to review a determination made by such external appeal agent or clinical peer reviewer, other than an action for damages pursuant to Article 49 of the Insurance Law or Article 49 of the Public Health Law. Insurers and health maintenance organizations to which the amendment applies do business in, and insureds are located in, all counties of the state, including rural areas as defined under State Administrative Procedure Act Section 102(13). The amendment applies equally to rural and urban areas.

Job Impact Statement

This proposed amendment to Regulation 166 will not adversely impact job or employment opportunities in New York. The amendment implements the Department's position with regard to relevant provisions of the New York State Insurance Law and Public Health Law, and thus will have no job impact in New York.

Public Service Commission

NOTICE OF WITHDRAWAL

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

The following rule makings have been withdrawn from consideration:

I.D. No.	Publication Date of Proposal
PSC 26-07-00016-P	June 27, 2007
PSC 35-07-00009-P	August 29, 2007
PSC 01-08-00023-P	January 2, 2008
PSC 04-08-00009-P	January 23, 2008
PSC 08-08-00026-P	February 20, 2008
PSC 11-08-00014-P	March 12, 2008

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Transfer of Real Property Located at 32-42 West 125th Street and 35-39 West 124th Street, New York, NY

I.D. No. PSC-35-08-00013-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 or reject, in whole or in part, a supplemental joint petition filed by Consolidated Edison Company of New York, Inc. and Village Academies Network Inc. for the transfer of real property.

Statutory authority: Public Service Law, section 70

Subject: Transfer of real property located at 32-42 West 125th Street and 35-39 West 124th Street, New York, NY.

Purpose: Transfer of real property located at 32-42 West 125th Street and 35-39 West 124th Street, New York, NY.

Substance of proposed rule: The Commission is considering a supplemental joint petition by Consolidated Edison Company of New York, Inc. and Village Academies Network Inc. for authority under Section 70 of the Public Service Law to transfer certain real property located at 32-42 West 125th Street and 35-39 West 124th Street, New York, NY, from Consolidated Edison Company of New York, Inc. to Village Academies Network Inc. The property is to be transferred pursuant to a sale and purchase agreement between Consolidated Edison Company of New York, Inc. and Village Academies Network Inc. The Commission may approve, reject or modify, in whole or in part, the parties' 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.

(08–M-0930SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Interconnection of the Networks between Cablevision and Taconic Telephone Corp. for Local Exchange Service and Exchange Access

I.D. No. PSC-35-08-00014-P

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

Proposed Action: The PSC is considering whether to approve or reject, in whole or in part, a proposal filed by Cablevision Lightpath, Inc. (Cablevision) and Taconic Telephone Corp. d/b/a FairPoint Comm. for approval of an Inteconnection Agreement executed on July 1, 2008.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of the networks between Cablevision and Taconic Telephone Corp. for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Cablevision and Taconic Telephone Corp.

Substance of proposed rule: Cablevision Lightpath, Inc. and Taconic Telephone Corporation d/b/a FairPoint Communications have reached a negotiated agreement whereby Cablevision Lightpath, Inc. and Taconic Telephone Corporation d/b/a FairPoint Communications will interconnect their networks at mutually agreed upon points of interconnection to provide Telephone Exchange Services and Exchange Access to their respective customers. The Agreement establishes obligations, terms and conditions under which the parties will interconnect their networks lasting for the term of an underlying agreement.

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-C-0849SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Interconnection of the Networks between Taconic Telephone Corp. and PaeTec Comm. for Local Exchange Service and Exchange Access

I.D. No. PSC-35-08-00015-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 or reject, in whole or in part, a proposal filed by Taconic Telephone Corp. d/b/a FairPoint Comm. and PaeTec Comm. or approval of a Mutual Traffic Exchange Agreement executed on June 16, 2008.

Statutory authority: Public Service Law, section 94(2)

Subject: Interconnection of the networks between Taconic Telephone Corp. and PaeTec Comm. for local exchange service and exchange access.

Purpose: To review the terms and conditions of the negotiated agreement between Taconic Telephone Corp. and PaeTec Comm.

Substance of proposed rule: Taconic Telephone Corporation d/b/a FairPoint Communications and Paetec Communications have reached a negotiated agreement whereby Taconic Telephone Corporation d/b/a FairPoint Communications and Paetec Communications will interconnect their networks at mutually agreed upon points of interconnection to exchange local traffic.

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-C-0853SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Transition Cost Surcharge

I.D. No. PSC-35-08-00016-P

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

Proposed Action: The Commission is considering a proposal filed by Rochester Gas & Electric Corporation (RG&E) to revise its Transition Cost Surcharge.

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

Subject: Transition Cost Surcharge.

Purpose: To make revisions to RG&E's Transition Cost Surcharge.

Substance of proposed rule: The Commission is considering a proposal filed by Rochester Gas & Electric Corporation (RG & E) to eliminate the transition costs associated with ANR Pipeline Company (ANR) and Great Lakes Pipeline Company (Great Lakes) storage assets from its Transition Costs Surcharge. RG & E is making its proposal since it will no longer hold pipeline and storage contracts on ANR and Great Lakes pipelines upon the expiration of the contracts on October 31, 2008. The Commission may approve, reject or modify, in whole or in part, RG & E's proposal.

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-G-0889SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Customer Size Limitations for Non-Residential and Multiple Dwelling Services and Interruptible Penalty Provisions

I.D. No. PSC-35-08-00017-P

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

Proposed Action: The Commission is considering a proposal filed by KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island to establish customer size limitations for Non-Residential and Multiple Dwelling Services and revise Interruptible Penalty Provisions.

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

Subject: Customer size limitations for Non-Residential and Multiple Dwelling Services and Interruptible Penalty Provisions.

Purpose: To establish size limitations for Non-Residential and Multiple Dwelling Services and revise Interruptible Penalty Provisions.

Substance of proposed rule: The Commission is considering KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island's (KeySpan or the Company) proposal to eliminate the ''two-strike'' rule from the Company's non-firm service classes, SC No. 4—Interruptible, SC No. 7—Interruptible Transportation, SC No. 12—Temperature Controlled, which requires customers to convert to firm service if they fail twice to switch to their alternate fuel when required by the Company during the winter period. The company will impose financial penalties to customers who consume gas in violation of their service classification which will be priced at the higher of (1) two times the sum of the daily market price of natural gas plus the underlying transportation rate, (2) nine times the applicable sales rate, or (3) two times the equivalent daily market oil price.

KeySpan's proposal also includes a new provision in its SC 2—Firm General and SC 3—Multiple Dwelling to establish a maximum size limitation for new gas service under these classes of 2,500,000 Btu per hour. Exemptions from this size limitation will be granted by KeySpan to the extent it receives a contribution payment for required service laterals and/or for system reinforcement or to maintain system operational integrity.

The Commission may approve, reject or modify, in whole or in part KeySpan'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.

(08-G-0918SA1)

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Customer Size Limitations for Non-Residential and Multiple Dwelling Services and Interruptible Penalty Provisions

I.D. No. PSC-35-08-00018-P

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

Proposed Action: The Commission is considering a proposal filed by The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York to establish customer size limitations for Non-Residential and Multiple Dwelling Services and revise Interruptible Penalty Provisions.

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

Subject: Customer size limitations for Non-Residential and Multiple Dwelling Services and Interruptible Penalty Provisions.

Purpose: To establish size limitations for Non-Residential and Multiple Dwelling Services and revise Interruptible Penalty Provisions.

Substance of proposed rule: The Commission is considering The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York's (Brooklyn Union or the Company) proposal to eliminate the ''two-strike'' rule from the Company's non-firm service classes, SC No. 5—Interruptible, SC No. 6—Temperature Controlled, which requires customers to convert to firm service if they fail twice to switch to their alternate fuel when required by the Company during the winter period. The company will impose financial penalties to customers who consume gas in violation of their service classification which will be priced at the higher of (1) two times the sum of the daily market price of natural gas plus the underlying transportation rate, (2) nine times the applicable sales rate, or (3) two times the equivalent daily market oil price.

Brooklyn Union's proposal also includes a modification to the Special Provision in its SC 2 - Firm General and SC 3—Multiple Dwelling to establish a maximum size limitation for new gas service under these classes of 2,500,000 Btu per hour. Exemptions from this size limitation will be granted by Brooklyn Union to the extent it receives a contribution payment for required service laterals and/or for system reinforcement or to maintain system operational integrity.

The Commission may approve, reject or modify, in whole or in part Brooklyn Union'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.

(08-G-0919SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Water Rates and Charges

I.D. No. PSC-35-08-00019-P

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

Proposed Action: On July 28, 2008, Rainbow Water Company (Rainbow) and Sunrise Ridge Water Company (Sunrise) filed a petition requesting authority to surcharge their customers $30 per quarter for six years to cover the cost of water system improvements.

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 surcharge Rainbow and Sunrise customers $30 per quarter for six years.

Substance of proposed rule: On July 28, 2008, Rainbow Water Company and Sunrise Ridge Water Company (Rainbow/Sunrise or the companies) filed a joint petition requesting authority to surcharge their customers $30 per quarter for six years to cover the cost of water system improvements. The companies are proposing a long range funding solution which would result in $17,280 per year or $103,680 being accumulated over the six year period. The funds would be kept in an interest bearing bank account. Rainbow provides metered water service to 88 residential customers and Sunrise provides metered water service to 56 residential customers in the Town of Southeast, Putnam County. The Commission may approve or reject, in whole or in part, or modify the companies' 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.

(08-W-0874SA1)

Office of Real Property Services

NOTICE OF ADOPTION

Annual Charges to Railroad Companies

I.D. No. RPS-16-08-00006-A

Filing No. 787

Filing Date: 2008-08-06

Effective Date: 2008-08-27

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

Action taken: Repeal of section 200-6.7 and addition of section 200-7.1 to Title 9 NYCRR.

Statutory authority: Real Property Tax Law, sections 202(1)(l), 489-q and 489-nn; and State Finance Law, section 97-jj

Subject: Annual charges to railroad companies.

Purpose: To restore the process of establishing annual charges that was unintentionally deleted in a prior rule making.

Text or summary was published in the April 16, 2008 issue of the Register, I.D. No. RPS-16-08-00006-P.

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

Text of rule and any required statements and analyses may be obtained from: Hung Kay Lo, Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, (518) 474-8821, email: internet.legal@orps.state.ny.us

Assessment of Public Comment

The agency received no public comment.

Susquehanna River Basin Commission

INFORMATION NOTICE

Notice of Public Hearing and Commission Meeting

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice of Public Hearing and Commission Meeting.

SUMMARY: The Susquehanna River Basin Commission will hold a public hearing as part of its regular business meeting beginning at 1:00 p.m. on September 11, 2008, in Lewisburg, Pa. At the public hearing, the Commission will consider: 1) approval of certain water resources projects; 2) enforcement actions for six projects; and 3) a request for extension of an emergency certificate issued on July 24, 2008. Details concerning the matters to be addressed at the public hearing and business meeting are contained in the Supplementary Information section of this notice.

DATE: September 11, 2008.

ADDRESS: Bucknell University - Elaine Langone Center, Center Room, Lewisburg, Pa. See Supplementary Information section for mailing and electronic mailing addresses for submission of written comments.

FOR FURTHER INFORMATION CONTACT: Richard A. Cairo, General Counsel, telephone: (717) 238-0423, ext. 306; fax: (717) 238-2436; e-mail: rcairo@srbc.net or Stephanie L. Richardson, Executive Assistant, telephone: (717) 238-0423, ext. 304; fax: (717) 238-2436; e-mail: srichardson@srbc.net.

SUPPLEMENTARY INFORMATION: In addition to the public hearing and its related action items identified below, the business meeting also includes the following items on the agenda: 1) a special presentation on Bucknell University's Susquehanna River Initiative by Dr. Benjamin Hayes, 2) a special presentation on Environmental Flows by Mark Breyer of the Nature Conservancy, 3) a report on the present hydrologic conditions of the basin, 4) consideration of a health insurance trust fund, 5) approval/ratification of various grants and contracts, 6) consideration of a proposed rulemaking action regarding consumptive use by gas well development projects, 7) establishment of a ''Compliance Reserve Fund'' to hold the proceeds of settlements and civil penalty assessments, 8) adoption of an errata sheet to the March 13, 2008, public hearing transcript, 9) discussion of the funding status of the basin streamgage network, 10) appointment of a new Secretary to the Commission; and 11) adoption of a 2009 Commission meeting schedule. The Commission will also hear a Legal Counsel's report.

Public Hearing - Projects Scheduled for Action:

1. Project Sponsor and Facility: East Resources, Inc. (Seeley Creek), Town of Southport, Chemung County, N.Y. Application for surface water withdrawal of up to 0.036 mgd.

2. Project Sponsor and Facility: Chesapeake Appalachia, LLC (for operations in Chemung and Tioga Counties, N.Y., and Bradford, Susquehanna, and Wyoming Counties, Pa.). Application for consumptive water use of up to 2.075 mgd from various surface water sources and the following public water suppliers: Towanda Municipal Authority, Aqua Pennsylvania, Inc. - Susquehanna Division, Canton Borough Authority, Borough of Troy, and Village of Horseheads, N.Y.

3. Project Sponsor and Facility: Chesapeake Appalachia, LLC (Susquehanna River), Town of Owego, Tioga County, N.Y. Application for surface water withdrawal of up to 0.999 mgd.

4. Project Sponsor and Facility: Cabot Oil & Gas Corporation (for operations in Susquehanna and Wyoming Counties, Pa.). Application for consumptive water use of up to 3.039 mgd from various surface water sources and the following public water suppliers: Tunkhannock Borough Municipal Authority, Pennsylvania American Water Company - Montrose System, and Meshoppen Borough Council.

5. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Susquehanna River), Great Bend Borough, Susquehanna County, Pa. Application for surface water withdrawal of up to 0.980 mgd.

6. Project Sponsor and Facility: Chesapeake Appalachia, LLC (Susquehanna River), Athens Township, Bradford County, Pa. Application for surface water withdrawal of up to 0.999 mgd.

7. Project Sponsor and Facility: Chesapeake Appalachia, LLC (Susquehanna River), Oakland Township, Susquehanna County, Pa. Application for surface water withdrawal of up to 0.999 mgd.

8. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Susquehanna River), Susquehanna Depot Borough, Susquehanna County, Pa. Application for surface water withdrawal of up to 0.980 mgd.

9. Project Sponsor and Facility: Fortuna Energy Inc. (Susquehanna River), Sheshequin Township, Bradford County, Pa. Application for surface water withdrawal of up to 0.250 mgd.

10. Project Sponsor and Facility: East Resources, Inc. (Crooked Creek), Middlebury Township, Tioga County, Pa. Application for surface water withdrawal of up to 0.036 mgd.

11. Project Sponsor and Facility: Chief Oil & Gas, LLC (for operations in Bradford County, Pa.). Application for consumptive use of water of up to 5.000 mgd.

12. Project Sponsor and Facility: Chief Oil & Gas, LLC (Sugar Creek), West Burlington Township, Bradford County, Pa. Application for surface water withdrawal of up to 0.053 mgd.

13. Project Sponsor and Facility: Fortuna Energy Inc. (Sugar Creek), West Burlington Township, Bradford County, Pa. Application for surface water withdrawal of up to 0.250 mgd.

14. Project Sponsor and Facility: Chesapeake Appalachia, LLC (Susquehanna River), Wysox Township, Bradford County, Pa. Application for surface water withdrawal of up to 0.999 mgd.

15. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Unnamed Tributary to Meshoppen Creek), Dimock Township, Susquehanna County, Pa. Application for surface water withdrawal of up to 0.980 mgd.

16. Project Sponsor and Facility: Fortuna Energy Inc. (Towanda Creek), Franklin Township, Bradford County, Pa. Application for surface water withdrawal of up to 0.250 mgd.

17. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Martins Creek), Lathrop Township, Susquehanna County, Pa. Application for surface water withdrawal of up to 0.980 mgd.

18. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Tunkhannock Creek), Lennox Township, Susquehanna County, Pa. Application for surface water withdrawal of up to 0.980 mgd.

19. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Meshoppen Creek-2), Lemon Township, Wyoming County, Pa. Application for surface water withdrawal of up to 0.980 mgd.

20. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Meshoppen Creek-1), Lemon Township, Wyoming County, Pa. Application for surface water withdrawal of up to 0.980 mgd.

21. Project Sponsor and Facility: Pennsylvania General Energy Company, LLC (operations in Potter and McKean Counties, Pa.). Application for consumptive water use of up to 4.900 mgd from various surface water sources and the following public water suppliers: Jersey Shore Joint Water Authority, Williamsport Municipal Water Authority, and Borough of Montoursville.

22. Project Sponsor and Facility: Pennsylvania General Energy Company, LLC (East Fork Sinnemahoning Creek - Horton), East Fork Township, Potter County, Pa. Application for surface water withdrawal of up to 0.008 mgd.

23. Project Sponsor and Facility: Chesapeake Appalachia, LLC (Susquehanna River), Mehoopany Township, Wyoming County, Pa. Application for surface water withdrawal of up to 0.999 mgd.

24. Project Sponsor and Facility: Pennsylvania General Energy Company, LLC (First Fork Sinnemahoning Creek), Sylvania Township, Potter County, Pa. Application for surface water withdrawal of up to 0.107 mgd.

25. Project Sponsor and Facility: Pennsylvania General Energy Company, LLC (East Fork Sinnemahoning Creek - East Fork), East Fork Township, Potter County, Pa. Application for surface water withdrawal of up to 0.025 mgd.

26. Project Sponsor and Facility: Pennsylvania General Energy Company, LLC (East Fork Sinnemahoning Creek), Wharton Township, Potter County, Pa. Application for surface water withdrawal of up to 0.027 mgd.

27. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Susquehanna River), Tunkhannock Township, Wyoming County, Pa. Application for surface water withdrawal of up to 0.980 mgd.

28. Project Sponsor and Facility: Pennsylvania General Energy Company, LLC (First Fork Sinnemahoning Creek), Wharton Township, Potter County, Pa. Application for surface water withdrawal of up to 0.231 mgd.

29. Project Sponsor and Facility: Cabot Oil & Gas Corporation (Bowmans Creek), Eaton Township, Wyoming County, Pa. Application for surface water withdrawal of up to 0.980 mgd.

30. Project Sponsor and Facility: Neptune Industries, Inc. (Lackawanna River), Borough of Archbald, Lackawanna County, Pa. Application for surface water withdrawal of up to 0.499 mgd.

31. Project Sponsor and Facility: PEI Power Corporation, Borough of Archbald, Lackawanna County, Pa. Modification to consumptive water use and surface water withdrawal approval (Docket No. 20010406) for addition of up to 0.530 mgd from a public water supplier as a secondary supply source, and settlement of an outstanding compliance matter.

32. Project Sponsor and Facility: Range Resources - Appalachia, LLC (for operations in Bradford, Centre, Clinton, Lycoming, Sullivan, and Tioga Counties, Pa.). Application for consumptive water use of up to 5.000 mgd from various surface water sources and the following public water suppliers: Jersey Shore Joint Water Authority - Pine Creek and Anthony Facilities, Williamsport Municipal Water Authority, City of Lock Haven Water Department, Borough of Bellefonte, Borough of Montoursville, Milesburg Water System, and Towanda Municipal Authority.

33. Project Sponsor and Facility: Range Resources - Appalachia, LLC (Lycoming Creek), Lewis Township, Lycoming County, Pa. Application for surface water withdrawal of up to 0.200 mgd.

34. Project Sponsor and Facility: Range Resources - Appalachia, LLC (Lycoming Creek), Lycoming Township, Lycoming County, Pa. Application for surface water withdrawal of up to 0.200 mgd.

35. Project Sponsor and Facility: Chief Oil & Gas, LLC (for operations in Lycoming County, Pa.) Application for consumptive water use of up to 5.000 mgd from various surface water sources and the following public water suppliers: Jersey Shore Joint Water Authority - Pine Creek and Anthony Facilities, Williamsport Municipal Water Authority, Borough of Montoursville, and Towanda Municipal Authority.

36. Project Sponsor and Facility: Chief Oil & Gas, LLC (Muncy Creek), Penn Township, Lycoming County, Pa. Application for surface water withdrawal of up to 0.099 mgd.

37. Project Sponsor and Facility: Chief Oil & Gas, LLC (Larrys Creek), Mifflin Township, Lycoming County, Pa. Application for surface water withdrawal of up to 0.099 mgd.

38. Project Sponsor and Facility: Chief Oil & Gas, LLC (Pine Creek), Cummings Township, Lycoming County, Pa. Application for surface water withdrawal of up to 0.099 mgd.

39. Project Sponsor and Facility: Chief Oil & Gas, LLC (Muncy Creek), Picture Rocks Borough, Lycoming County, Pa. Application for surface water withdrawal of up to 0.099 mgd.

40. Project Sponsor and Facility: Chief Oil & Gas, LLC (Loyalsock Creek), Montoursville Borough, Lycoming County, Pa. Application for surface water withdrawal of up to 0.099 mgd.

41. Project Sponsor and Facility: Range Resources - Appalachia, LLC (West Branch Susquehanna River), Colebrook Township, Lycoming County, Pa. Application for surface water withdrawal of up to 0.200 mgd.

42. Project Sponsor and Facility: Rex Energy Corporation (for operations in Centre and Clearfield Counties, Pa.). Application for consumptive water use of up to 5.000 mgd from various surface water sources and the following public water supplier: Clearfield Municipal Authority.

43. Project Sponsor and Facility: Rex Energy Corporation (Upper Little Surveyor Run), Girard Township, Clearfield County, Pa. Application for surface water withdrawal of up to 0.400 mgd.

44. Project Sponsor and Facility: Rex Energy Corporation (Lower Little Surveyor Run), Girard Township, Clearfield County, Pa. Application for surface water withdrawal of up to 0.400 mgd.

45. Project Sponsor and Facility: Rex Energy Corporation (West Branch Susquehanna River), Goshen Township, Clearfield County, Pa. Application for surface water withdrawal of up to 5.000 mgd.

46. Project Sponsor and Facility: Range Resources - Appalachia, LLC (Beech Creek), Snow Shoe Township, Centre County, Pa. Application for surface water withdrawal of up to 0.200 mgd.

47. Project Sponsor and Facility: Rex Energy Corporation (Moshannon Creek - Route 53), Snow Shoe Township, Centre County, Pa. Application for surface water withdrawal of up to 2.000 mgd.

48. Project Sponsor and Facility: Rex Energy Corporation (Moshannon Creek Outfall), Snow Shoe Township, Centre County, Pa. Application for surface water withdrawal of up to 2.000 mgd.

49. Project Sponsor and Facility: Rex Energy Corporation (Moshannon Creek - Peale), Snow Shoe Township, Centre County, Pa. Application for surface water withdrawal of up to 2.000 mgd.

50. Project Sponsor: Suez Energy North America, Inc. Project Facility:

Viking Energy of Northumberland, Point Township, Northumberland County, Pa. Modification to consumptive water use approval (Docket No. 19870301).

51. Project Sponsor: New Enterprise Stone & Lime Co., Inc. Project Facility: Tyrone Quarry, Warriors Mark Township, Huntingdon County, and Snyder Township, Blair County, Pa. Modification to consumptive water use and groundwater withdrawal approval (Docket No. 20031205) for groundwater withdrawals of 0.095 mgd from Well 1, 0.006 mgd from Well 2, and 0.050 mgd from Well 3, and 0.003 mgd from Well 5.

52. Project Sponsor and Facility: Papetti's Hygrade Egg Products, Inc., d.b.a. Michael Foods Egg Products Co., Upper Mahantango Township, Schuylkill County, Pa. Modification of consumptive water use approval (Docket No. 19990903) and a new groundwater withdrawal of 0.450 mgd from Well 3.

53. Project Sponsor: Old Castle Materials, Inc. Project Facility: Pennsy Supply, Inc. - Hummelstown Quarry, South Hanover Township, Dauphin County, Pa. Application for surface water withdrawal of up to 29.952 mgd.

54. Project Sponsor and Facility: Dart Container Corporation of Pennsylvania, Upper Leacock Township, Lancaster County, Pa. Modification of groundwater approval (Docket No. 20040910).

55. Project Sponsor: East Berlin Area Joint Authority. Project Facility: Buttercup Farms, Hamilton Township, Adams County, Pa. Applications for groundwater withdrawals (30 day averages) of 0.144 mgd from Well TW-1, 0.029 mgd from Well TW-2, and a total system withdrawal limit of 0.173 mgd.

56. Project Sponsor: Project Sponsor: PPL Holtwood, LLC. Project Facility: Holtwood Hydroelectric Station, Martic and Conestoga Townships, Lancaster County, and Chanceford and Lower Chanceford Townships, York County, Pa. Applications for amendment to existing FERC license (FERC Project No. 1881) and for redevelopment of the project with modification of its operations on the lower Susquehanna River, including the addition of a second power station and associated infrastructure.

Public Hearing - Projects Scheduled for Enforcement Action:

1. Project Sponsor and Facility: Cabot Oil & Gas Corporation; Teel, Greenwood, Ely, Lewis and Black Wells; Dimock and Springfield Townships, Susquehanna County, Pa.

2. Project Sponsor and Facility: Chief Oil & Gas, LLC; Kensinger, Spotts, and Poor Shot Wells; Mifflin, Penn and Anthony Townships, Lycoming County, Pa.

3. Project Sponsor and Facility: EOG Resources, Inc.; Houseknecht, Olsyn and Pierce Wells; Springfield Township, Bradford County, Pa.; PHC Well, Lawrence Township, Clearfield County, Pa.; Leasgang and Pichler Wells, Jay Township, Elk County, Pa.

4. Project Sponsor and Facility: North Coast Energy, Inc.; Litke Wells, Burnside Township, Centre County, Pa.

5. Project Sponsor and Facility: Range Resources - Appalachia LLC; McWilliams, Bobst Mountain, Ogontz, and Ulmer Wells; Cogan House, Cummings and Lycoming Townships, Lycoming County, Pa.; Gulf USA Well, Snow Shoe Township, Centre County, Pa.; Duffey Well, Ridgebury Township, Bradford County, Pa.

6. Project Sponsor and Facility: Turm Oil, Inc., LaRue Well, Rush Township, Susquehanna County, Pa.

Public Hearing - Request to Extend Emergency Certificate:

1. CAN DO, Inc., Hazle Township, Luzerne County, Pa. - Request to extend the use of Site 14 Test Well to serve Humbolt Industrial Park.

AUTHORITY: P.L. 91-575, 84 Stat. 1509 et seq., 18 CFR Parts 806, 807, and 808

Dated: August 12, 2008.

Paul O. Swartz,

Executive Director.

Worker's Compensation Board

PROPOSED RULE MAKING
NO HEARING(S) SCHEDULED

Insolvency of Group Self-insured Trusts

I.D. No. WCB-35-08-00020-P

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

Proposed Action: Amendment of section 317.20 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 50 and 117

Subject: Insolvency of group self-insured trusts.

Purpose: Provide definition of insolvent for group self-insured trust and when the Chair will levy an assessment to pay claims.

Text of proposed rule:

Section 317.20 of Part 317 of Title 12 NYCRR is amended to designate the current section as subdivision (c) and add new subdivisions (a) and (b) to read as follows:

Section 317.20 [T]*Insolvent; assessments; t*ermination and dissolution of the group.

(a) Definition. ''Insolvent'', in the context of a determination by the Chair, or his or her designee, to levy an assessment pursuant to the provisions of Workers' Compensation Law section 50(5)(g), shall mean the inability of a private group self-insurer, to pay its outstanding lawful obligations under the Workers' Compensation Law as they mature in the regular course of business, as may be shown by: i) the self-insurer being underfunded as defined in Workers' Compensation Law section 50 (3-a); and ii) the sum of the self-insurer's assets, as defined by section 317.2(n) of this Part, plus the available security deposit held by the Chair pursuant to Workers' Compensation Law section 50(3-a) and section 317.5 of this Part, being less than the total cost of all of the self-insurers anticipated workers' compensation liabilities, as defined by section 317.2(o) of this Part, that will accrue within the succeeding six months.

(b) The Chair shall levy an assessment against all private group self-insurers, pursuant to Workers' Compensation Law section 50(5)(g), whenever he or she, or his or her designee, determines that workers' compensation benefits may be unpaid by reason of the default of an insolvent private group self-insurer as defined in subdivision (a).

(c) Termination and dissolution of the group. The group shall continue for such time as may be necessary to accomplish the purpose for which it was created, and so long as all requirements to maintain authorization as set forth in this Part continue to be met. Upon termination of the group's status as a group self-insurer, the group will continue to administer the workers' compensation liabilities incurred by the group. Upon failure on the part of the group to properly administer such liabilities, the [c]*C*hair shall assume the administration and final distribution of the group's assets and liabilities.

Text of proposed rule and any required statements and analyses may be obtained from: Cheryl M Wood, Special Counsel to the Chair, NYS Workers' Compensation Board, 20 Park Street, Room 400, Albany, New York 12207, (518) 408-0469, email: regulations@wcb.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.

Regulatory Impact Statement

1. Statutory Authority: Workers' Compensation Law (WCL) § 117 authorizes the Chair of the Workers' Compensation Board (Board) to adopt reasonable rules consistent with the provisions of the WCL. Section 50(3-a) (6) further directs the Chair to adopt reasonable rules relating to group self insurance. Chapter 139 of the Laws of 2008, effective June 30, 2008, amended the WCL with respect to private individual and group self-insureds. Section 3 of Chapter 139 amended the second paragraph designated as (f) of subdivision (5) of WCL § 50 to renumber it as paragraph (g). Newly renumbered WCL § 50(5)(g) requires the Chair to assess and collect from all private self-insureds, including private group self insurers, necessary funds to assure the prompt payment of workers' compensation benefits when they may be unpaid by reason of the default of an insolvent private self-insured employer.

2. Legislative Objectives: Employers in New York must provide workers' compensation coverage for their employees by either purchasing a policy from the State Insurance Fund or a private carrier, or by being authorized by the Chair to be individually self-insured, or by being a member of a group self-insured trust authorized by the Chair to provide coverage. Members of a group self-insured trust are jointly and severally liable for the claims and related costs incurred by the group self-insured trust. As additional security, former WCL § 50(5)(f) now WCL § 50(5)(g) provides that if a private self-insurer is insolvent and may default on the payment of benefits, the Chair may assess all private self-insurers for the funds to pay the claims. This is to ensure that claimants always receive their benefits. The proposed regulation defines insolvent to govern how the Chair determines that a private group self-insurer is insolvent and explains when the Chair shall levy an assessment to pay the claims of the insolvent private self-insurers.

3. Needs and Benefits. The Board is funded by assessments paid by the employers of New York. The assessment process requires the Chair to assess and collect the Board's administrative and special fund costs from the State Insurance Fund, private insurance carriers, and self-insurers (both

individual and groups) including self-insured political subdivisions. In addition to the administrative and special fund assessments paid by all employers, public and private self-insurers, both individuals and groups, pay an assessment to cover the administrative costs of running the self-insurance program. Finally, private individual and group self-insurers pay another assessment to cover any unmet obligations of any insolvent group or individual private self-insurer that defaults on its payments.

In 2006 the first private group self-insurer became insolvent and defaulted. Since then another eight private group self-insurers have been deemed insolvent and defaulted. When a private self-insurer is insolvent and defaults on the payment of its obligations, the Chair is responsible for ensuring the claims continue to be paid. The Chair obtains the necessary funds to pay claims, pending any collection of funds from group members, by issuing assessments pursuant to WCL § 50(5) (g) [until June 20, 2008, WCL§ 50(5)(f)] against all private individual and group self-insurers. Due to the number of insolvencies and defaults the Chair determined that approximately $66 million was needed to pay claims in 2008, an amount many times greater than that needed in the past.

The Chair levies the assessments required by WCL § 50(5) (g) in accordance with WCL § 50(5) (e), and partial payments of the assessment are made on March 10th, June 10th, September 10th and December 10th of each year. In other words billing is made quarterly. In order for payments to be made on such dates and to provide private self-insureds with thirty days in which to make the payment, the Chair sends the invoices or bills for the quarterly assessments on or about February 10th, May 10th, August 10th and November 10th. Before each quarterly bill is sent, the amount needed is redetermined and then apportioned among the private self-insureds.

In response to the bills for the first quarter assessments 13 of the 58 group self-insurers refused to pay and commenced an Article 78 action seeking to annul the Chair's imposition of the assessments on them as invalid based upon a number of theories, chief amongst them was that the term ''private self-insured employer'' did not encompass a group self-insurer. (See, *Held, et. al. v. Workers' Compensation Board, et.al.,* Albany County Supreme Court, Index No.2957-08, July 7, 2008) While the petitioners did pay the portion of the assessment related to the administrative cost of the self-insurance office, they also refused to pay the portion of the second quarter assessment to cover the obligations of the insolvent and defaulted groups.

By decision issued May 2, 2008, the court granted the petitioners' request in *Held, et. al.* for a stay of the enforcement of the 2008 assessments. Three trusts were allowed to intervene in the action but they did not obtain the relief of the stay. Instead, like many other private group self-insurers, the intervening groups paid their assessments ''under protest.'' In a Decision/Order/Judgment dated July 7, 2008, Judge O'Connor determined that the Chair's application of the provisions of WCL § 50(5)(f) [now renumbered as WCL § 50(5)(g) and amended] on all private group self-insurers was appropriate and proper, but annulled the assessments because the Chair did not meet the conditions precedent to levying the assessments. The court held that the Chair failed to establish that any of the private group self-insurers were actually insolvent as required by WCL § 50(5)(g) before issuing the assessments. Specifically, Judge O'Connor held that the statements of the Board's Director of Licensing were insufficient to establish the insolvency of the private group self-insurers. The Director of Licensing stated in her affidavit that the Board was currently funding the compensation benefit payments of six of the nine private group self insurers that had defaulted, that assessments had been levied to fund the payments for all nine defaulted private group self-insurers, and based upon the cash flow statements of the other three private group self-insurers, the Board would begin funding their compensation benefit payments before the end of the fiscal year. *Held, et. al.* at p.18.

This rule sets forth the definition of insolvent for purposes of meeting the condition precedent to issue assessments pursuant to WCL § 50(5)(g). The definition of insolvent in the rule makes clear the information the Chair must have and how he must make the determination that a private group self-insurer is insolvent. Such specificity requires a reasoned decision based upon the facts that a private group self-insurer is insolvent. Without this definition, any determination of insolvency by the Chair will not meet the standards required by statute as set forth in the July 7, 2008, *Held et.al.* decision. The rule also addresses the court's finding that insolvency must not be prospective or speculative but real and actual before imposing the assessment. In accordance with this finding the definition of insolvent provides that assets plus the security deposit must be less than the total of the private self-insurer's workers' compensation liabilities that will accrue within the next six months. Further, when stating when the Chair will levy an assessment, the rule requires the security deposit to be less than the total cost of the next six months of liabilities. It is not feasible to use a shorter period as the assessments are made on a quarterly basis, which must include time to perform the calculations and to collect the payments.

This rule provides a framework for making a determination of insolvency in light of the Court's decision in *Held et.al.*, so that the Chair may determine the appropriate assessments in light of that decision.

4. Costs: The imposition of the assessments to cover the claims of the insolvent and defaulted private group self-insurers is required by statute. See, *Held et.al.* at p.18. This rule codifies when a group trust is insolvent, the condition precedent in WCL § 50(5)(g) before the Chair is authorized levy an assessment. The amendments to § 317.20 codify the definition used since 2006 of the term ''insolvent'' for the purposes of issuing assessments on private self-insurers. The information that would be requested by the Chair to determine if a group is insolvent is either already required to be maintained by the private group self-insurer, or would be maintained in the ordinary course of business, so the only cost to the private self-insurer is the cost of furnishing the information to the Chair. Therefore, any costs would be minimal.

The third quarter assessment bills will be sent on or about August 10, 2008. The amount billed is based on the quarterly determination of what is needed for the rest of the year and will be less than the estimated need reflected in the first two quarterly bills. The reduced assessment is due in part to ensuring the insolvency is real and not speculative. The Chair will apportion what is needed among the private self-insureds and bill over the remaining two quarters, crediting the private self-insureds for payments made in the first and second quarters. As private self-insureds, private group self-insured trusts will receive a third quarter bill for an assessment to cover the claims of defaulted groups. Upon receiving the bill the private group self-insureds will determine how to pay the assessment and if it needs to be immediately apportioned among the member employers. Some of the members of the group self-insured trusts are small businesses, who may incur this cost. The exact cost to members is unknown and will vary by group self-insured trust, as some groups will receive very small bills. The Board needs the funds from this assessment to pay the claims of the defaulted groups.

There is no cost to the Board in implementing this rule as it already engages in these activities.

5. Local Government Mandates: There are no local government mandates in this rule as it only applies to private self-insurers.

6. Paperwork: The Board's procedures for making the determinations involve the examination of financial information that private group self-insurers are already required to submit under existing regulations. There are no new paperwork requirements. The information requested by the Chair is either already required to be maintained by the private group self-insurer, or would be maintained in the ordinary course of business.

7. Duplication: This rule does not duplicate any other New York State or Federal rule.

8. Alternatives: One alternative would be to take no action. However, in light of the need to clarify the Chair's determination of insolvency, so as to allow him to levy an assessment to ensure the payment of claims covered by the defaulted insolvent private group self-insurers, this was not a viable option. To determine the definition of insolvent to adopt by regulation, the Board reviewed the existing policy for making such determinations, the definition of insolvency used by Certified Public Accountants, the New York State Department of Taxation and Finance, Debtor Creditor Law and Insurance Law. Except for the definition in Insurance Law § 1309(a) and the Board's existing policy, the definitions were too imprecise and speculative in light of the decision in *Held et. al*. Therefore, the decision was made to use the Board's policy and modify it to account for six months of liabilities instead of twelve months of liabilities.

9. Federal Standards: There are no federal standards that apply to these assessments.

10. Compliance Schedule: Private group self-insurers will be able to comply immediately.

Regulatory Flexibility Analysis

1. Effect of rule: This rule codifies in regulation the definition of insolvent and policy regarding determining an assessment is necessary to pay claims covered by private group self-insured trusts. This rule only affects private self-insurers, both individual and group and does not affect insurance carriers, the State Insurance Fund or self-insured local governments. Private individual self-insurers are not small businesses because in order to be authorized to individually self-insure, an employer must have the financial ability to pay all claims and deposit with the Chair security worth 100% of its claims. Private group self-insurers contain small employers. There are approximately 58 trusts with a total of approximately 20000 active and inactive members.

2. Compliance requirements: These paragraphs do not impose any new reporting, recordkeeping or other affirmative act upon any private self-insurer. Workers' Compensation Law § 50(5)(g) sets forth a temporary funding mechanism for payment of the claims and their related expenses of insolvent defaulted private self-insurers, by way of an assessment on all private self-insurers. The recent court decision in *Held, et. al. v. Workers' Compensation Board, et.al.*, Albany County Supreme Court, Index

No.2957-08, July 7, 2008, has questioned the Chair's determination of when a private group self-insured employer was insolvent and an assessment necessary. The Chair's procedures for making the determination involve the examination of financial information that group self-insurers are already required to submit pursuant to Part 317 of Title 12.

3. Professional services: Private self-insurers do not need any professional services in order to comply with the proposed regulation. The paragraphs merely set forth the Chair's procedures for making determinations of insolvency. Only the Chair needs to actually make the calculations. The amendments do not require the private self-insurers to submit any additional information they are not otherwise already required to submit.

4. Compliance costs: This rule imposes only minimal costs on private self-insurers. The amendments to § 317.20 define the term ''insolvent'' which is used in Workers' Compensation Law § 50(5) (g) for the purposes of issuing assessments on private self-insurers. This definition is not new but rather is a codification of existing policy modified to consider only the next six months of liabilities rather than the next twelve months. This rule only affects private self-insurers, both individual and group and has no affect on insurance carriers, the State Insurance Fund or self-insured local governments. The information that would be requested by the Chair is either already required to be maintained by the private group self-insurer, or would be maintained in the ordinary course of business, so all that would be required is transmitting the information to the Chair. Any cost for such compliance would be minimal.

The third quarter assessment bills will be sent on or about August 10, 2008. The amount billed is based on the quarterly determination of what is needed for the rest of the year and will be less than the estimated need reflected in the first two quarterly bills. The reduced assessment is due in part to ensuring the insolvency is real and not speculative. The Chair will apportion what is needed among the private self-insureds and bill over the remaining two quarters, crediting the private self-insureds for payments made in the first and second quarters. As private self-insureds, private group self-insured trusts will receive a third quarter bill for an assessment to cover the claims of defaulted groups. Upon receiving the bill the private group self-insureds will determine how to pay the assessment and if it needs to be immediately apportioned among the member employers. Some of the members of the group self-insured trusts are small businesses, who may incur this cost. The exact cost to members is unknown and will vary by group self-insured trust, as some groups will receive very small bills. The Board needs the funds from this assessment to pay the claims of the defaulted groups.

5. Economic and technological feasibility: Private group self-insurers can easily comply with this rule. As stated above, the rule merely sets forth the Chair's procedures for determining of insolvency. Only the Chair needs to actually make the calculations. The rule does not require the private self-insurers to submit any additional information they are not otherwise already required to submit.

6. Minimizing adverse impact: As stated above, this rule only affects private self-insurers. It does not impact insurance carriers or SIF, so small businesses and local governments insured by them are not affected. It also does not affect any self-insured local government as they are largely exempted from the provisions of Part 317 and are not subject to the WCL § 50(5)(g) assessments. The proposed rule does not require any action on the part of private self-insurers. It merely defines the term ''insolvent'' as that term is used in Workers' Compensation Law § 50(5)(g) for the purposes of issuing assessments on private self-insurers. This definition is not new but rather is a codification of existing Board policy. This rule is intended to clarify this term in light of a recent court decision.

7. Small business and local government participation: The rule only affects private self-insurers, both individual and groups. Private individual self-insureds are not small businesses or local governments so their participation is irrelevant. Local governments who are self-insured as municipalities are not subject to assessments pursuant to WCL § 50(5) (g), therefore their participation is not relevant. The only small businesses affected by this rule are those who are members of private group self-insured trusts or administer private group self-insured trusts. The rule codifies the existing policy regarding the definition of ''insolvent'' with a modification to limit consideration to six months of liabilities rather than twelve months. This policy has been used since the first private group self-insured trust was determined to be insolvent in 1996. Until recently, the Chair's definition of insolvent has not been challenged. While some of the group self-insurers and some of their members have recently challenged the Board's definition of insolvency, these challenges were made in the context of the Chair's authority to levy assessments in general and such authority has been specifically upheld by the court.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas: This rule define the term ''insolvent'' as that term is used in Workers' Compensation Law § 50(5)(g) for the purposes of issuing assessments on private self-insurers. This definition is not new but rather codifies existing policy. This rule only affects private self-insurers, both individual and group. It has no affect on insurance carriers, the State Insurance Fund or self-insured local governments. Private individual self-insurers and members of private group self-insurers are located in all areas of the State, including all rural areas. There are approximately 150 private individual self-insured employers and 58 private group self-insured trusts with approximately twenty thousand active and inactive members.

2. Reporting, recordkeeping and other compliance requirements; and professional services: This rule does not impose any new reporting, recordkeeping or other affirmative act upon any private self-insurer in rural areas. Workers' Compensation Law § 50(50(g) sets forth a temporary funding mechanism for payment of the claims and their related expenses of insolvent defaulted private self-insurers, by way of assessments on all private self-insurers. A recent court decision in *Held et. al. v. Workers' Compensation Board, et. al.*, Albany County Supreme Court, Index No. 2957-08, July 7, 2008, has questioned the Chair's determination of when a private group self-insured employer was insolvent and an assessment necessary. The Chair's procedures for making the determination involve the examination of financial information that group self-insurers are already required to submit pursuant to Part 317 of Title 12.

Private individual self-insurers in rural areas or members of private group self-insured trusts who are located in rural areas do not need any professional services in order to comply with the proposed regulation. The rule merely sets forth the Chair's procedures for making determinations of insolvency. Only the Chair needs to actually make the calculations. The rule does not require the private self-insurers to submit any additional information beyond what they currently are required to submit.

3. Costs: This rule imposes only minimal new costs on private self-insurers. The amendments to § 317.20 define the term ''insolvent'' which is used in Workers' Compensation Law § 50(5) (g) for the purposes of issuing assessments on private self-insurers. This rule only affects private self-insurers, both individual and group and does not affect on insurance carriers, the State Insurance Fund or self-insured local governments. The information that would be requested by the Chair is either already required to be maintained by the private group self-insurer, or would be maintained in the ordinary course of business, and all that would be required of the private self-insurer would be to furnish the information to the Chair. Any cost for such compliance by entities in rural areas would be minimal.

The third quarter assessment bills will be sent on or about August 10, 2008. The amount billed is based on the quarterly determination of what is needed for the rest of the year and will be less than the estimated need reflected in the first two quarterly bills. The reduced assessment is due in part to ensuring the insolvency is real and not speculative. The Chair will apportion what is needed among the private self-insureds and bill over the remaining two quarters, crediting the private self-insureds for payments made in the first and second quarters. As private self-insureds, private group self-insured trusts will receive a third quarter bill for an assessment to cover the claims of defaulted groups. Upon receiving the bill the private group self-insureds will determine how to pay the assessment and if it needs to be immediately apportioned among the member employers. Some of the members of the group self-insured trusts are small businesses, who may incur this cost. The exact cost to members is unknown and will vary by group self-insured trust, as some groups will receive very small bills. The Board needs the funds from this assessment to pay the claims of the defaulted groups.

4. Minimizing adverse impact: As stated above, this rule only affects private self-insurers. It does not impact insurance carriers or SIF, so businesses in rural areas insured by them are not affected. It also does not affect any self-insured local government as they are largely exempted from the provisions of this Part and are not subject to the WCL § 50(5)(g) assessments. The proposed rule does not require any action on the part of rurally located private self-insurers. It merely defines the term ''insolvent'' as that term is used in Workers' Compensation Law § 50(5)(g) for the purposes of issuing assessments on private self-insurers. This definition is not new but rather is a codification of existing policy modified to consider only the next six months of liabilities rather than the next twelve months. This rule is intended to clarify this term in light of the recent decision in *Held et. al*.

5. Rural area participation: This rule affects all private self-insurers, both individuals and groups, who are located all across New York, including rural areas. It codifies the existing policy regarding the definition of ''insolvent'' with a modification to limit consideration to six months of liabilities rather than twelve months. This policy has been used since the first private group self-insured trust was determined to be insolvent in 1996. Until recently, the Chair's definition of insolvent has not been challenged. While some of the group self-insurers and some of their members have recently challenged the Board's definition of insolvency, these challenges were made in the context of the Chair's authority to levy assessments in general and such authority has been specifically upheld by the court. The individual self-insurers, including those located in rural ar-

eas, have not and do not challenge how the Chair has made these determinations.

Job Impact Statement

The proposed amendment will not have an adverse impact on jobs. This amendment defines the term "insolvent" as that term is used in Workers' Compensation Law § 50(5)(g) for the purposes of issuing assessments on private self-insurers. Further this rule merely codifies existing policy and definition into regulation.