

RULE MAKING ACTIVITIES

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

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

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

Department of Agriculture and Markets

EMERGENCY RULE MAKING

Firewood (All Hardwood Species), Nursery Stock, Logs, Green Lumber, Stumps, Roots, Branches and Debris

I.D. No. AAM-48-09-00007-E

Filing No. 1288

Filing Date: 2009-11-17

Effective Date: 2009-11-17

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

Action taken: Amendment of Part 139 of Title 1 NYCRR.

Statutory authority: Agriculture and Markets Law, sections 18, 164 and 167

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

Specific reasons underlying the finding of necessity: The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States, was first detected in the Greenpoint section of Brooklyn, New York in August of 1996. Subsequent survey activities detected infestations of this pest in other areas of Brooklyn as well as in and about Amityville, Queens, Manhattan and Staten Island. As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2. Subsequent observations of the beetle have resulted in a need to extend the existing quarantine area on Staten Island. This rule contains the needed

modification. This rule also amends 1 NYCRR section 139.3(b)(1) to add katsura (*Cercidiphyllum japonicum*) to the list of regulated host materials subject to regulation under the quarantine, since katsura has been found by the United States Department of Agriculture (USDA) to be subject to infestation by the Asian Long Horned Beetle.

The Asian Long Horned Beetle (ALB) is a destructive wood-boring insect native to China, Japan, Korea and the Isle of Hainan. It can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. The adult Asian Long Horned Beetle has a large body (1 to 1.5 inches in length) with very long antenna (1.3-2.5 times their body length). Its body is black with white spots and its antenna are black and white. Adult beetles emerge during the spring and summer months from large (1/2 inch in diameter) round holes anywhere on infested trees, including branches, trunks and exposed roots. They fly for two or three days, during which they feed and mate. To lay eggs, adult females chew depressions in the bark of host trees to lay eggs. One female can lay 35 to 90 eggs. The larvae bore into and feed on the interior of the trees, where they over-winter. The accumulation of coarse sawdust around the base of the infested tree where branches meet the main stem and where branches meet other branches, is evidence of the presence of the borer. One generation is produced each year. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: Acer (Maple); Aesculus (Horse Chestnut), Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); Ulmus (Elm); Celtis (Hackberry), Fraxinus (Ash), *Cercidiphyllum japonicum* (Katsura); Platanus (Plane tree, Sycamore); and Sorbus (Mountain Ash).

Since the Asian Long Horned Beetle is not considered established in the United States, the risk of moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to the hardwood forests and street, yard, park and fruit trees of the State. Approximately 858 million susceptible trees above 5 inches in diameter involving 62 percent (18.6 million acres) of the State's forested land are at risk.

Control of the Asian Long Horned Beetle is accomplished by the removal of infested host trees and materials and then chipping or burning them. More than 18,000 infested trees have been removed to date. Chemical treatments are also used to suppress ALB populations with approximately 480,000 treatments administered. However, the size of the area infested and declining fiscal resources cannot mitigate the risk from the movement of regulated articles outside of the area under quarantine. As a result, the quarantine imposed by this rule has been determined to be the most effective means of preventing the spread of the Asian Long Horned Beetle. It will help to ensure that as control measures are undertaken in the areas the Asian Long Horned Beetle currently infests, it does not spread beyond those areas via the movement of infested trees and materials.

The effective control of the Asian Long Horned Beetle within the limited areas of the State where this insect has been found is also important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

Based on the facts and circumstances set forth above the Depart-

ment has determined that the immediate adoption of this rule is necessary for the preservation of the general welfare and that compliance with subdivision one of section 202 of the State Administrative Procedure Act would be contrary to the public interest. The specific reason for this finding is that the failure to immediately modify the quarantine area and restrict the movement of trees and materials from the areas of the State infested with Asian Long Horned Beetle could result in the spread of the pest beyond those areas and damage to the natural resources of the State and could result in a federal quarantine and quarantines by other states and foreign countries affecting the entire State. This would cause economic hardship to the nursery and forest products industries of the State. The consequent loss of business would harm industries which are important to New York State's economy and as such would harm the general welfare. Given the potential for the spread of the Asian Long Horned Beetle beyond the areas currently infested and the detrimental consequences that would have, it appears that the rule modifying the quarantine area should be implemented on an emergency basis and without complying with the requirements of subdivision one of section 202 of the State Administrative Procedure Act, including the minimum periods therein for notice and comment.

Subject: Firewood (all hardwood species), nursery stock, logs, green lumber, stumps, roots, branches and debris.

Purpose: To modify the Asian Long Horned Beetle quarantine to prevent the spread of the beetle to other areas.

Text of emergency rule: Subdivision (d) of section 139.2 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is repealed and a new subdivision (d) is added to read as follows:

(d) That area in the Borough of Richmond in the City of New York bound by a line beginning at a point along the State of New York and the State of New Jersey border due north of the intersection of Richmond Terrace and Morningstar Road; then south to the intersection of Morningstar Road and Richmond Terrace; then southwest along Morningstar Road to its intersection with Forest Avenue; then east along Forest Avenue to its intersection with Willow Road East; then south and then southeast along Willow Road East to its intersection with Victory Boulevard; then west along Victory Boulevard to its intersection with Arlene Street; then south along Arlene Street until it becomes Park Drive North; then south on Park Drive North to its intersection with Rivington Avenue; then east along Rivington Avenue to its intersection with Mulberry Avenue; then south on Mulberry Avenue to its intersection with Travis Avenue; then northwest on Travis Avenue until it crosses Main Creek; then along the west shoreline of Main Creek to Fresh Kills Creek; then along the north shoreline of Fresh Kills Creek to Little Fresh Kills Creek; then along the north shoreline of Little Fresh Kills Creek to the Arthur Kill; then west to the border of the State of New York and the State of New Jersey in the Arthur Kill; then north along the borderline of the State of New York and the State of New Jersey; then east along the borderline of the State of New York and New Jersey excluding Shooters Island to the point of beginning.

Paragraph 1 of subdivision (b) of section 139.3 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York is amended to read as follows:

(1) Firewood (all hardwood species) and all host material living, dead, cut or fallen, inclusive of nursery stock, logs, green lumber, stumps, roots, branches and debris of a half inch or more in diameter of the following genera: Acer (Maple); Aesculus (Horse Chestnut); Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); Ulmus (Elm); Celtis (Hackberry); Fraxinus (Ash); *Cercidiphyllum japonicum* (Katsura); Platanus (Plane Tree, Sycamore) and Sorbus (Mountain Ash) are regulated articles.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire February 14, 2010.

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

Regulatory Impact Statement

1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part,

that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

Section 164 of the Agriculture and Markets Law provides, in part, that the Commissioner shall take such action as he may deem necessary to control or eradicate any injurious insects, noxious weeds, or plant diseases existing within the State.

Section 167 of the Agriculture and Markets Law provides, in part, that the Commissioner is authorized to make, issue, promulgate and enforce such order, by way of quarantines or otherwise, as he may deem necessary or fitting to carry out the purposes of Article 14 of said Law. Section 167 also provides that the Commissioner may adopt and promulgate such rules and regulations to supplement and give full effect to the provisions of Article 14 of the Agriculture and Markets Law as he may deem necessary.

2. Legislative objectives:

The quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the spread within the State of an injurious insect, the Asian Long Horned Beetle.

3. Needs and benefits:

The Asian Long Horned Beetle, *Anoplophora glabripennis*, an insect species non-indigenous to the United States was detected in the Greenpoint section of Brooklyn, New York in August of 1996. Subsequent survey activities delineated other locations in Brooklyn as well as locations in and about Amityville, Queens, Manhattan and Staten Island.

As a result, 1 NYCRR Part 139 was adopted, establishing a quarantine of the areas in which the Asian Long Horned Beetle had been observed. The boundaries of those areas are described in 1 NYCRR section 139.2. Subsequent observations of the beetle have resulted in a need to extend by approximately two square miles, the existing quarantine area on Staten Island. The proposed rule contains the needed modifications. This rule also amends 1 NYCRR section 139.3(b)(1) to add katsura (*Cercidiphyllum japonicum*) to the list of regulated host materials subject to regulation under the quarantine. Katsura has been found by the United States Department of Agriculture (USDA) to be subject to infestation by the Asian Long Horned Beetle.

The Asian Long Horned Beetle is a destructive wood-boring insect native to China, Japan, Korea and the Isle of Hainan. It can cause serious damage to healthy trees by boring into their heartwood and eventually killing them. The adult Asian Long Horned Beetle has a large body (1 to 1.5 inches in length) with very long antenna (1.3-2.5 times their body length). Its body is black with white spots and its antenna are black and white. Adult beetles emerge during the spring and summer months from large (1/2 inch in diameter) round holes anywhere on infested trees, including branches, trunks and exposed roots. They fly for two or three days, during which they feed and mate. To lay eggs, adult females chew depressions in the bark of host trees to lay eggs. One female can lay 35 to 90 eggs. The larvae bore into and feed on the interior of the trees, where they over-winter. The accumulation of coarse sawdust around the base of the infested tree where branches meet the main stem and where branches meet other branches, is evidence of the presence of the borer. One generation is produced each year. Nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter are subject to infestation. Host hardwood materials at risk to attack and infestation include species of the following: Acer (Maple); Aesculus (Horse Chestnut), Albizzia (Silk Tree or Mimosa); Betula (Birch); Populus (Poplar); Salix (Willow); Ulmus (Elm); Celtis (Hackberry), Fraxinus (Ash); *Cercidiphyllum japonicum* (Katsura); Platanus (Plane tree, Sycamore) and Sorbus (Mountain Ash).

Since the Asian Long Horned Beetle is not considered established in the United States, the risk of moving infested nursery stock, logs, green lumber, firewood, stumps, roots, branches and debris of a half inch or more in diameter poses a serious threat to the hardwood forests

and street, yard, park and fruit trees of the State. Approximately 858 million susceptible trees above 5 inches in diameter involving 62 percent (18.6 million acres) of the State's forested land are at risk.

Control of the Asian Long Horned Beetle is accomplished by the removal of infested host trees and materials and then chipping or burning them. More than 18,000 infested trees have been removed to date. Chemical treatments are also used to suppress ALB populations with approximately 480,000 treatments administered. However, the size of the area infested and declining fiscal resources cannot mitigate the risk from the movement of regulated articles outside of the area under quarantine. As a result, the extension of the quarantine on Staten Island imposed by this rule has been determined to be the most effective means of preventing the further spread of the Asian Long Horned Beetle. It will help to ensure that as control measures are undertaken in the areas the Asian Long Horned Beetle currently infests, it does not spread beyond those areas via the movement of infested trees and materials.

The effective control of the Asian Long Horned Beetle within the limited areas of the State where this insect has been found is also important to protect New York's nursery and forest products industry. The failure of states to control insect pests within their borders can lead to federal quarantines that affect all areas of those states, rather than just the infested portions. Such a widespread federal quarantine would adversely affect the nursery and forest products industry throughout New York State.

4. Costs:

(a) Costs to the State government: none.

(b) Costs to local government: A wood debris pick-up program, funded entirely by New York City, is already in place. New York City's Department of Parks and Recreation advises that the amendments, including the extension of the quarantine area on Staten Island, will not result in any additional costs to New York City.

(c) Costs to private regulated parties:

Nurseries exporting host material from the quarantine area established by this rule, other than pursuant to compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year with a total annual cost of less than \$1,000.

Most shipments will be made pursuant to compliance agreements for which there is no charge.

Tree removal services will have to chip host material or transport such material under a limited permit to a federal/state disposal site for processing.

Firewood from hardwood species within the quarantine area established by this rule may not move outside that area due to the fact that it is not practical at this time to determine for certification purposes that the material is free from infestations.

The extension of the existing quarantine area on Staten Island would affect eight nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within that area.

(d) Costs to the regulatory agency:

(i) The initial expenses the agency will incur in order to implement and administer the regulation: None

(ii) It is anticipated that the Department will be able to administer the proposed quarantine with existing staff.

5. Local government mandate:

Yard waste, storm clean-up and normal tree maintenance activities involving twigs and/or branches of ½" or more in diameter of host species will require proper handling and disposal, i.e., chipping and/or incineration if such materials are to leave the quarantine area established by this rule. A wood debris pick-up program, funded entirely by New York City, is already in place. New York City's Department of Parks and Recreation advises that the amendments, including the extension of the quarantine area on Staten Island, will not result in any additional costs to New York City. An effort is underway to identify

centralized disposal sites that would accept such waste from cities, villages and other municipalities at no additional cost.

6. Paperwork:

Regulated articles inspected and certified to be free of Asian Long Horned Beetle moving from the quarantine area established by this rule will have to be accompanied by a state or federal phytosanitary certificate and a limited permit or be undertaken pursuant to a compliance agreement.

7. Duplication:

None.

8. Alternatives:

The failure of the State to extend the existing quarantine on Staten Island where the Asian Long Horned Beetle has been observed could result in exterior quarantines by foreign and domestic trading partners as well as a federal quarantine of the entire State. It could also place the State's own natural resources (forest, urban and agricultural) at risk from the spread of Asian Long Horned Beetle that could result from the unrestricted movement of regulated articles from the areas covered by the modified quarantine. In light of these factors there does not appear to be any viable alternative to the modification of quarantine proposed in this rulemaking.

9. Federal standards:

The amendment does not exceed any minimum standards for the same or similar subject areas.

10. Compliance schedule:

It is anticipated that regulated persons would be able to comply with the rule immediately.

Regulatory Flexibility Analysis

1. Effect on small business.

The small businesses affected by extending the existing quarantine area on Staten Island are the nursery dealers, nursery growers, landscaping companies, transfer stations, compost facilities and general contractors located within that area. There are eight such businesses within that area. Since there is already a quarantine area on Staten Island, the City of New York and the borough of Staten Island will remain involved in the proposed extension of this quarantine.

Although it is not anticipated that local governments will be involved in the shipment of regulated articles from the proposed quarantine area, in the event that they do, they would be subject to the same quarantine requirements as other regulated parties.

2. Compliance requirements.

All regulated parties in the new quarantine area on Staten Island established by this amendment will be required to obtain certificates and limited permits in order to ship regulated articles from those areas. In order to facilitate such shipments, regulated parties may enter into compliance agreements.

3. Professional services.

In order to comply with the rule, small businesses and local governments shipping regulated articles from the new quarantine area on Staten Island will require professional inspection services, which would be provided by the Department and the United States Department of Agriculture (USDA).

4. Compliance costs:

(a) Initial capital costs that will be incurred by a regulated business or industry or local government in order to comply with the proposed rule: None.

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

Nurseries exporting host material from the new quarantine area on Staten Island, other than pursuant to a compliance agreement, will require an inspection and the issuance of a federal or state phytosanitary certificate. This service is available at a rate of \$25 per hour. Most such inspections will take one hour or less. It is anticipated that there would be 25 or fewer such inspections each year, with a total cost of less than \$1,000. Most shipments would be made pursuant to compliance agreements for which there is no charge.

Tree removal services will have to chip host material or transport such material under a limited permit to a federal/state disposal site for processing.

Firewood from hardwood species within the new quarantine areas may not move outside those areas due to the fact that it is not practical at this time to determine for certifications purposes that the material is free from infestation.

Although it is not anticipated that local governments will be involved in the shipment of regulated articles from the proposed quarantine area, in the event that they do, they would be subject to the same costs as other regulated parties. A wood debris pick-up program, funded entirely by New York City, is already in place. New York City's Department of Parks and Recreation advises that the amendments, including the extension of the quarantine area on Staten Island, will not result in any additional costs to New York City.

5. Minimizing adverse impact.

The Department has designed the rule to minimize adverse economic impact on small businesses and local governments. This is done by limiting the new quarantine area to only those parts of Staten Island where the Asian Long Horned Beetle has been detected; and by limiting the inspection and permit requirements to only those necessary to detect the presence of the Asian Long Horned Beetle and prevent its movement in host materials from the quarantine area. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the shipment of regulated articles without state or federal inspection. These agreements, for which there is no charge, are another way in which the rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

6. Small business and local government participation.

The Department has had ongoing discussions with representatives of various nurseries, arborists, the forestry industry, and local governments regarding the general needs and benefits of Asian long horned beetle quarantines. The Department has also had extensive consultation with the USDA on the efficacy of such quarantines. Most recently, the Department has had discussions with the City of New York and the borough of Richmond concerning this amendment to extend the existing quarantine on Staten Island. Representatives of the city and borough governments expressed support for the amendment.

7. Assessment of the economic and technological feasibility of compliance with the rule by small businesses and local governments.

The economic and technological feasibility of compliance with the rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Regulated parties shipping host materials from the new quarantine area, other than pursuant to a compliance agreement, will require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, will be made pursuant to compliance agreements for which there is no charge.

Rural Area Flexibility Analysis

The rule will not impose any adverse impact or reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. This finding is based upon the fact that the quarantine areas to which the amendments apply are not situated in "rural areas," as defined in section 481(7) of the Executive Law.

Job Impact Statement

The rule will not have a substantial adverse impact on jobs and employment opportunities. The extension of the existing quarantine area on Staten Island and the addition of katsura as a species susceptible to infestation by the Asian long horned beetle are designed to prevent the spread of the Asian Long Horned Beetle to other parts of the State. A spread of the infestation would have very adverse economic consequences to the nursery, forestry, fruit and maple product industries of the State, both from the destruction of the regulated articles upon which these industries depend, and from the more restrictive quarantines that could be imposed by the federal government, other states and foreign countries. By helping to prevent the spread of the Asian long horned beetle, the rule will help to prevent such adverse economic consequences and in so doing, protect the jobs and employ-

ment opportunities associated with the State's nursery, forestry, fruit and maple product industries.

Forest related activities in New York State provide employment for approximately 70,000 people. Of that number, 55,000 jobs are associated with the wood-based forest economy, including manufacturing. The forest-based economy generates payrolls of more than \$2 billion.

As set forth in the regulatory impact statement, the cost of the rule to regulated parties is relatively small. The responses received during the Department's outreach to regulated parties indicate that the rule will not have a substantial adverse impact on jobs and employment opportunities.

Education Department

EMERGENCY RULE MAKING

Museum Collections Management Policies

I.D. No. EDU-01-09-00004-E

Filing No. 1283

Filing Date: 2009-11-13

Effective Date: 2009-11-14

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

Action taken: Amendment of section 3.27 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 215 (not subdivided), 216 (not subdivided), 217 (not subdivided), 233-aa(1), (2) and (5); and L 2008, ch. 220

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

Specific reasons underlying the finding of necessity: The proposed amendment is necessary to implement Regents policy to protect the public's interest in collections held by chartered museums and historical societies.

Specifically, the proposed amendment clarifies restrictions on the deaccessioning of items and materials in an institution's collections, consistent with generally accepted professional and ethical standards within the museum and historical society communities. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

- (1) the item or material is not relevant to the mission of the institution;
- (2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;
- (3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or
- (4) the institution is unable to conserve the item or material in a responsible manner.

In addition to the existing prohibition against using proceeds from a deaccessioning for operating expenses, the proposed amendment would extend such prohibition to also include the use of such proceeds for the payment of outstanding debt and for the payment of capital expenses other than those incurred to preserve, protect or care for an historic building which has been designated part of its collections. The proposed amendment also removes the option in section 3.27 allowing an institution to designate a structure as a collections item; but keeps intact any such designation made by vote of a board of trustees prior to December 19, 2008. If such designation was made, an institution may use proceeds from deaccessioning for capital expenses, to preserve, protect or care for an historic building designated as part of the institution's collection.

In the current financial downturn, collections held by museums and historical societies could be threatened by inappropriate deaccessioning by sale, disposal or transfer. Currently, some 37 institutions in New York in 2006 reported deficits of \$100,000 or more. The Department is concerned that, in the absence of an express prohibition in Regents rule section 3.27, museums and historical societies in financial distress will deaccession items or materials for purposes of paying their outstanding debt. Consistent with generally accepted professional and ethical standards within the museum and historical society communities, the proposed amendment would expressly prohibit proceeds from deaccessioning from being used for the payment of outstanding debt or capital expenses. The

proposed amendment would also restrict when an institution may deaccession its collections to the instances listed in (1) through (4) above. This specific language was added in response to museums which sought clarity on what constitutes proper and acceptable grounds for deaccessioning.

Emergency action to adopt the proposed amendment is necessary for the preservation of the general welfare in order to protect the public's interest in collections held by a chartered museum or historical society by immediately clarifying the limited circumstances under which an item or material in a collection may be deaccessioned, in order to deter institutions in financial distress in the current fiscal crisis from selling or otherwise disposing of collection items and materials, in a manner inconsistent with accepted museological standards and State law, such as using the proceeds from the deaccessioning for payment of outstanding debt or operating expenses, and to prospectively limit the ability of museums and historical societies to designate a historic building as a collection item, so that institutions in financial distress will not make such designation for the purpose of justifying the sale of other items in their collections in order to pay capital expenses associated with the building.

The proposed amendment was adopted as an emergency rule at the December 2008 Regents meeting, and readopted as an emergency rule at the March, April, June and July 2009 Regents meetings. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on January 7, 2009.

State Education Department staff have worked with the Legislature and with museum constituents to develop revised standards for museum deaccessioning that have been incorporated into recently introduced legislation (A.6959 and S.3078) applicable to all museums. A Notice of Revised Rule Making was published in the State Register on August 29, 2009. Further revisions to the proposed rule are anticipated in response to review and recommendation by Department staff. Pursuant to the State Administrative Procedure Act, a revised rule cannot be permanently adopted until after publication of a Notice of Revised Rule Making and expiration of a 30-day public comment period. Because the Board of Regents meets at fixed intervals, the earliest the proposed revised rule could be presented for permanent adoption, after publication of the Notice and expiration of the 30-day public comment period, would be the December 2009 Regents meeting. However, the emergency rule adopted at the July Regents meeting is only effective for 60 days and will expire on November 13, 2009. If the rule were to lapse, collections held by museums and historical societies could be threatened by inappropriate deaccessioning by sale, disposal or transfer. To avoid the adverse effects of a lapse in the emergency rule, another emergency action is necessary at the October Regents meeting to readopt the rule, effective November 14, 2009.

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

Subject: Museum collections management policies.

Purpose: To clarify restrictions on the deaccessioning of items and materials in collections held by museums and historical societies.

Text of emergency rule: 1. Paragraph (7) of subdivision (a) of section 3.27 of the Rules of the Board of Regents is amended, effective November 14, 2009, to read as follows, provided that such amendment shall expire and be deemed repealed January 12, 2010:

(7) Collection means one or more original tangible objects, artifacts, records or specimens, including art generated by video, computer or similar means of projection and display, that have intrinsic historical, artistic, cultural, scientific, natural history or other value that share like characteristics or a common base of association and are accessioned; for purposes of this section, historic structures owned by an institution shall be considered as part of a collection *only* when so designated by the *board of trustees of the institution by vote conducted on or before December 19, 2008*;

2. Paragraphs (6) and (7) of subdivision (c) of section 3.27 of the Rules of the Board of Regents are amended, effective November 14, 2009, to read as follows, provided that such amendment shall expire and be deemed repealed January 12, 2010:

(6) Collections Care and Management. The institution shall:

(i) own, maintain and/or exhibit original tangible objects, artifacts, records, specimens, buildings, archeological remains, properties, lands and/or other tangible and intrinsically valuable resources that are appropriate to its mission;

(ii) ensure that the acquisition and deaccessioning of its collection is consistent with its corporate purposes and mission statement, *including that deaccessioning of items or material in its collection is limited to the circumstances prescribed in paragraph (7) of this subdivision*;

(iii) have a written collections management policy providing clear standards to guide institutional decisions regarding the collection, that is

in regular use, available to the public upon request, filed with the commissioner for inspection by anyone wishing to examine it; and which, at a minimum, satisfactorily addresses the following subject areas:

(a) acquisition. The criteria and processes used for determining what items are added to the collections;

(b) loans. The criteria and processes used for borrowing items owned by other institutions and individuals, and for lending items from the collections;

(c) preservation. A statement of intent to ensure the adequate care and preservation of collections;

(d) access. A statement indicating intent to allow reasonable access to the collections by persons with legitimate reasons to access them; and

(e) deaccession. The criteria and process (including levels of permission) used for determining what items are to be removed from the collections, *which shall be consistent with paragraph (7) of this subdivision*, and a statement limiting the use of any funds derived therefrom in accordance with subparagraph [(vii)] (vi) of this paragraph;

(iv) ensure that collections or any individual part thereof and the proceeds derived therefrom shall not be used as collateral for a loan;

(v) ensure that collections shall not be capitalized; and

(vi) ensure that proceeds derived from the deaccessioning of any property from the institution's collection be restricted in a separate fund to be used only for the acquisition, preservation, protection or care of collections. In no event shall proceeds derived from the deaccessioning of any property from the collection be used for operating expenses, *for the payment of outstanding debt, or for capital expenses other than such expenses incurred to preserve, protect or care for an historic building which has been designated part of its collections in accordance with paragraph (7) of subdivision (a) of this section*, or for any purposes other than the acquisition, preservation, protection or care of collections.

(7) *Deaccessioning of collections. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:*

(i) *the item or material is not relevant to the mission of the institution;*

(ii) *the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;*

(iii) *the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or*

(iv) *the institution is unable to conserve the item or material in a responsible manner.*

(8) Education and Interpretation. The institution shall offer programmatic accommodation for individuals with disabilities to the extent required by law.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-01-09-00004-EP, Issue of January 7, 2009. The emergency rule will expire January 11, 2010.

Text of rule and any required statements and analyses may be obtained from: Chris Moore, Office of Counsel, State Education Department, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234, (518) 473-4921, email: legal@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 101 continues the existence of the Education Department, with the Board of Regents as its head, and authorizes the Board of Regents to appoint the Commissioner of Education as the Chief Administrative Officer of the Department, which is charged with the general management and supervision of all public schools and the educational work of the State.

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

Education Law section 215 authorizes the Regents, the Commissioner, or their representatives, to visit, examine and inspect education corporations and other institutions admitted to the University of the State of New York, as defined in Education Law section 214, and to require, as often as desired, duly verified reports giving such information and in such form as they shall prescribe.

Education Law section 216 authorizes the Board of Regents to incorporate educational institutions, including museums and other institutions for the promotion of science, literature, art, history or other department of knowledge, with such powers, privileges and duties, and subject to such limitations and restrictions, as they Regents may prescribe.

Education Law section 217 empowers the Board of Regents to grant a

provisional charter to an institution, which shall be replaced by an absolute charter when the conditions for such absolute charter have been fully met.

Education Law section 233-aa, as added by Chapter 220 of the Laws of 2008, enacts provisions governing the ownership and management of properties owned by or lent to museums, requires that the acquisition of property by a museum pursuant to section 233-aa must be consistent with the mission of the museum, and specifies that proceeds derived from the sale of any property title to which was acquired by a museum pursuant to section 233-aa shall be used only for the acquisition of property for the museum's collection or for the preservation, protection, and care of the collection and shall not be used to defray ongoing operating expenses of the museum.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment carries out the intent of the statutes by clarifying criteria regarding the deaccessioning of items and materials in the collections of chartered museums or historical societies, consistent with generally accepted professional and ethical standards within the museum and historical society communities.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Regents policy to protect the public's interest in collections held by chartered museums and historical societies.

Specifically, the proposed amendment clarifies restrictions on the deaccessioning of items and materials in an institution's collections, consistent with generally accepted professional and ethical standards within the museum and historical society communities. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

- (1) the item or material is not relevant to the mission of the institution;
- (2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;
- (3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or
- (4) the institution is unable to conserve the item or material in a responsible manner.

In addition to the existing prohibition against using proceeds from a deaccessioning for operating expenses, the proposed amendment would extend such prohibition to also include the use of such proceeds for the payment of outstanding debt and for the payment of capital expenses other than those incurred to preserve, protect or care for an historic building which has been designated part of its collections.

The proposed amendment also removes the option in section 3.27 allowing an institution to designate a structure as a collections item; but keeps intact any such designation made by vote of a board of trustees prior to December 19, 2008. If such designation was made, an institution may use proceeds from deaccessioning for capital expenses, to preserve, protect or care for an historic building designated as part of the institution's collection.

4. COSTS:

- (a) Costs to the State: None.
- (b) Costs to local governments: None.
- (c) Costs to private, regulated parties: None.
- (d) Costs to regulating agency for implementation and continued administration of this rule: None.

The proposed amendment clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, and does not impose any costs on such institutions, the State, local governments or the State Education Department.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment applies to museums and historical societies with collections chartered by the Board of Regents, and does not impose any program, service, duty or responsibility upon any county, city, town, village, school district, fire district or other special district.

6. PAPERWORK:

The proposed amendment clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, and does not impose any additional paperwork requirements on such institutions.

7. DUPLICATION:

The proposed amendment duplicates no existing state or federal requirements.

8. ALTERNATIVES:

There are no significant alternatives to the proposed amendment and none were considered.

9. FEDERAL STANDARDS:

There are no applicable federal standards regarding the chartering and registration of museums and historical societies by the Board of Regents.

10. COMPLIANCE SCHEDULE:

The proposed amendment clarifies criteria regarding the deaccessioning of items and materials in the collections of chartered museums or historical societies, consistent with generally accepted professional and ethical standards within the museum and historical society communities. It is anticipated that regulated parties can achieve compliance with the proposed amendment by its effective date.

Regulatory Flexibility Analysis

The proposed amendment applies to museums and historical societies authorized to hold collections chartered by the Board of Regents and does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse financial impact, on small businesses or local governments. Because it is evident from the nature of the rules that it does not affect small businesses or local governments, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will apply to all of the 644 museums and 884 historical societies in New York State (source: New York State Museum chartering database as of November 2008), including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 persons per square mile or less.

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

The purpose of the proposed amendment is to protect the public's interest in collections held by chartered museums and historical societies.

Specifically, the proposed amendment clarifies restrictions on the deaccessioning of items and materials in an institution's collections, consistent with generally accepted professional and ethical standards within the museum and historical society communities. An institution may deaccession an item or material in its collection only where one or more of the following criteria have been met:

- (1) the item or material is not relevant to the mission of the institution;
- (2) the item or material has failed to retain its identity, or has been lost or stolen and has not been recovered;
- (3) the item or material duplicates other items or material in the collection of the institution and is not necessary for research or educational purposes; and/or
- (4) the institution is unable to conserve the item or material in a responsible manner.

In addition to the existing prohibition against using proceeds from a deaccessioning for operating expenses, the proposed amendment would extend such prohibition to also include the use of such proceeds for the payment of outstanding debt and for the payment of capital expenses other than those incurred to preserve, protect or care for an historic building which has been designated part of its collections.

The proposed amendment also removes the option in section 3.27 allowing an institution to designate a structure as a collections item; but keeps intact any such designation made by vote of a board of trustees prior to December 19, 2008. If such designation was made, an institution may use proceeds from deaccessioning for capital expenses, to preserve, protect or care for an historic building designated as part of the institution's collection.

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

3. COMPLIANCE COSTS:

The proposed amendment clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, and does not impose any costs on such institutions, the State, local governments or the State Education Department.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendment is necessary to implement Regents policy to protect the public's interest in collections held by chartered museums and historical societies. The proposed amendment clarifies restrictions on when a chartered museum or historical society may deaccession an item or material in its collection and clarifies restrictions on the use of deaccession proceeds, consistent with generally accepted professional and ethical standards within the museum and historical society communities, and does not impose any additional compliance requirements or costs on such institutions. Since these requirements must have State-wide application in order to ensure uniform, consistent practices relating to museum and historical society collections management, it is not feasible to impose a lesser standard on, or otherwise exempt, institutions located in rural areas.

5. RURAL AREA PARTICIPATION:

The State Education Department consulted with the Museum Association of New York in the development of the proposed amendment.

In addition, the Department asked its museum and historical society constituents to comment on the proposed amendment through announcements on web sites, and copies sent to listservs and electronic mailing lists. All areas of the state, including rural areas, received the announcements.

Job Impact Statement

The proposed amendment applies to museums and historical societies with collections, chartered by the Board of Regents and will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature of the proposed amendment that it will have no impact on jobs or employment opportunities, no further measures were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

The agency received no public comment.

Department of Environmental Conservation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Commercial and Recreational Harvest Limits for Winter Flounder

I.D. No. ENV-48-09-00003-EP

Filing No. 1286

Filing Date: 2009-11-13

Effective Date: 2009-11-13

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

Proposed Action: Amendment of Part 40 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 13-0105 and 13-0340-c

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

Specific reasons(s) underlying the finding of necessity: The Department of Environmental Conservation (DEC) proposes to adopt by emergency rule making additional restrictions on the harvest of winter flounder (*Pseudopleuronectes americanus*) in New York waters. This rule making is necessary to protect New York's population of winter flounder. Pursuant to section 3-0301 of the Environmental Conservation Law (ECL), it is DEC's responsibility to provide for the protection and management of New York's marine and coastal resources. The principle mechanism for cooperative interstate management of coastal marine finfish species is the Atlantic States Marine Fisheries Commission's (ASMFC) Interstate Fishery Management Program. This program is designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Inshore stocks of winter flounder have been managed cooperatively under the ASMFC Fishery Management Plan (FMP) for Winter Flounder since 1992. In response to the declining status of winter flounder stocks in recent years, the ASMFC adopted Amendment 1 to the FMP in November of 2005. Under Amendment 1 New York and other states implemented restrictive commercial and recreational management measures that were expected to eliminate overfishing and achieve rebuilt stocks of winter flounder by 2015. However, the most recent assessment of regional stocks of winter flounder, conducted by the National Marine Fisheries Service (NMFS), has shown that the measures adopted under Amendment 1 to the ASMFC Winter Flounder Fishery Management Plan failed to achieve the targeted reductions in fishing mortality and have little chance of rebuilding stocks of winter flounder.

The NMFS stock assessment, conducted as part of the 2008 Groundfish Assessment Review Meeting (GARM III), concluded that Southern New England and Mid-Atlantic (SNE/MA) stocks of winter flounder (including New York's populations) have not recovered and continues to experience high rates of removals. The assessment indicated that as of 2007, the spawning biomass of winter flounder was only 9 percent of the sustainable level. Furthermore, recruitment has been poor, with record low year classes in the last five years, indicating a very low probability of recovery in the near future.

In New York's marine waters, populations of winter flounder are clearly in a significant state of depletion. Historically, the winter flounder has supported one of New York's largest and most valuable inshore marine recreational and commercial fisheries. Despite cooperative interstate efforts to manage this fishery, catch data obtained from the NMFS show that winter flounder landings in New York have collapsed. Combined commercial and recreational landings in 2008 are the lowest on record and are less than 6 percent of those reported in the 1980s.

In response to the continued overharvest and decline of stocks of winter flounder, ASMFC adopted Addendum I to Amendment 1 of the Winter Flounder FMP in May of 2009. Addendum I includes some additional harvest restrictions on inshore recreational and commercial fisheries that are intended to reduce harvest by 50 to 65 percent.

Since spawning biomass will remain at low levels until recruitment improves, it is essential that fishing mortality on spawning adults be immediately reduced to the lowest possible level. Winter flounder spawn in inshore waters from mid-December through March. New York's commercial fyke fishery opened October 1 and the open season for commercial hook and line and otter trawl fisheries, the largest source of fishing mortality during the flounder spawning season, begins December 1. Reducing fishing mortality on the remaining spawning stock biomass of winter flounder requires an immediate adoption of the ASMFC mandated fishery restrictions. Allowing continued harvest at the current rate may result in irreparable harm to the inshore stocks of winter flounder in New York waters.

Subject: The commercial and recreational harvest limits for winter flounder.

Purpose: To reduce the commercial and recreational harvest limits of winter flounder and stay in compliance with ASMFC management plans.

Text of emergency/proposed rule: Existing subdivision 40.1 (f) of 6 NYCRR is amended to read as follows: Species striped bass through bluefish remain the same. Species winter flounder is amended to read as follows:

40.1(f) Table A - Recreational Fishing.

Species	Open Season	Minimum Length	Possession Limit
Winter flounder	[April] April 1-May 30	12'' TL	[10] 2

Species scup (porgy) licensed party/charter boat anglers through prohibited sharks remain the same.

Existing subdivision 40.1 (i) of 6 NYCRR is amended to read as follows: Species striped bass through bluefish remain the same. Species winter flounder is amended to read as follows:

40.1(i) Table B - Commercial Fishing.

Species	Open Season	Minimum Length	Trip Limit
Winter flounder	Pound and trap nets	12'' TL	[no limit] 50 pounds
	July 26 - June 14	12'' TL	[no limit] 50 pounds
	Fyke nets	12'' TL	[no limit] 50 pounds
	Oct. 1 - March 22		
	All other gear		
	Dec 1 - June 13		

Species scup through prohibited sharks remains the same.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire February 10, 2010.

Text of rule and any required statements and analyses may be obtained from: Stephen W. Heins, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, NY 11733, (631) 444-0435, email: swheins@gw.dec.state.ny.us

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

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

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

Regulatory Impact Statement

1. Statutory authority:

Environmental Conservation Law (ECL) sections 11-0303, 13-0105 and 13-0340-c authorize the Department of Environmental Conservation (DEC) to establish by regulation the open season, size limits, catch limits, possession and sale restrictions, and manner of taking for winter flounder.

2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manages marine fisheries in such a way as to protect this natural resource for its intrinsic value to the marine ecosystem and to optimize resource use for

commercial and recreational harvesters. The ECL stipulates that management and use of State fish and wildlife resources must be consistent with marine fisheries conservation and management policies, and Interstate Fishery Management Plans (FMP).

3. Needs and benefits:

New York, as a member State of the Atlantic States Marine Fisheries Commission (ASMFC), must participate in the Interstate Fishery Management Program and comply with the provisions of FMPs adopted by ASMFC pursuant to that program. These FMPs are designed to promote the long-term sustainability of quota managed marine species, preserve the States' marine resources, and protect the interests of both commercial and recreational fishermen. All member states must promulgate any regulations necessary to implement the provisions of the FMPs to remain compliant with the FMPs. If ASMFC determines a state to be non-compliant with a specific FMP, the state may be subject to a complete prohibition on all fishing for the associated species in the waters of the non-compliant state until the state comes into compliance with the FMP.

The stocks of winter flounder in the Southern New England and Mid-Atlantic regions of the Atlantic Ocean have been declining significantly since the late 1990's. In response to this decline in recent years, the ASMFC adopted Amendment 1 to the Winter Flounder FMP in November of 2005. Under Amendment 1 New York and other states implemented restrictive commercial and recreational management measures that were expected to eliminate overfishing and achieve rebuilt stocks of winter flounder by 2015. However, the most recent assessment of regional stocks of winter flounder, conducted by the National Marine Fisheries Service (NMFS), has concluded that Southern New England and Mid-Atlantic (SNE/MA) stocks of winter flounder (including New York's populations) have not recovered and continue to experience high rates of removals. Recruitment has been poor, with record low year classes in the last five years, and the 2007 spawning biomass was only 9 percent of the target level. These findings indicate a very low probability of recovery in the near future under the current management plan. Lastly, winter flounder catch data collected by NMFS show that winter flounder landings in New York have collapsed within the past 10 years.

This fishery has been overfished and overfishing continues to take place. Recognizing the urgency of the depleted state of the winter flounder stock, in May 2009 NMFS prohibited the possession of winter flounder in the Southern New England and Mid-Atlantic regions of the Exclusive Economic Zone. In response to the continued overharvest and decline of stocks of winter flounder, ASMFC adopted Addendum I to the 2005 Amendment 1 of the Winter Flounder FMP in May 2009.

It is essential that fishing mortality on winter flounder be immediately reduced to the lowest possible level. Greatly reducing fishing mortality on the remaining biomass of winter flounder requires immediate adoption of the ASMFC mandated measures. Allowing continued harvest at the current rate will likely result in irreparable harm to the inshore stocks of winter flounder in New York waters. This rule making is needed to provide immediate protection to the remaining stock of winter flounder from overfishing.

4. Costs:

(a) Cost to State government:

There are no new costs to State government resulting from this action.

(b) Cost to local government:

There will be no costs to local governments.

(c) Cost to private regulated parties:

There are no new costs to regulated parties resulting from this action.

Certain regulated parties will likely experience some adverse economic effects. Local party and charter boat businesses and bait and tackle shops will lose many of their customers who target winter flounder during the winter recreational season. Many New York State commercial fishermen rely on harvesting winter flounder for the income it provides and may see a substantial reduction in their earnings.

(d) Costs to the regulating agency for implementation and continued administration of the rule:

The Department of Environmental Conservation will incur limited costs associated with both the implementation and administration of these rules, including the costs relating to notifying commercial and recreational harvesters, party and charter boat operators, and other recreational support industries of the new rules.

5. Local government mandates:

The proposed rule does not impose any mandates on local government.

6. Paperwork:

None.

7. Duplication:

The proposed amendment does not duplicate any state or federal requirement.

8. Alternatives:

1. No Action Alternative - The Southern New England/Mid-Atlantic (SNE/MA) winter flounder stock (New York stock is included in the

SNE/MA stock) is at 9 percent of the target biomass and is considered overfished, with overfishing occurring. Atlantic States Marine Fisheries Commission has recognized the severity of the stock's condition and has made recommendations to reduce fishing mortality. The No Action alternative implies that New York would take no steps to comply with ASMFC's recommendation of the provisions of Addendum I of Amendment 1 to the FMP. This may result in a finding of non-compliance by the National Marine Fisheries Service (NMFS) and the imposition of a total closure of fishing for winter flounder in New York State waters until the state comes into compliance with the FMP.

2. Complete ban on possession of winter flounder - Stock projections by the 2008 Groundfish Assessment Review Meeting indicate that the ASMFC mandated harvest reductions have less than a 1 percent chance of rebuilding stocks of winter flounder by 2015 and therefore may be insufficient to reduce fishing mortality to the level at which stocks would be expected to rebuild in a reasonable amount of time. A recreational and commercial harvest moratorium has a better chance at achieving the rebuilding target, though likely not in time for 2015. This alternative was rejected after it was determined that no other state subject to the FMP is willing to adopt a complete fishery closure. Connecticut was strongly considering it after consultation with New York, but chose instead to move forward with the ASMFC mandate. In addition, New York is facing severe restrictions in its scup and black sea bass fisheries for 2010, and a potential moratorium on weakfish harvest as well. A winter flounder moratorium in addition to these restrictions may result in significant economic loss for businesses dependent upon commercial or recreational fisheries for these species.

9. Federal standards:

The amendments to Part 40 are in compliance with the ASMFC and Regional Fishery Management Council FMPs.

10. Compliance schedule:

Regulated parties will be notified by mail, through appropriate news releases and via DEC's website of the changes to the regulations. The emergency regulations will take effect upon filing with the Department of State.

Regulatory Flexibility Analysis

1. Effect of rule:

The Department of Environmental Conservation (DEC) has proposed a rule that will severely restrict the possession and landing of winter flounder by commercial and recreational fishermen in New York. This action is necessary to protect this critical species from further depletion by drastically reducing fishing mortality. Winter flounder stocks have declined significantly since the late 1990's. The Atlantic State Marine Fisheries Commission (ASMFC) recognized the depleted status of the winter flounder stock and adopted Amendment 1 to the Winter Flounder Fishery Management Plan (FMP) in 2005 which introduced restrictive management measures to eliminate overfishing. In 2009, ASMFC adopted Addendum I to Amendment 1 of the FMP and further reduced the commercial harvest for winter flounder to a 50 pound possession limit for non-federally permitted commercial fishermen and the recreational harvest to two fish per angler.

Those most affected by the proposed rule are commercial and recreational fishermen, licensed party and charter businesses, and retail and wholesale marine bait and tackle shops operating in New York State (NYS). Local party and charter boat businesses and bait and tackle shops will lose many customers who target winter flounder during the spring recreational season. This represents a significant portion of some party and charter boat businesses during the spring. Many NYS commercial fishermen rely on harvesting winter flounder harvest for the income it provides and may see a reduction in their earnings once the regulations are in place. There are no local governments involved in the recreational fish harvesting business, nor do any participate in the sale of marine bait fish or tackle. Therefore, no local governments are affected by these proposed regulations.

2. Compliance requirements:

None.

3. Professional services:

None.

4. Compliance costs:

There are no initial capital costs that will be incurred by a regulated business or industry to comply with the proposed rule.

5. Economic and technological feasibility:

The proposed regulations do not require any expenditure on the part of affected businesses in order to comply with the changes. The changes required by the proposed regulations may reduce the income of commercial fishermen, party and charter businesses and marine bait and tackle shops. Restrictions on the harvest of winter flounder may reduce the income of any fishermen who depend on winter flounder landings as part of their earnings. Recreational anglers who target winter flounder may no longer seek party and charter boat trips for winter flounder and may no

longer frequent bait or tackle shops to buy bait and tackle for winter flounder fishing.

There is no additional technology required for small businesses, and this action does not apply to local governments; there are no economic or technological impacts for either.

6. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for DEC to maintain compliance with the FMP for winter flounder and to protect the depleted winter flounder stock from overfishing. Since these amendments are consistent with Federal and Interstate FMPs, DEC anticipates that New York will remain in compliance with the FMPs.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive affect on employment for the fisheries in question, including commercial fishermen, party and charter boat fisheries and bait and tackle shops and other support industries for recreational fisheries. Failure to comply with FMPs and take required actions to protect our natural resources could cause the catastrophic collapse of a stock and have a severe adverse impact on the commercial and recreational fishing industries dependent on that species, as well as on the supporting industries for those fisheries. For winter flounder, this positive effect of proper management may not be seen for several years, not until the stock recovers from overfishing and is considered rebuilt.

7. Small business and local government participation:

The Department of Environmental Conservation reviewed two options for reducing fishing mortality on winter flounder with the Marine Resources Advisory Council: a total moratorium on harvest; and the recommendations of ASMFC. Marine Resources Advisory Council voted to accept the ASMFC recommendation instead of the total moratorium out of the concern that a total moratorium would cause financial hardships for the party and charter industry and commercial fishermen.

There was no special effort to contact local governments because the proposed rule does not affect them.

Rural Area Flexibility Analysis

The Department of Environmental Conservation has determined that this rule will not impose an adverse impact on rural areas. There are no rural areas within the marine and coastal district. The winter flounder commercial and recreational fisheries directly affected by the proposed rule are entirely located within the marine and coastal district, and are not located adjacent to any rural areas of the state. Further, the proposed rule does not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. Since no rural areas will be affected by the proposed amendments of 6 NYCRR Part 40, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

1. Nature of impact:

The promulgation of this regulation is necessary for the Department of Environmental Conservation (DEC) to maintain compliance with the Fishery Management Plan (FMP) for Winter Flounder and to eliminate overfishing of the winter flounder stock. The proposed rule severely restricts the possession of winter flounder by commercial and recreational fishermen in New York State (NYS) waters. Commercial fishermen, licensed party and charter boat businesses, and bait and tackle shops will be affected by these regulations. Recreational anglers who target winter flounder may no longer seek party and charter boat trips for winter flounder and may no longer frequent bait or tackle shops to buy bait and tackle for winter flounder fishing. This represents a significant portion of some party and charter boat businesses during the spring. Many NYS commercial fishermen rely on harvesting winter flounder for the income it provides and will likely see a reduction in their earnings once restrictions are in place.

2. Categories and numbers affected:

In 2008, there were 1,074 licensed commercial fishermen landing in New York and 558 licensed party and charter businesses in NYS. There were also a number of retail and wholesale marine bait and tackle shop businesses operating in New York; however, DEC does not have a record of the actual number. The number of recreational anglers in New York who could be affected by this rule making is unknown by DEC at this time, but the National Marine Fisheries Service has estimated that there were just over 1 million recreational anglers in New York in 2007. However, this Job Impact Statement does not include recreational anglers in this analysis, since fishing is recreational for them and not related to employment.

3. Regions of adverse impact:

The regions most likely to receive any adverse impact are within the marine and coastal district of the State of New York. This area included all the waters of the Atlantic Ocean within three nautical miles from the coast line and all other tidal waters within the State, including Long Island Sound and the Hudson River up to the Tappan Zee Bridge. The Hudson River is not a usual habitat of winter flounder.

4. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for DEC to maintain compliance with the FMP for winter flounder and to protect the depleted winter flounder stock from overfishing. Since these amendments are consistent with Federal and Interstate FMPs, DEC anticipates that New York will remain in compliance with the FMPs.

In the long-term, the maintenance of sustainable fisheries will have a positive effect on employment for commercial fishermen, party and charter boat fisheries and bait and tackle shops. Failure to comply with FMPs and take required actions to protect our natural resources could cause the catastrophic collapse of a stock and have a severe adverse impact on the commercial and recreational fishing industries dependent on that species. Any short-term losses in harvest, sales and angler participation will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. For winter flounder, the positive effect of this regulatory action may not be seen for several years, not until the stock recovers from overfishing and is considered rebuilt. Protection of the winter flounder resources is essential to the long-term benefit of commercial fishermen, the party and charter boat industry, and bait and tackle shops. These regulations are designed to protect the winter flounder stock from overfishing, allow the stock to rebuild and achieve long-term sustainability of the fishery for future use.

NOTICE OF ADOPTION

Pesticide Applicator Certification and Direct Supervision Requirements

I.D. No. ENV-32-09-00002-A

Filing No. 1292

Filing Date: 2009-11-17

Effective Date: 2009-12-02

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

Action taken: Amendment of section 325.7 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, arts. 15, 33 and 71

Subject: Pesticide applicator certification and direct supervision requirements.

Purpose: To exempt persons authorized to apply 100 percent corn oil to bird eggs from pesticide applicator certification requirements.

Text or summary was published in the August 12, 2009 issue of the Register, I.D. No. ENV-32-09-00002-P.

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

Text of rule and any required statements and analyses may be obtained from: Bryan L. Swift, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8866, email: blswift@gw.dec.state.ny.us

Assessment of Public Comment

The department received one comment expressing strong support for the proposal, and a response is not required.

NOTICE OF ADOPTION

Migratory Game Bird Hunting Regulations for the 2009-2010 Season

I.D. No. ENV-38-09-00004-A

Filing No. 1293

Filing Date: 2009-11-17

Effective Date: 2009-12-02

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

Action taken: Amendment of section 2.30 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 11-0303, 11-0307, 11-0903, 11-0905, 11-0909 and 11-0917

Subject: Migratory game bird hunting regulations for the 2009-2010 season.

Purpose: To change migratory game bird hunting regulations to conform to Federal regulations.

Text or summary was published in the September 23, 2009 issue of the Register, I.D. No. ENV-38-09-00004-EP.

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

Text of rule and any required statements and analyses may be obtained from: Bryan L. Swift, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-4754, (518) 402-8885, email: wfseason@gw.dec.state.ny.us

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

Assessment of Public Comment

The agency received no public comment.

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

Operation of Mechanically Propelled Vessels and Aircraft in the Forest Preserve

I.D. No. ENV-48-09-00005-P

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

Proposed Action: Amendment of section 196.4 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101(3)(b), (d), 3-0301(1)(b), (d), (2)(m), (v), 9-0105(1); Executive Law, section 816(3) and art. 14, section 1

Subject: Operation of mechanically propelled vessels and aircraft in the forest preserve.

Purpose: To authorize an interim permit system that sets limits on the time and frequency of flights to Lows Lake until December 31, 2011.

Text of proposed rule: Subdivision (d) of Section 196.4 of 6 NYCRR is amended to read as follows:

(d) *Lows Lake*

(1) It is unlawful for any person to possess or operate mechanically propelled vessels on Lows Lake, located in the Town of Long Lake, Hamilton County and the Towns of Clifton and Colton, St. Lawrence County, including those expanses of water connected to the main body of Lows Lake, commonly known as Grass Pond, located in the Town of Clifton in St. Lawrence County, and Tomar Pond, located in the Town of Long Lake, Hamilton County. Nothing herein shall prohibit littoral landowners on Lows Lake, or guests of such littoral landowners, from possessing or operating a mechanically propelled vessel on such water bodies.

(2) It is unlawful for any operator of a commercial float plane to land on or takeoff from Lows Lake except by permit from the Department as provided in paragraphs (4) and (5).

(3) Definitions. As used herein, the terms set forth below shall have the following meanings:

(i) "operator of a commercial float plane" shall mean a person engaged in the business of operating a float plane for private revenue, including any person operating a float plane as an employee or contractor of such business.

(ii) "flight" shall mean a single occasion of landing and taking off.

(iii) "flying season" shall mean May 1 through November 30.

(iv) "permit" shall mean a Temporary Revocable Permit issued by the Department pursuant to Article 9 of the Environmental Conservation Law.

(4) Permits.

(i) Commercial float plane operators can obtain an application for a permit to fly into Lows Lake by contacting the person listed below:

Regional Forester

New York State Department of Environmental Conservation

Region 6

317 Washington Street, Watertown, NY 13601

(315) 785-2610.

(ii) Permit applications shall be submitted to the contact person listed above at least thirty (30) days prior to commencement of the flying season.

(iii) Permits issued by the Department pursuant to this subdivision shall be effective for a single flying season and shall expire at the conclusion of that flying season.

(5) Permit conditions. Each permit issued by the Department shall be subject to the following conditions:

(i) The maximum number of flights by all commercial float plane operators combined into Lows Lake shall not exceed one hundred sixty-five (165) flights in any single flying season.

(ii) The maximum number of flights by all commercial float plane operators combined into Lows Lake shall not exceed thirty-five (35) flights in any single calendar month.

(iii) It is unlawful for any commercial float plane operator to store canoes or other equipment on Forest Preserve lands at Lows Lake.

(iv) Within thirty (30) days after the conclusion of the flying season, each commercial float plane operator possessing a permit for access to Lows Lake shall provide the Department with copies of flight records for all flights to Lows Lake for that season by delivering or mailing such records to:

Regional Forester

New York State Department of Environmental Conservation

Region 6

317 Washington Street, Watertown, NY 13601

(315) 785-2610

(6) This subdivision (d) shall expire on December 31, 2011.

A new subdivision (e) of 6 NYCRR Section 196.4 is added to read as follows:

(e) It is unlawful for any person to possess or operate mechanically propelled vessels or aircraft on Lows Lake, located in the Town of Long Lake, Hamilton County and the Towns of Clifton and Colton, St. Lawrence County, including those expanses of water connected to the main body of Lows Lake, commonly known as Grass Pond, located in the Town of Clifton, St. Lawrence County, and Tomar Pond, located in the Town of Long Lake, Hamilton County. Nothing herein shall prohibit littoral landowners on Lows Lake, or guests of such littoral landowners, from possessing or operating a mechanically propelled vessel or aircraft on such water bodies. This subdivision shall become effective on January 1, 2012.

Text of proposed rule and any required statements and analyses may be obtained from: Peter J. Frank, Bureau of Forest Preserve Management, NYS DEC, 625 Broadway, Albany, NY 12233-4254, (518) 473-9518, email: lfadk@gw.dec.state.ny.us

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

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

Additional matter required by statute: This regulatory action is part of the Bog River Final Supplemental EIS which is in compliance with article 8 of the ECL.

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

Regulatory Impact Statement

1. Statutory Authority

The Environmental Conservation Law (ECL) provides statutory authority for guaranteeing beneficial use of the environment without risk to health and safety (ECL Section 1-0101(3)(b)), preserving the unique qualities of the Adirondack Forest Preserve (ECL Section 1-0101(3)(d)), promoting and coordinating management of land resources to assure their protection (ECL Section 3-0301(1)(b)), adopting rules and regulations (ECL Section 3-0301(2)(m)), providing for the care, custody, and control of the Forest Preserve (ECL Section 3-0301(1)(d) and 9-0105(1)), and managing the real property under the jurisdiction of the Department for the purpose of preserving, protecting and enhancing the natural resource value for which the property was acquired or dedicated (ECL Section 3-0301(2)(v)). Furthermore, Executive Law Section 816(3) authorizes the Department to adopt rules and regulations necessary, convenient or desirable to effectuate management planning responsibilities for State lands in the Adirondack Park. Finally, the New York State Constitution, Article XIV, Section 1 mandates that the Forest Preserve be forever kept as wild forest lands.

2. Legislative Objectives

The permit requirement for operators of commercial float planes to land on or take off from Lows Lake and the eventual prohibition of aircraft on Lows Lake effective on January 1, 2012 will contribute to the fulfillment of the legislative objective for the care, custody, and control of the Adirondack Forest Preserve. This permit requirement and eventual ban on float planes will enable the Department to fulfill its statutory obligation to preserve, protect and enhance the natural resource value for which Lows Lake was acquired. Executive Law Section 816 requires that a Master Plan be developed by the Adirondack Park Agency (APA) in consultation with the Department for the management of State Lands in the Adirondack Park. The Adirondack Park State Land Master Plan (Master Plan or APSLMP) provides for the goal of creating a wilderness canoe route "without motorboat or airplane usage" through Lows Lake. This rulemaking will contribute to fulfill this Master Plan goal and in turn the legislative and constitutional objectives for preserving and protecting the State lands in the Adirondack Park.

3. Needs and Benefits

As noted above, this regulation is necessary to effectuate the Master Plan's management goal of establishing a wilderness canoe route from Hitchens Pond to the Five Ponds Wilderness: "Preservation of the wild character of this canoe route without motorboat or airplane usage...is the primary management goal for this primitive area." The decision to

promulgate this regulation was the result of the 2009 Amendment/SEIS to the 2002 Bog River Complex the Unit Management Plan/Environmental Impact Statement (2002 Bog River UMP). This UMP process involved extensive public outreach and public comment, considered a wide range of alternatives and permit conditions to avoid potential adverse impacts to the resource and impacts to paddlers. The permit conditions to be implemented through this regulation include: (1) limiting the number of flights on an annual and monthly basis; (2) prohibiting the storage of canoes or other equipment on Forest Preserve lands; and (3) reporting of flight records relating to Lows Lake by operators of commercial float planes. This flight cap and prohibition on the storage will minimize potential adverse impacts resulting from the operation of float plants to paddlers and wildlife pending the implementation of the ban on all aircraft on January 1, 2012. The reporting requirement will allow the Department to monitor permit compliance. In conclusion, the permit conditions will protect the resource and minimize user conflicts during the period leading up to the eventual ban on aircraft into Lows Lake, which is necessary to achieve the management goals of the Master Plan of creating a wilderness canoe route “without motorboat or airplane usage” through Lows Lake. The additional period of access to Lows Lake will provide a benefit to the commercial float plane operators, and it is expected that they will use the extra time to prepare for and adjust to the eventual ban. By letter dated March 31, 2009, the two commercial float plane operators, together with local government officials from the towns of Long Lake and Inlet and Hamilton County expressed support for this amendment. Furthermore, the letter expressed the commitment of the two float plane operators to voluntarily abide by the conditions and restrictions set forth in this amendment pending promulgation of this regulation.

4. Costs

(a) Costs to State Government

There will be some administrative costs to the Department in administering and monitoring the permit system, and providing a summary report to APA. However, there are no administrative costs for other state agencies or state government in general, because with the exception noted above, this regulation imposes no requirements on State government.

(b) Costs to Local Governments

There are no local government mandates or costs related to this regulation.

(c) Costs to Private Regulated Parties

This permit system established in this regulation will alleviate the economic impact to commercial float plane operators as a result of the eventual closure of Lows Lake to aircraft. The interim permit system should not have any significant economic impact on these businesses, because: (1) float plane operators already are required to maintain flight records as part of their pilot license; and (2) the annual and monthly cap seeks to maintain past use levels by commercial float plane operators, although it does represent a reduction of flights during peak paddling season (July 1 through September). The prohibition on the storage of canoes or other equipment on Forest Preserve Lands may result in a cost of depleting monthly flight allocations used for transport of canoes and equipment rather than clients, or potential costs of finding alternative storage locations on private lands.

As stated in the 2009 Amendment/SEIS, there are two commercial float plane operators who currently fly customers into Lows Lake: Helms Aero Service (Helms) based in Long Lake, and Payne Air Service (Payne) based in Inlet. These are the last two commercial float plane operators in the Adirondack Park (at one time there were seven commercial float plane businesses in the Park). At the Department’s request, Helms and Payne provided information concerning the economic value of Lows Lake flights to their businesses, as well as flight data detailing the number of trips (by date) that Helms and Payne made into Lows Lake during a three year period: 2005-2007 (Appendix A of the 2009 Amendment/SEIS).

By way of background, Helms and Payne noted that prior to adoption of the APSLMP, approximately 50 remote lakes were available for float plane access. In 1972, Helms made 625 trips to 23 lakes, all of which were subsequently closed to float plane access following adoption of the APSLMP. Helms and Payne state that approximately 15 remote lakes are used by their services today, of which 7 or 8 receive the bulk of activity. Helms states that the number of woods trips (flying to remote lakes) has declined approximately 40% from the 1972 level.

Today, woods trips constitute approximately 35-40% of gross revenues for Helms. Trips to Lows Lake comprise approximately 20% of woods trips, but due to rate schedules contribute about 30% of woods trip revenues. Moreover, due to other considerations affecting efficiency, Helms estimates that Lows Lake flights constitute over 40% of woods trips profits after hard expenses (e.g., gas, maintenance, etc.). Payne makes fewer woods trips overall than Helms, and trips to Lows Lake therefore comprise a larger proportion of Payne’s woods trips. Helms and Payne state that “Lows Lake is, by a large margin, the most important lake to our economic health. . . and it is irreplaceable because of its quality as a bass fishery and its suitability for float plane operation.”

Based on the flight data provided by Helms and Payne, it is clear that the busiest season for float planes going to Lows Lake coincides with peak paddling season (July 1 through September 30). The data for trips by Helms and Payne to Lows Lake for the three year period 2005-2007 can be summarized as follows:

Month	Avg. Trips Flown	Avg. Days Flown
May	7	4
June	21	9
July	40	13
August	45	14
September	40	13
October	17	5
November	2	1

It is expected that commercial float plane operators will take advantage of this additional period of access to Lows Lake to make whatever preparations or adjustments may be necessary in order to adapt to the eventual closure of the Lake to float planes. The Department and the APA are committed to working with float plane operators to evaluate current and potential opportunities for the use of float planes in the Adirondack Park beside Lows Lake.

In an letter dated April 2, 2009 to DEC and the APA, the commercial float plane operators supported the regulatory permit approach proposed in the 2009 Amendment/SEIS.

5. Local Government Mandates

This proposal will not impose any program, service, duty nor responsibility upon any county, city, town, village, school district or fire district.

6. Paperwork

There will be new reporting and monitoring requirements associated with this regulation for both the Department and the commercial float plane operators who will be required to submit a copy of flight records to the Department which will monitor the annual permit system for compliance and in turn submit a summary report to the APA.

7. Duplication

The only relevant state rule is 6 NYCRR Part 196 which is proposed to be modified; there is no relevant federal rule which applies to Forest Preserve lands; consequently, there is no duplication, overlap, nor conflict with State or Federal rules.

8. Alternatives

The 2002 Bog River UMP evaluated five management alternatives for float plane access on Lows Lake: (1) elimination (by regulation) of public float plane use on Lows Lake within five years (Alternative A); (2) developing voluntary guidelines limiting timing, frequency and location of float plane access (Alternative B); (3) establishing (by regulation) zones on the lake where float plane use would be prohibited, while allowing other areas to continue to be used (Alternative C); (4) purchasing all in-holdings and then prohibiting float plane access (Alternative D); and (5) allowing the status quo to continue (“no action” or Alternative E). However, at that time, the Department did not consider the alternative adopted in the 2009 Amendment/SEIS to be implemented through this regulation of allowing float plane use to continue for a limited period subject to a mandatory permit system.

Alternative A, which was selected as the preferred alternative in the 2002 Bog River UMP, required the Department to promulgate regulations prohibiting public float plane access to Lows Lake within five years from the date the UMP was adopted. This alternative also required the Department to attempt to identify appropriate remote lakes where float plane access may be provided as a substitute for Lows Lake. As stated in the 2002 Bog River UMP, the advantage of this alternative was that public float plane and motorboat use on the lake would, over time, be totally eliminated, thereby providing a more wilderness type of recreational experience on the Lake and reducing user group conflicts.

However, the Department no longer considers Alternative A to be preferable for several reasons. The 2002 Bog River UMP did not fully consider as a separate alternative the management option of a mandatory permit system to avoid user conflicts and resource impacts pending an eventual ban. The Department considers this new alternative to be preferable to Alternative A, because it (1) is a less disruptive means of avoiding potential conflicts between paddlers and float planes than an immediate and complete ban on float planes; (2) recognizes the continued existence of motorized use on Lows Lake by riparian landowners but commits to additional regulations for control of aircraft on Lows Lake; (3) simultaneously implements a permit system and a date certain (December 31, 2011) for the ban to be effective that cannot be extended and is therefore a significant step towards achieving a wilderness canoe route required for compliance with the APSLMP; and (4) will avoid immediate economic consequences to float plane operators associated with an immediate ban.

Consequently, for the reasons stated above, the Department no longer considers Alternative A from the 2002 Bog River UMP to be the preferred alternative and even though this regulation will defer complete elimination of commercial float plane operations until December 31, 2011. The 2002 Bog River UMP dismissed alternatives relating to voluntary guidelines and landing zones (B and C), because they would not significantly reduce user conflicts or potential impacts to the resource. Alternative D, the purchase of inholding properties is not possible to achieve at this point in time. The "No Action" alternative would not achieve APSLMP compliance and would not address impacts of allowing unrestricted float plane use.

9. Federal Standard

There is no relevant Federal standard governing means of access to forest preserve lands.

10. Compliance Schedule

The proposed permit requirement will become effective on the date of publication in the State Register. The ban on aircraft on Lows Lake will go into effect on January 1, 2012.

Regulatory Flexibility Analysis

1. Effect of rule:

As stated in the 2009 Amendment/SEIS to the 2002 Bog River Complex the Unit Management Planning/Environmental Impact Statement (2009 Amendment/SEIS), there are two commercial float plane operators who currently fly customers into Lows Lake: Helms Aero Service (Helms) based in Long Lake, and Payne Air Service (Payne) based in Inlet. These are the last two commercial float plane operators in the Adirondack Park. This rule will have no direct economic impact on any local government, because it does not impose any compliance requirements on any local government.

2. Compliance requirements:

The interim permit conditions to be implemented through this regulation include: (1) limiting the number of flights on an annual and monthly basis; (2) prohibiting the storage of canoes or other equipment on Forest Preserve lands; and (3) reporting of flight records relating to Lows Lake by operators of commercial float planes.

It is expected that commercial floatplane operators will take advantage of this additional period of access to Lows Lake to make whatever preparations or adjustments may be necessary in order to adapt to the eventual closure of the Lake to float planes. The Department and the APA are committed to working with float plane operators to evaluate current and potential opportunities to provide other float plane opportunities in the Adirondack Park.

3. Professional services:

The float plane operators can obtain a permit and comply with this regulation without obtaining any professional services.

4. Compliance costs:

The interim permit system should not have any significant economic impact on commercial float plane operators, because: (1) float plane operators already are required to maintain flight records as part of their pilot license; and (2) the annual and monthly cap seeks to maintain past use levels by commercial float plane operators, although it does represent a reduction of flights during peak paddling season (July 1 through September). The prohibition on the storage of canoes or other equipment on Forest Preserve Lands may result in a cost of depleting monthly flight allocations used for transport of canoes and equipment rather than clients, or potential costs of finding alternative storage locations on private lands.

At the Department's request, Helms and Payne provided information concerning the economic value of Lows Lake flights to their businesses, as well as flight data detailing the number of trips (by date) that Helms and Payne made into Lows Lake during a three year period: 2005-2007 (Appendix A of the 2009 Amendment/SEIS). Helms and Payne noted that prior to adoption of the APSLMP, approximately 50 remote lakes were available for float plane access. In 1972, Helms made 625 trips to 23 lakes, all of which were subsequently closed to float plane access following adoption of the APSLMP. Helms and Payne state that approximately 15 remote lakes are used by their services today, of which 7 or 8 receive the bulk of activity. Helms states that the number of woods trips (flying to remote lakes) has declined approximately 40% from the 1972 level.

Today, woods trips constitute approximately 35-40% of gross revenues for Helms. Trips to Lows Lake comprise approximately 20% of woods trips, but due to rate schedules contribute about 30% of woods trip revenues. Moreover, due to other considerations affecting efficiency, Helms estimates that Lows Lake flights constitute over 40% of woods trips profits after hard expenses (e.g., gas, maintenance, etc.). Payne makes fewer woods trips overall than Helms, and trips to Lows Lake therefore comprise a larger proportion of Payne's wood trips. Helms and Payne state that "Lows Lake is, by a large margin, the most important lake to our economic health. . . and it is irreplaceable because of its quality as a bass fishery and its suitability for float plane operation."

5. Economic and technological feasibility:

As discussed above, it will be relatively routine for the two remaining float plane operators to apply for a permit for the 3 remaining flight seasons on Lows Lake.

6. Minimizing adverse impact:

The interim permit system established in this regulation will alleviate the economic impact to commercial float plane operators as a result of the eventual closure of Lows Lake to aircraft as required by this regulation in conformance with the Adirondack Park State Land Master Plan (APSLMP). It is expected that commercial floatplane operators will take advantage of this additional period of access to Lows Lake to make whatever preparations or adjustments may be necessary in order to adapt to the eventual closure of the Lake to float planes. The Department and the APA are committed to working with float plane operators to evaluate current and potential opportunities to provide other float plane opportunities in the Adirondack Park.

7. Small business and local government participation:

The decision to promulgate regulations with respect to float plane use on Lows Lake was the result of the 2009 Amendment/SEIS to the 2002 Bog River Complex Unit Management Plan/Environmental Impact Statement, which involved extensive public outreach, including multiple public meetings with the commercial float plane operators and local government officials. The float plane operators sent a letter to DEC in support of this proposal stating that it gave them three additional flying seasons to access Lows Lake, subject to simplified permit restrictions.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This rule will only apply to float plane operators flying into and out of Lows Lake located in Town of Long Lake, Hamilton County and the Towns of Clifton and Colton, St. Lawrence County, including those expanses of water connected to the main body of Lows Lake, commonly known as Grass Pond, located in the Town of Clifton in St. Lawrence County, and Tomar Pond, located in the Town of Long Lake, Hamilton County.

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

This proposal will not impose any program, service, duty nor responsibility upon any county, city, town, village, school district or fire district located in a rural area. There will be new reporting and monitoring requirements associated with this regulation for the commercial float plane operators flying into Lows Lake which is located in a rural area. Such operators will be required to submit a copy of flight records to the Department which will monitor the annual permit system for compliance and in turn submit a summary report to the APA.

The float plane operators can obtain a permit and comply with this regulation without obtaining any professional services.

3. Costs:

The interim permit system should not have any significant economic impact on commercial float plane operators, because: (1) float plane operators already are required to maintain flight records as part of their pilot license; and (2) the annual and monthly cap seeks to maintain past use levels by commercial float plane operators, although it does represent a reduction of flights during peak paddling season (July 1 through September). The prohibition on the storage of canoes or other equipment on Forest Preserve Lands may result in a cost of depleting monthly flight allocations used for transport of canoes and equipment rather than clients, or potential costs of finding alternative storage locations on private lands.

At the Department's request, Helms and Payne provided information concerning the economic value of Lows Lake flights to their businesses, as well as flight data detailing the number of trips (by date) that Helms and Payne made into Lows Lake during a three year period: 2005-2007 (Appendix A of the 2009 Amendment/SEIS). Helms and Payne noted that prior to adoption of the APSLMP, approximately 50 remote lakes were available for float plane access. In 1972, Helms made 625 trips to 23 lakes, all of which were subsequently closed to float plane access following adoption of the APSLMP. Helms and Payne state that approximately 15 remote lakes are used by their services today, of which 7 or 8 receive the bulk of activity. Helms states that the number of woods trips (flying to remote lakes) has declined approximately 40% from the 1972 level.

Today, woods trips constitute approximately 35-40% of gross revenues for Helms. Trips to Lows Lake comprise approximately 20% of woods trips, but due to rate schedules contribute about 30% of woods trip revenues. Moreover, due to other considerations affecting efficiency, Helms estimates that Lows Lake flights constitute over 40% of woods trips profits after hard expenses (e.g., gas, maintenance, etc.). Payne makes fewer woods trips overall than Helms, and trips to Lows Lake therefore comprise a larger proportion of Payne's wood trips. Helms and Payne state that "Lows Lake is, by a large margin, the most important lake to our economic health. . . and it is irreplaceable because of its quality as a bass fishery and its suitability for float plane operation."

4. Minimizing adverse impact:

The interim permit system established in this regulation will alleviate the economic impact to commercial float plane operators as a result of the eventual closure of Lows Lake to aircraft as required by this regulation in conformance with the Adirondack Park State Land Master Plan (APSLMP). It is expected that commercial floatplane operators will take advantage of this additional period of access to Lows Lake to make whatever preparations or adjustments may be necessary in order to adapt to the eventual closure of the Lake to float planes. The Department and the APA are committed to working with float plane operators to evaluate current and potential opportunities to provide other float plane opportunities in the Adirondack Park.

5. Rural area participation:

The decision to promulgate regulations with respect to float plane use on Lows Lake was the result of the 2009 Amendment/SEIS to the 2002 Bog River Complex Unit Management Plan/Environmental Impact Statement, which involved extensive public outreach including multiple public meetings with the commercial float plane operators and local government officials. Two informational meetings were held to explain the proposal to the public and provide an opportunity for the public to comment. The meetings were held on Wednesday, Feb. 18, at 1:00 p.m. at the APA's Ray Brook headquarters (1133 State Route 86) and at 6 p.m. at DEC's Warrensburg office (232 Golf Course Road).

Job Impact Statement

The permit system established in this regulation will alleviate the economic impact to two (2) commercial float plane operators as a result of the eventual closure of Lows Lake to aircraft as required by the Adirondack Park State Land Master Plan. The interim permit system should not have any significant economic impact on these businesses, because: (1) float plane operators already are required to maintain flight records as part of their pilot license; and (2) the annual and monthly cap seeks to maintain past use levels by commercial float plane operators, although it does represent a reduction of flights during peak paddling season (July 1 through September). As stated in the 2009 Amendment/SEIS to the 2002 Bog River Complex the Unit Management Planning/Environmental Impact Statement, there are two commercial float plane operators who currently fly customers into Lows Lake: Helms Aero Service (Helms) based in Long Lake, and Payne Air Service (Payne) based in Inlet. These are the last two commercial float plane operators in the Adirondack Park.

A Job Impact Statement is not submitted with this rulemaking proposal because it will not have a "substantial adverse impact on existing or future jobs and employment opportunities" as this phrase is defined in law. SAPA Section 201-a defines "substantial adverse impact on existing or future jobs and employment opportunities" as a decrease of more than one hundred full-time annual jobs and employment opportunities. As explained above, this regulation will impact two commercial float plane operators, which is well below the one hundred job impact threshold set in statute.

Department of Health

NOTICE OF ADOPTION

Criminal History Record Check

I.D. No. HLT-41-08-00005-A

Filing No. 1289

Filing Date: 2009-11-17

Effective Date: 2009-12-02

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

Action taken: Addition of Part 402 to Title 10 NYCRR.

Statutory authority: Public Health Law, section 2899-a(4); and Executive Law, section 845-b(12)

Subject: Criminal History Record Check.

Purpose: Criminal background checks of certain prospective employees of NHs, CHHAs, LHCSAs & long term home health care programs.

Text or summary was published in the October 8, 2008 issue of the Register, I.D. No. HLT-41-08-00005-P.

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

Revised rule making(s) were previously published in the State Register on September 30, 2009.

Text of 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, email: regsqna@health.state.ny.us

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Drinking Water State Revolving Fund

I.D. No. HLT-37-09-00005-A

Filing No. 1290

Filing Date: 2009-11-17

Effective Date: 2009-12-02

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

Action taken: Amendment of Part 53 of Title 10 NYCRR.

Statutory authority: Public Health Law, sections 1161 and 1162

Subject: Drinking Water State Revolving Fund.

Purpose: To accommodate new requirements from the Federal American Recovery and Reinvestment Act (ARRA) of 2009.

Text or summary was published in the September 16, 2009 issue of the Register, I.D. No. HLT-37-09-00005-P.

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

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

Assessment of Public Comment

The agency received no public comment.

Insurance Department

**EMERGENCY
RULE MAKING**

**WORKERS' COMPENSATION INSURANCE RATES:
Reserves for Special Disability Fund Claims**

I.D. No. INS-48-09-00008-E

Filing No. 1291

Filing Date: 2009-11-18

Effective Date: 2009-11-18

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

Action taken: Addition of Subpart 151-4 (Regulation 119) to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201, 301, 1303 and 4117; Workers' Compensation Law, section 32

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

Specific reasons underlying the finding of necessity: Workers' Compensation Law ("WCL") Section 32 permits the chair of the Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the Special Disability Fund ("SDF"). Furthermore, no insurer, self-insured employer, or the State Insurance Fund ("SIF") may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. The law mandates the Superintendent to set a reserve standard specific to transactions authorized by WCL Section 32. This regulation establishes the required reserve standards.

Presently, the SDF reimburses carriers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent physical impairment" incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before

August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee's death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disabilities before August 1, 1994).

The SDF funds its operations and claims payments by making annual assessments on private insurance carriers, self-insured employers (including political sub-divisions), group self-insurers, and SIF. The combination of increasing requests for reimbursement from the SDF, as well as the SDF's assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.

The Legislature enacted Chapter 6 of the Laws of 2007, which amended Section 15(8)(h) of the Workers' Compensation Law, in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amends Section 32(i) of the Workers' Compensation Law to permit the chair of the New York State Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the SDF. Furthermore, Section 32(i)(5) mandates that no carrier, self insured employer, or SIF may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent. This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of any claims.

The Waiver Agreement Management Office (WAMO), acting on behalf of the Workers' Compensation Board, will enter into waiver agreements with insurers, self-insured employers, and SIF whereby those parties agree to assume the liability for, management, administration or settlement of claims. In consideration of the assumption of those obligations, the insurer, self-insured employer, or SIF will receive a lump-sum payment from WAMO. WAMO will also negotiate and execute other waiver agreements (i.e., the retail/individual waiver agreements) contemplated by the regulation.

The New York State Dormitory Authority will be issuing tax exempt revenue bonds beginning in November, 2009, to fund the waiver agreements to be entered into by WAMO. This regulation must be in place before that time so that insurers (one of the parties to wholesale waiver agreements) will be able to enter into waiver agreements with WAMO. Nor will self-insured employers or the SIF be in a position to execute waiver agreements with WAMO until such time as this regulation is in place.

The rapid depopulation of the SDF through the waiver agreements will lead to a decrease the SDF assessments that New York State insurers and employers must pay. For this reason, the rule must be promulgated on an emergency basis for the furtherance of the general welfare.

Subject: WORKERS' COMPENSATION INSURANCE RATES: Reserves for Special Disability Fund Claims.

Purpose: This regulation requires reserves to be established for those claims subject to reimbursement by the Special Disability Fund.

Text of emergency rule: A new Subpart 151-4 entitled "Reserves for Special Disability Fund Claims" is added to read as follows:

Section 151-4.1 Preamble.

The Special Disability Fund ("SDF") reimburses carriers and self-insured employers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent physical impairment" incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee's death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disabilities before August 1, 1994).

The SDF funds its operations and claims payments by making annual assessments on insurers writing workers compensation insurance in New York, self-insured employers (including political sub-divisions), group

self-insurers, and the State Insurance Fund. The combination of increasing requests for reimbursement from SDF, as well as the SDF's assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.

The Legislature enacted Chapter 6 of the Laws of 2007, which amended Workers' Compensation Law Section 15(8)(h), in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amends Workers' Compensation Law section 32(i) to permit the chair of the Workers' Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the special disability fund. Furthermore, Workers' Compensation Law section 32(i)(5) mandates that no carrier, self insured employer, or the State Insurance Fund may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. This purpose of this subpart is to ensure that an insurer, self-insured employer, or State Insurance Fund does not over-reserve for claims if it voluntarily assumes the liability for, or management, administration or settlement.

Section 151-4.2 Definitions.

Waiver agreement, in this subpart, means any agreement entered into between an insurer, self-insured employer, or the State Insurance Fund and the New York State Workers' Compensation Board pursuant to Workers' Compensation Law sections 32(i)(2) and (3).

Section 151-4.3 Reserve Amounts.

(a) An insurer other than the State Insurance Fund that enters into a waiver agreement shall establish reserves for those claims in accordance with Insurance Law sections 1303 and 4117(d).

(b) The State Insurance Fund or a self-insured employer holding reserves that enters into a waiver agreement shall establish reserves for those claims in accordance with the principles set forth in Insurance Law sections 1303 and 4117(d).

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire February 15, 2010.

Text of 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

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of Part 151-4 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Regulation No. 119) derives from Sections 201, 301, 1303, and 4117 of the Insurance Law, and Section 32 of the Workers' Compensation Law ("WCL"). These provisions establish the Superintendent's authority to establish the amount of reserves an insurer, self-insured employer, or the State Insurance Fund ("SIF") may hold for claims for which the entity has waived its right to reimbursement from the Special Disability Fund ("SDF"), and for which it has assumed the liability, management, administration, or settlement.

Sections 201 and 301 of the Insurance Law authorize the Superintendent to effectuate any power accorded to him by the Insurance Law, and to prescribe regulations interpreting the Insurance Law.

Section 1303 of the Insurance Law requires every insurer to maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of statement, whether reported or unreported, which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims.

Section 4117(d) of the Insurance Law sets forth the minimum reserves for outstanding losses and loss expenses under policies of workers' compensation insurance.

Section 32 of the Workers' Compensation Law permits the chair of the workers' compensation board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the SDF. Furthermore, no carrier, self insured employer, or the State Insurance Fund ("SIF") may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent.

2. Legislative objectives: The SDF reimburses carriers for all payments properly paid in accordance with Workers' Compensation Law Sections 15(8) and 14(6). Specifically, where an employee with a "permanent

physical impairment” incurs a subsequent disability as a result of a work-related injury or occupational disease that results in a permanent disability caused by both conditions combined, to a degree greater than what would have resulted from the second injury or occupational disease alone, the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 260 weeks of disability. If the employee suffered the second injury before August 1, 1994, then the employer or carrier is reimbursed from the SDF for all benefits incurred after the first 104 weeks of the second injury. Further, if the second injury results in the employee’s death, which would not have occurred except for the pre-existing permanent physical impairment, the employer or carrier is entitled to be reimbursed from the SDF for all benefits payable in excess of 260 weeks (or 104 weeks for accidents or disablements before August 1, 1994).

The SDF funds its operations and claims payments by making annual assessments on private insurance carriers, self-insured employers (including political sub-divisions), group self-insurers, and SIF. The combination of increasing requests for reimbursement from the SDF, as well as the SDF’s assessment funding mechanism, has resulted in a burden on New York State insurers and employers. In fact, assessments on insurers have increased by nearly 160% from 1999 to 2008, resulting in increased premium charges to employers.

As a result, the Legislature enacted Chapter 6 of the Laws of 2007, which amended Section 15(8)(h) of the Workers’ Compensation Law, in order to close the SDF to claims for reimbursement for injuries or illnesses occurring on or after July 1, 2007, and to mandate that all claims for reimbursement be filed with the SDF prior to July 10, 2010. The legislation also amended Section 32(i) of the Workers’ Compensation Law to permit the chair of the Workers’ Compensation Board to procure one or more private entities to assume the liability for, and management, administration or settlement of all or a portion of the claims in the special disability fund. Furthermore, Section 32(i)(5) mandates that no carrier, self insured employer, or SIF may assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent. This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of any claims.

3. Needs and benefits: This regulation requires an insurer, self-insured employer, or SIF to establish reserves for those claims subject to reimbursement by the SDF in accordance with Insurance Law Sections 1303 and 4117(d), thereby ensuring that insurers, self-insured employers, or SIF do not over-reserve for claims for which they have directly assumed the liability, management, administration, or settlement. Insurance Law Section 1303 states that all insurers must maintain reserves in an amount estimated in the aggregate to provide for the payment of all losses or claims incurred on or prior to the date of the statement, whether reported or unreported, which are unpaid as of such date and for which such insurer may be liable, and also reserves in an amount estimated to provide for the expenses of adjustment or settlement of such losses or claims. In turn, Insurance Law Section 4117(d) sets forth the minimum reserves for outstanding losses and loss expenses under policies of workers’ compensation insurance.

4. Costs: Participation in the program is voluntary. If an insurer, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse cost impact on those entities that do choose to participate in the program.

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

6. Paperwork: This regulation requires no new paperwork. Insurers, self-insured employers and SIF already administer the claims for second injuries. However, by assuming the liability, management, administration, and settlement directly, these insurers, self-insured employers, or SIF would no longer be reimbursed by the SDF, and thereby reduce their paperwork.

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

8. Alternatives: The law mandates the Superintendent to set a reserve standard specific to transactions authorized by WCL Section 32(i)(5). Reserving in accordance with Insurance Law Sections 1303 and 4117(d) will ensure that insurers that assume the liability, management, administration, and settlement of claims for which they were previously reimbursed by the SDF do not over-reserve for those claims. Nor would reserving in accordance with these sections result in inadequate reserves for those claims.

SIF and self-insured employers currently are not subject to the standards set forth in Insurance Law Sections 1303 and 4117(d). However, because the Workers’ Compensation Law mandates the Superintendent to set reserve standards for those two types of entities, this regulation requires SIF and self-insured employers to hold reserves in accordance with the principles set forth in Insurance Law Sections 1303 and 4117(d).

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

10. Compliance schedule: Insurers, self-insured employers, or SIF, if they choose to assume the liability for, or management, administration or settlement of any claims, will be expected to demonstrate compliance with the reserve standards established by this regulation immediately upon entering into a waiver agreement.

Regulatory Flexibility Analysis

1. Small businesses:

The Insurance Department finds that this rule will not impose any adverse economic impact on small businesses and will not impose any reporting, recordkeeping or other compliance requirements on small businesses.

This regulation applies to all workers’ compensation insurers authorized to do business in New York State, self-insureds, and the State Insurance Fund (“SIF”). This regulation ensures that insurers, self-insured employers, and SIF do not over-reserve for claims if they voluntarily assume the liability for, or management, administration or settlement of those claims from the Workers’ Compensation Special Disability Fund (“SDF”) by requiring those entities to reserve in accordance with Insurance Law Sections 1303 and 4117(d).

The basis for this finding is that this rule is directed at workers’ compensation insurers authorized to do business in New York State, none of which falls within the definition of “small business” as found in Section 102(8) of the State Administrative Procedure Act (“SAPA”). The Insurance Department has monitored Annual Statements and Reports on Examination of authorized workers’ compensation insurers subject to this rule, and believes that none of the insurers falls within the definition of “small business”, because there are none that are both independently owned and have fewer than one hundred employees. Nor does SIF, which is also effected by the regulation, come within the definition of “small business” found in SAPA Section 102(8).

The prerequisites maintained by the Workers’ Compensation Board for an employer to be self-insured make it highly unlikely that any small businesses, as defined by SAPA Section 102(8), are in fact self-insured. All of the currently self-insured employers have high credit scores and payrolls equal to or greater than \$732,000. Moreover, all self-insured employers must post a security deposit with the Workers’ Compensation Board of at least \$935,000 or provide a letter of credit for the required amount of security. These qualifications, among others, preclude the overwhelming majority of small employers from becoming self-insured.

In any event, this rule is applicable only if a workers’ compensation insurer, self-insured employer, or SIF voluntarily chooses to enter into waiver agreement. If an insurer, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse impact on those entities that do choose to participate in the program.

2. Local governments:

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

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

This regulation applies to all workers’ compensation insurers authorized to do business in New York State, self-insureds, and the State Insurance Fund (“SIF”). These entities do business throughout New York State, including rural areas as defined under State Administrative Procedure Act (“SAPA”) Section 102(10).

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

This regulation is not expected to impose any reporting, recordkeeping or other compliance requirements on public or private entities in rural areas. Insurers, self-insured employers, and SIF already administer the claims from a claims management perspective. If anything, they would have a reduction in paperwork because the reimbursement process would no longer be necessary.

3. Costs:

To insurers: Participation in the program is voluntary. If a carrier, self-insured employer or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were

previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse cost impact on those entities that do choose to participate in the program.

4. Minimizing adverse impact:

Participation in the program is voluntary. If a carrier, self-insured employer, or SIF chooses to assume the liability for, or management, administration or settlement of any claims for which they were previously reimbursed by the SDF, there will be costs associated with the undertaking. However, in consideration of the undertaking, the insurer, self-insured employers, or SIF will receive a lump-sum payment from the Waiver Agreement Management Office. Consequently, there will be no adverse impact on those entities that do choose to participate in the program.

5. Rural area participation:

The legislature in 2007 amended Workers' Compensation Law Section 32(i)(5) was amended to mandate that an insurer, self insured employer, or SIF may not assume the liability for, management, administration or settlement of any claims on which it holds reserves, beyond such reserves as are permitted by regulation of the Superintendent of Insurance. In order for the mechanism contemplated by the statute to operate, the Superintendent must promulgate a regulation establishing reserve standards.

The entities covered by this regulation - workers' compensation insurers authorized to do business in New York State, self-insured employers, and SIF - do business in every county in this state, including rural areas as defined under SAPA Section 102(10). This regulation mandates that insurers should set reserves in accordance with Insurance Law Sections 1303 and 4117(d), and that self-insureds and SIF should set reserves in accordance with the principles set forth in Insurance Law Sections 1303 and 4117(d). The regulation contains no provisions that create impacts unique to rural areas of the state.

Job Impact Statement

This rule will not adversely impact job or employment opportunities in New York. The rule mandates that insurers must set reserves in accordance with Insurance Law Sections 1303 and 4117(d), and that self-insureds and the State Insurance Fund should set reserves in accordance with the principles set forth in Insurance Law Sections 1303 and 4117(d). The insurer's existing personnel should be able to perform this task. There should be no region in New York which would experience an adverse impact on jobs and employment opportunities. This regulation should not have a measurable impact on self-employment opportunities.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Conduct, Trustworthiness, and Competence of Insurance Producers, Especially Relating to Compensation Arrangements with Insurers

I.D. No. INS-48-09-00002-P

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

Proposed Action: Addition of Part 30 to Title 11 NYCRR.

Statutory authority: Insurance Law, sections 201 and 301; art. 21

Subject: Conduct, trustworthiness, and competence of insurance producers, especially relating to compensation arrangements with insurers.

Purpose: To require insurance producers to make certain disclosures about their role in the insurance transaction to insurance customers.

Text of proposed rule: A new Part 30 is added to read as follows:

§ 30.1 Purposes.

The purposes of this Part are:

(a) to implement the New York Insurance Law by regulating the acts and practices of insurers and insurance producers with respect to transparency of compensation paid to insurance producers and their role in insurance transactions in this state; and

(b) to protect the interests of the public by establishing minimum disclosure requirements relating to the role of insurance producers and the compensation paid to insurance producers.

§ 30.2 Definitions.

For purposes of this Part:

(a) Compensation means anything of value, including money, credits, loans, interest on premium, forgiveness of principal or interest, vacations, prizes, or gifts, whether paid as commission or otherwise. Compensation does not mean tangible goods with the insurer name, logo or other advertisement and having an aggregate value of less than \$100 per year per insurer.

(b) Purchaser means the person or entity to be charged under an insurance contract or a group policyholder and may include the named insured, policyholder, owner of a life insurance policy or annuity contract, principal under a bond, or other person to be charged, including an applicant for insurance, bond or annuity; but does not include a certificate holder or member under a group or blanket insurance contract unless the insurance producer has direct sales or solicitation contact with the certificate holder or member, and the certificate holder or member pays some or all of the premium.

(c) Insurer means any person or entity doing an insurance business in this State.

(d) Insurance contract means an insurance policy, surety bond, contract of guarantee, or annuity contract.

(e) Insurance producer means any insurance producer as defined by Insurance Law section 2101(k).

§ 30.3 Disclosure of producer compensation, ownership interests and role in the insurance transaction.

(a) Except as provided in section 30.5 of this Part, an insurance producer selling or renewing an insurance contract shall disclose the following information to the purchaser orally or in a prominent writing not later than application for the insurance contract or the renewal:

(1) whether the insurance producer represents the purchaser or the insurer for purposes of the sale;

(2) that the insurance producer will receive compensation from the selling insurer based on the insurance contract the producer sells (if applicable);

(3) that the compensation insurers pay to insurance producers may vary depending on a number of factors, including the insurance contract and the insurer that the purchaser selects, the volume of business the producer provides to the insurer or the profitability of the insurance contracts that the producer provides to the insurer; and

(4) that the purchaser may obtain information about the compensation expected to be received by the producer for the sale and for any alternative quotes presented by the producer by requesting such information from the producer.

(b) If the purchaser requests more information about the producer's compensation prior to the issuance of the insurance contract, the producer shall disclose the following information to the purchaser in a prominent writing no later than the issuance of the insurance contract, except that if time is of the essence to issue the insurance contract, then within five business days:

(1) a description of the nature, amount and source of any compensation to be received by the producer or any parent, subsidiary or affiliate based in whole or in part on the sale;

(2) a description of any alternative quotes presented by the producer, including the coverage, premium and compensation that the insurance producer or any parent, subsidiary or affiliate would have received based in whole or in part on any such alternative quotes;

(3) a description of any material ownership interest the insurance producer or any parent, subsidiary or affiliate has in the insurer issuing the insurance contract or any parent, subsidiary or affiliate;

(4) a description of any material ownership interest the insurer issuing the insurance contract or any parent, subsidiary or affiliate has in the insurance producer or any parent, subsidiary or affiliate; and

(5) a statement whether the insurance producer is prohibited by law from altering the amount of compensation received from the insurer for the sale.

(c) If the purchaser requests more information about the producer's compensation after issuance of the insurance contract but less than thirty days after issuance, the insurance producer shall disclose to the purchaser in a prominent writing the information required by subsection 30.3(b) of this Part within five business days.

(d) If the nature, amount or value of any compensation to be disclosed by the insurance producer is not known at the time of the disclosure required by subdivision 30.3 (b) or (c) of this section, then the insurance producer shall include in the disclosure:

(1) a description of the circumstances that may determine the receipt and amount or value of such compensation, and

(2) a reasonable estimate of the amount or value, which may be stated as a range of amounts or values.

(e) If the disclosure required by subdivision (a) of this section is provided orally, the insurance producer shall also disclose the information required by subdivision (a) of this section to the purchaser in a prominent writing no later than the issuance of the insurance contract.

(f) An insurance producer shall not make statements to a purchaser contradicting the disclosures required by this section or any other misleading or knowingly inaccurate statements about the role of the insurance producer in the sale.

§ 30.4 Certification and retention of disclosure.

(a) An insurance producer shall retain a copy of any written disclosure

provided to the purchaser pursuant to section 30.3 of this Part for not less than three years after the disclosure is given.

(b) If oral disclosure is provided to the purchaser pursuant to section 30.3(a) of this Part, the insurance producer shall retain for not less than three years:

(1) a certification that the oral disclosure was provided; or

(2) an audio recording of the oral disclosure.

§ 30.5 Exceptions.

This Part shall not apply:

(a) to the placement of reinsurance;

(b) to the placement of insurance with a captive insurance company pursuant to Article 70 of the Insurance Law;

(c) to an insurance producer that has no direct sales or solicitation contact with the purchaser, which may include wholesale brokers or managing general agents; or

(d) to a sale of insurance by a person who is not required to be licensed as an insurance producer under Insurance Law section 2102(a)(1) for the purposes of that sale.

(e) to renewals when the producer has no sales or solicitation contact with the purchaser in connection with the renewal.

§ 30.6 Obligations of an authorized insurer.

The amount of any compensation that an authorized insurer or its agent pays to an insurance producer shall be maintained by the insurer in accordance with Part 243 of this Title (Regulation 152).

§ 30.7 Conformity with other laws.

Nothing in this Part shall be construed in a manner inconsistent with, or in violation of, Insurance Law sections 2119, 2324, 4224, or other provisions of the Insurance Law and regulations promulgated thereunder.

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

Data, views or arguments may be submitted to: Matthew J. Gaul, NYS Insurance Department, 25 Beaver Street, New York, NY 10004, (212) 480-2305, email: mgaul@ins.state.ny.us

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

Summary of Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of this Part derives from Insurance Law Sections 201 and 301, and Article 21 of the Insurance Law.

Insurance Law Sections 201 and 301 authorize the Superintendent to effectuate any power accorded to the Superintendent by the Insurance Law, and to prescribe regulations interpreting the Insurance Law. Section 201 says that the "...superintendent shall possess the rights, powers, and duties, in connection with the business of insurance in this state, expressed or reasonably implied by this chapter or any other applicable law of this state."

Article 21 establishes the requirements, including standards of competency and trustworthiness, for obtaining and renewing certain licenses, including agents (Section 2103), brokers (Section 2104), adjusters (Section 2108), consultants (Section 2107), and intermediaries (Section 2106). It also provides for the investigation and disciplining of the licensees (Sections 2110 and 2127). Provided that the regulation is not inconsistent with some specific statutory provision, the Superintendent may broadly interpret, clarify and implement legislative policy and effectuate any powers that the Insurance Law reasonably implies.

In order to protect all insurance customers, the proposed regulation exercises the Superintendent's broad authority under Section 201, by requiring Article 21 licensees to disclose the potential conflict that arises due to the differences in the amount of compensation an insurer pays to its producers.

2. Legislative objectives: The Legislature vested in the Superintendent the authority to regulate the conduct, trustworthiness, and competence of insurance producers (insurance agents, insurance brokers and excess line brokers, reinsurance intermediaries, and limited lines licensees) to protect all insurance customers, whether for personal or commercial insurance.

3. Needs and benefits: Insurers compensate insurance producers for their role in placing and selling insurance by paying compensation, including commissions and other items or benefits of monetary value. Compensation arrangements typically differ from insurer to insurer, with some insurers paying not only commissions by the policy, but also by the total volume generated by a producer or the profitability of the insurance contracts the producer provides to the insurer. Individual consumers and commercial interests typically rely on insurance producers to assist them with obtaining information about available insurance policies and evaluating those policies to determine which are best suited to the customer's needs.

There is nothing inherently improper about an incentive-based compen-

sation arrangement between an insurer and the producer, but due to the differences in each insurer's compensation arrangement, a potential conflict of interest may arise when an insurance policy that would earn the producer the greatest compensation for its sale is not the most appropriate insurance for the customer in terms of coverage, service or price. This may create an incentive for the producer to recommend that policy to the customer. This could arise not only with respect to policies offered by competing insurers, but even with respect to different policies offered by one insurer, where the nature and extent of the compensation may vary depending upon the particular policy form or type of policy.

Indeed, the New York State Attorney General and the New York State Insurance Department commenced a joint investigation in 2004 that uncovered instances of criminal bid rigging by a large insurance broker and several large insurers, as well as steering schemes involving a number of major insurers and other insurance producers. The investigation culminated in settlements between 2005 and 2006 under which producers and insurers paid more than \$1 billion to recompense customers for harm resulting from bid rigging and steering.

The issue also goes beyond the large brokers and insurance companies investigated by the Attorney General and the Department. Consumer representatives have told the Department repeatedly that insurance purchasers (particularly individual consumers of personal lines products like auto, homeowners and life) do not understand the role of the insurance producer in the insurance transaction, (i.e. whose interests the producer is required to represent). Consumer representatives also pointed out that consumers often do not understand that producers receive incentive-based compensation that may affect the recommendations the producers make, and therefore rarely ask for such information. The Department believes that the marketplace will function better for purchasers, producers and insurers if purchasers have access to information about producer compensation arrangements.

The proposed regulation is intended to provide a means to address the potential conflict that arises due to the differences in the amount of compensation an insurer pays to its producers in the least invasive manner possible – by requiring that insurance producers make certain disclosures about their role in the insurance transaction and compensation arrangements with insurers to insurance customers. Specifically, the regulation would require an insurance producer to disclose whom the producer represents in the transaction, that the producer will receive compensation from the insurer based upon the sale of the policy, that the compensation paid by insurers may vary, and that the purchaser may obtain from the producer, upon request, information about the compensation the producer expects to receive from the sale of the policy. The regulation also requires that upon the customer's request, the producer disclose the amount of compensation for the policy selected and any alternative quotes presented. The required disclosures would minimize the potential conflicts that arise from producer compensation because it allows insurance customers to request information about the compensation for the insurance policy and alternative policies quoted.

Empowering customers with this information makes it more difficult for an insurance producer to succumb to an incentive to place the policy with the insurer paying the greatest compensation, or one type of policy with an insurer over another with the same insurer, rather than offering the best policy in terms of price, coverage or service. Overall, all insurance consumers in the state, whether personal or commercial, are likely to benefit from the regulation because transparency and a better understanding of the role of the insurance producer is likely to lead to better-informed selection among available insurance options.

4. Costs: The amendments will not impose any compliance costs on local governments. The Insurance Department does not anticipate any added cost to the Department associated with the regulation. Enforcement of the regulation will be integrated into the Department's ongoing efforts to address consumer complaints, license insurance producers and insurers and licensee compliance with the trustworthiness standards set forth in the Insurance Law.

Insurance producers, many of whom are small businesses, may incur additional costs of compliance, but they should be minimal. The cost to producers will be associated primarily with developing and providing a brief initial disclosure to purchasers either orally or in writing. Once developed, this initial disclosure will be a short boilerplate statement a few sentences long. There will also be some cost to producers and insurers to maintain the records as required under the regulation, but these can be maintained electronically or otherwise, thereby reducing maintenance costs. The only additional record keeping required by the regulation is maintaining the disclosures for each purchaser. Producers are not required to keep any additional information that they do not already maintain in the ordinary course of business. The regulation does not regulate the amount, nature or amount of compensation; it simply requires disclosure of compensation practices.

Producers will also have to spend a small amount of time gathering the

compensation information they have on hand and presenting it to the purchaser when requested. The regulation, however, does not require the producer to collect or maintain any more information than the producer already has on hand in the ordinary course of business. The regulation will require insurers to maintain records relating to the payment of compensation to producers, but will not dictate the manner in which those records are kept, thereby reducing any potential compliance cost.

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

6. Paperwork: The Department has designed the proposed regulation to minimize the paperwork required to the extent possible. The producer must make the disclosure required prior to the sale of an insurance policy either in writing or orally. If the producer makes the disclosure orally, the producer must either prepare a certification stating that the producer made the oral disclosure or make a recording of the disclosure. If the producer elects to provide oral disclosure, the producer must follow up with a written disclosure statement (which could be boilerplate) prior to issuance of the insurance policy. An insurance producer who chooses to satisfy the initial disclosure requirement with a written disclosure may prepare a boilerplate form to use with each disclosure. Also, to the extent that the insurance producer is required to disclose additional information about its compensation, the producer is only required to provide information that it has at that time, or to make a reasonable estimate. There would also be some time and cost associated with preparing a more detailed, substantive disclosure statement when a purchaser requests it. That time and cost would depend on the number of consumers who make such requests.

There will also be some cost to producers and insurers to maintain the records as required under the regulation, but these can be maintained electronically or otherwise, thereby reducing maintenance costs. The regulation, however, does not require the producer to collect or maintain any more information than the producer already has on hand in the ordinary course of business. The regulation will require insurers to maintain records relating to the payment of compensation to producers but will not dictate the manner in which those records are kept thereby reducing any potential compliance cost.

7. Duplication: The proposed regulation will not duplicate any existing state or federal law or regulation.

8. Alternatives: Insurance producers generally receive compensation from insurers or other producers by one of two types of methods. The first is a flat percentage commission based on premium volume, paid at the time of sale. There may be different flat rates paid for new and renewal business. The second is a contingent commission, which may be paid in addition to flat percentage commissions, and which typically is based on profit, volume, retention, and/or business growth. Contingent commissions are not payable on a per policy basis, but are allocated based on the performance of the entire portfolio of business placed with a particular insurer. The contingent commission schedule is known to producers at the beginning of a given period of time (usually one year), but contingent commissions actually earned are calculated some period after business is placed and loss experience is observed. The amount of compensation paid may also vary from producer to producer, depending upon the relationship between the producer and the insurer or other producer, though the compensation paid usually will not change the actual premium to the consumer.

Defenders of incentive-based producer compensation argue that competition in the marketplace can address any conflicts because consumers can comparison shop among producers. Producers that do not offer insurance providing the best combination of coverage, service and price will lose business to those that do. However, consumer representatives emphasized in discussions with the Department that consumers who purchase insurance through an insurance producer may not comparison shop for the most favorable coverage, service and price because they are often encouraged to rely on the producer to comparison shop the market for them.

From 2005 to 2007, the Attorney General and the Superintendent entered into enforcement settlement agreements and regulatory stipulations concerning allegations of improper steering in response to incentive-based compensation with a number of major brokers and insurers. The allegations underlying the settlements and stipulations included undisclosed conflicts of interest and improper steering by small, medium and large producers. The investigation also made it clear that insurers pay contingent commissions and other types of incentive-based compensation in order to influence producers' recommendations to their clients. The agreements and stipulations prohibited the receipt of contingent commissions by certain insurance brokers; prohibited the payment of contingent compensation by certain insurers for certain lines of insurance; provided a mechanism for expansion of the prohibition of contingent compensation to additional lines of insurance; and required substantial improvements in the disclosure of all producer compensation by certain large producers.

In response to the New York investigation, the National Association of Insurance Commissioners in 2004 amended its Producer Licensing Model Act to include requirements that brokers (but not agents) disclose compensation to purchasers. The New York Insurance Department also circulated a draft disclosure regulation in 2007. The work done on that draft and the comments received have been incorporated into the current draft.

In July 2008, the New York State Insurance Department in cooperation with the Attorney General's Office held public hearings in Buffalo, Albany and New York City and conducted extensive outreach to consumer groups, industry and other stakeholders for more than a year. The Department has publicly exposed two informal draft regulations (in January 2009 and July 2009) and sought comment on each. The Department has also held six "working group" meetings with stakeholders in various lines of insurance and dozens of other formal and informal meetings and phone calls with consumer and industry representatives. Through this process, the Department has considered a number of different courses of action including (1) banning or limiting certain types of producer compensation; (2) full disclosure of all producer compensation for every insurance transaction; (3) requiring disclosure only for producers who are paid directly by the purchaser and by the insurer; (4) requiring disclosure of producer compensation only upon the request of the purchaser; (5) requiring that producers disclose only their role in the transaction and the source of their compensation with no disclosure of the compensation amount; and (6) taking no regulatory action and/or promoting voluntary disclosure of compensation by producers.

After this exhaustive process, the Department has determined that the draft regulation is the best way to ensure that consumers better understand the role that insurance producers play in the insurance transaction, the compensation they receive and any potential conflicts of interest that may arise, while imposing as little cost as possible on the producers and insurers.

A longer Regulatory Impact Statement including a detailed summary of the input provided to the department by various stakeholders and the alternatives considered at each stage of the outreach process is available online at www.ins.state.ny.us.

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

10. Compliance schedule: Once the regulation is adopted, regulated parties will be given a phase-in period of six months.

Regulatory Flexibility Analysis

1. Effect of the regulation: The regulation will not affect any local governments. This regulation will affect regulated insurers, most of which do not come within the definition of "small business" found in Section 102(8) of the State Administrative Procedure Act, because none is independently owned and operated, and employs less than one hundred individuals. The regulation would also affect insurance producers, the vast majority of which are small businesses because they are independently owned and operated, and employ one hundred or less individuals. There are over 200,000 licensed insurance producers in New York, resident and non-resident, that will be affected by the regulation. The Department has no record of the exact number of small businesses included in that group. The Department has designed the regulation to place the least burden possible on insurance producers, as discussed below.

2. Compliance requirements: The regulation would require an insurance producer to provide an oral or written disclosure stating whether the producer represents the insurer or the insured, that the producer will receive compensation from the insurer based upon the sale of the policy, that the compensation paid by insurers may vary, and that the purchaser may obtain from the producer upon request information about the compensation the producer expects to receive from the sale of the policy and for any alternative quotes that the insurer producer obtained for the customer. If the producer makes the disclosure orally, the producer may either prepare a certification stating that the producer made the oral disclosure, or the producer may make a recording of the disclosure. The regulation would also require a written disclosure where the customer specifically asks for more information about the producer's expected compensation for the policy recommended and alternative quotes. The regulation would require the producer to retain a copy of all written disclosures and, if applicable, certifications or recordings of oral disclosures for a period of three years after the disclosure is given.

3. Professional services: The regulation would not require an insurance producer to use professional services.

4. Compliance costs: The regulation will not impose any compliance costs on local governments. Insurance producers, many of whom are small businesses, may incur additional costs of compliance, but they should be minimal. The cost to producers will be associated primarily with developing and providing a brief initial disclosure to purchasers either orally or in writing. Once developed, this initial disclosure will be a short boilerplate statement a few sentences long. There will also be some cost to producers and insurers to maintain the records as required under the regulation, but

these can be maintained electronically or otherwise, thereby reducing maintenance costs. The regulation does not regulate the amount, nature or amount of compensation; it simply requires disclosure of compensation practices.

5. Economic or technological feasibility: Local governments will not incur an economic or technological impact as a result of this regulation. Small businesses will not have to purchase any new technology to comply with the regulation. An insurance producer may choose whether to comply with the regulation by providing disclosure in writing or orally. If the insurance producer chooses to provide the disclosure orally, the producer may choose to memorialize the disclosure either by recording it or by preparing a written certification.

6. Minimizing adverse impact: The regulation applies to the insurance market throughout New York State. The same requirements will apply to all insurance producers and so do not impose any adverse or disparate impact on small businesses. Further, the Department has designed the regulation to place the least burden possible on insurance producers by allowing insurance producers to decide whether to provide mandatory disclosures prior to sale either orally or in writing. An insurance producer who chooses to satisfy the initial disclosure requirement with a written disclosure may prepare a "boilerplate" form to use with each disclosure. An insurance producer choosing to provide oral disclosure may choose whether to record the disclosure or prepare a written certification stating that the producer provided the disclosure. Finally, to the extent that the insurance producer is required to disclose additional information about its compensation, the producer is only required to provide information that the producer has at that time, or to make a reasonable estimate.

7. Small business and local government participation: In July 2008, the New York State Insurance Department in cooperation with the Attorney General's Office held public hearings in Buffalo, Albany, and New York City and conducted extensive outreach to consumer groups, industry and other stakeholders for more than a year. The Department has publicly exposed two informal draft regulations (in January 2009 and July 2009) and sought public comment on each. The Department has also held six "working group" meetings with stakeholders in various lines of insurance and dozens of other formal and informal meetings and phone calls with consumer and industry representatives. By its extensive outreach, the Department facilitated comments from all interested parties, including small businesses and local governments and their representatives such as the Independent Insurance Agents and Brokers of New York and Professional Insurance Agents which represent many small businesses and the Public Risk and Insurance Management Society which represents risk managers employed by local governments.

Rural Area Flexibility Analysis

1. Types and estimated number of rural areas: This regulation applies to producers and regulated insurers doing business or resident in every county in the state, including those that are, or contain, rural areas, as defined under Section 102(13) of the State Administrative Procedure Act. There are over 200,000 licensed insurance producers in New York, resident and non-resident, that will be affected by the regulation. The Department has no record of the exact number of insurance producers that do business in rural areas.

2. Reporting, recordkeeping and other compliance requirements and professional services: The proposed regulation would require an insurance producer to provide an oral or written disclosure stating whether the producer represents the insurer or the insured, that the producer will receive compensation from the insurer based upon the sale of the policy, that the compensation paid by insurers may vary, and that the purchaser may obtain from the producer upon request information about the compensation the producer expects to receive from the sale of the policy and for any alternative quotes that the insurer producer obtained for the customer. If the producer makes the disclosure orally, the producer may either prepare a certification stating that the producer made the oral disclosure, or the producer may make a recording of the disclosure. The regulation would also require a written disclosure where the customer specifically asks for more information about the producer's expected compensation for the policy recommended and alternative quotes. The regulation would require the producer to retain a copy of all written disclosures and, if applicable, certifications or recordings of oral disclosures for a period of three years after the disclosure is given.

3. Costs: Regulated insurers and insurance producers, including those located in rural areas, may incur additional costs of compliance, but they should be minimal. The cost to producers will be associated primarily with developing and providing a brief initial disclosure to purchasers either orally or in writing. Once developed, this initial disclosure will be a short boilerplate statement a few sentences long. There will also be some cost to producers and insurers to maintain the records as required under the regulation, but these can be maintained electronically or otherwise, thereby reducing maintenance costs. The regulation does not regulate the amount, nature or amount of compensation; it simply requires disclosure of compensation practices.

Producers will also have to spend a small amount of time gathering and presenting additional information about their compensation when a consumer requests such information. The regulation, however, does not require the producer to collect or maintain any more information than the producer already has on hand in the ordinary course of business. The regulation will require insurers to maintain records relating to the payment of compensation to producers but will not dictate the manner in which those records are kept thereby reducing any potential compliance cost.

4. Minimizing adverse impact: The Department has designed the regulation to place the least burden possible on insurance producers by allowing insurance producers to decide whether to provide mandatory disclosures prior to sale either orally or in writing. An insurance producer who chooses to satisfy the initial disclosure requirement with a written disclosure may prepare a "boilerplate" form to use with each disclosure. An insurance producer choosing to provide oral disclosure may choose whether to record the disclosure or prepare a written certification stating that the producer provided the disclosure. An insurance producer who chooses to provide oral disclosure and prepare a certification to that effect may also use a "boilerplate" form. Finally, to the extent that the insurance producer is required to disclose additional information about its compensation, the producer is only required to provide information that the producer has at that time, or to make a reasonable estimate.

There will also be some cost to producers and insurers to maintain the records as required under the regulation, but these can be maintained electronically or otherwise, thereby reducing maintenance costs.

5. Rural area participation: In July 2008, the New York State Insurance Department in cooperation with the Attorney General's Office held public hearings in Buffalo, Albany and New York City and conducted extensive outreach to consumer groups, industry and other stakeholders for more than a year. The Department has publicly exposed two informal draft regulations (in January 2009 and July 2009) and sought public comment on each. The Department has also held six "working group" meetings with stakeholders in various lines of insurance and dozens of other formal and informal meetings and phone calls with consumer and industry representatives. By its extensive outreach, the Department endeavored to facilitate comments from all interested parties, including parties in rural areas.

Job Impact Statement

The proposed regulation is not likely to have a substantial adverse impact on job or employment opportunities in New York. The proposed regulation would require an insurance producer to provide an oral or written disclosure stating whether the producer represents the insurer or the insured, that the producer will receive compensation from the insurer based upon the sale of the policy, that the compensation paid by insurers may vary, and that the purchaser may obtain from the producer upon request information about the compensation the producer expects to receive from the sale of the policy and for any alternative quotes that the insurer producer obtained for the customer. If the producer makes the disclosure orally, the producer may either prepare a certification stating that the producer made the oral disclosure, or the producer may make a recording of the disclosure. The regulation would also require a written disclosure where the customer specifically asks for more information about the producer's expected compensation for the policy recommended and alternative quotes. The regulation would require the producer to retain a copy of all written disclosures and, if applicable, certifications or recordings of oral disclosures for a period of three years after the disclosure is given.

The Department has designed the regulation to place the least burden possible on insurance producers. An insurance producer who chooses to satisfy the initial disclosure requirement with a written disclosure may prepare a "boilerplate" form to use with each disclosure. An insurance producer who chooses to provide oral disclosure and prepare a certification to that effect may also use a "boilerplate" form. Also, to the extent that the insurance producer is required to disclose additional information about its compensation, the producer is only required to provide information that the producer has at that time, or to make a reasonable estimate.

Further, the regulation may have a positive effect on jobs of businesses that purchase insurance. It would provide a business with the information its needs to assess the recommendations that insurance producers make and avoid situations where producers could potentially steer them to less advantageous (in terms of price or coverage or service) insurance policies. Overall, all insurance consumers in the state, whether personal or commercial, are likely to benefit from the regulation because transparency and a better understanding of the role of the insurance producer is likely to lead to better-informed selection among available insurance options.

A number of life insurance industry groups representing producers and insurers have argued that the regulations disclosure requirements will make it more difficult to attract, train and retain new life insurance agents because more inexperienced agents will have difficulty overcoming consumer questions about producer compensation to make sales. The

Department has sought to address these concerns by moving to the two-step disclosure process that only requires the agent to describe his or her role in the transaction and in general how the agent will be compensated with an offer of more information upon request. Anything less than this initial "role disclosure" would undermine the important consumer protection goals of transparency for all insurance purchasers."

The regulation will not result in any negative impact on jobs or economic opportunities in New York State.

Department of Labor

EMERGENCY RULE MAKING

Provision of Safety Ropes and System Components for Firefighters at Risk of Being Trapped at Elevations

I.D. No. LAB-26-09-00007-E

Filing No. 1282

Filing Date: 2009-11-12

Effective Date: 2009-11-12

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

Action taken: Addition of section 800.7 to Title 12 NYCRR.

Statutory authority: Labor Law, art. 2, sections 27 and 27-a; title 7, section 200

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

Specific reasons underlying the finding of necessity: To give fire departments sufficient time to conduct risk assessments regarding the types of safety ropes and rescue system needed, to purchase needed equipment, and to train firefighters in their effective use before the date of the statutory requirement.

Subject: Provision of safety ropes and system components for firefighters at risk of being trapped at elevations.

Purpose: To insure that firefighters are provided with appropriate ropes and system components for self-rescue and emergency escape.

Text of emergency rule: Section 800.7

Emergency Escape and Self Rescue Ropes and System Components for Firefighters

(a) *Title and Citation:* Within and for the purposes of the Department of Labor, this part may be known as Code Rule 800.7, *Emergency Escape and Self Rescue Ropes and System Components for Firefighters, specifying the requirements for safety ropes and associated system components.*

(b) *Purpose and Intent:* This rule is intended to ensure that firefighters are provided with necessary escape rope and system components for self rescue and emergency escape and to establish specifications for such ropes and system components.

(c) *Application:* This part shall apply throughout the State of New York to the State, any political subdivision of the State, Public Authorities, Public Benefit Corporations or any other governmental agency or instrumentality thereof employing firefighters within the meaning of § 27-a of the Labor Law.

This Part shall not apply to such employers located in a city with a population of over one million.

Section 800.7(d)

Definitions. Within this part, the following terms shall have the meanings indicated:

(1) "System Components" means safety harnesses, belts, ascending devices, carabiners, descent control devices, rope grab devices, and snap links.

(2) "Escape Rope" means a single purpose, single use, emergency escape (Self-rescue) rope.

(3) "Interior Structural Fire Fighting" means the physical activity of fire suppression, rescue or both, inside of buildings or enclosed structures which are involved in a fire situation beyond the incipient stage.

(4) "Interior Structural Fire Fighter" means a firefighter who is designated by their employer to perform interior structural firefighting duties in an immediately dangerous to life and health (IDLH) atmosphere and is medically qualified to use self-contained breathing apparatus (SCBA) as defined in 29 CFR 1910.134.

(5) "Entrapment at Elevations" means a situation where a firefighter finds the normal route of exit is made unusable by fire, or other emergency situation, that requires the firefighter to immediately exit the structure from an opening not designed as an exit, that is above the ground floor and at an elevation above the surrounding terrain which would reasonably be expected to cause injury should the firefighter be required to exit.

Section 800.7(e)

Specifications for Escape Ropes and System Components

Escape ropes and system components provided to firefighters shall conform to the requirements of "The National Fire Protection Association Standard 1983, Standard on Fire Service Life Safety Rope and Equipment for Emergency Services" in effect at the time of their manufacture. Escape ropes and system components purchased after the effective date of this Part shall conform to the 2006 edition (NFPA1983- 2006) of such standard.

Section 800.7(f)

Risk Assessment and Equipment Selection

(1) Each employer who employs firefighters shall develop a written risk assessment to be used to determine under what circumstances escape ropes and system components will be required and what type will be required to protect the safety of firefighters in its employ. In performing the assessment, the employer shall:

(i) Identify the types and heights of buildings and other structures in the area the firefighters are expected to work. Such area shall include the regular scope of the fire district or other area covered by the fire department in question as well as any other districts or communities to which the fire department provides mutual aid with a reasonably predictable frequency.

(ii) Assess the standard operating procedures followed by the department with regard to rescue of firefighters from elevations.

(iii) Identify the risks to firefighters of being trapped at an elevation during structural fire fighting operations given the types of buildings or other structures located in the area(s) in which firefighters are expected to work. Identification of the risk in question shall include an assessment of:

(a) the extent to which standard operating procedures already in place will mitigate the risks identified;

(b) the type of escape ropes and system components that will be necessary to protect the safety of firefighters if operating procedures do not sufficiently mitigate the risk.

(2) Should the risk assessment establish that firefighters employed by the department performing interior structural firefighting are reasonably expected to be exposed to the risk of entrapment at elevations, the employer shall provide to each interior structural firefighter in its employ a properly fitted escape rope and those system components which meet the specifications for such rope and system components set forth in Section 800.7(e) and which would mitigate the danger to life and health associated with such risk.

Section 800.7(g)

Training

(1) The employer shall ensure that each firefighter who is provided with an escape rope and system components is instructed in their proper use by a competent instructor. Instruction shall include the requirements of paragraph (h) of this Part and the user information provided by the manufacturer as required by NFPA 1983 Chapter 5.2 for each rope and system component.

(2) Instruction shall include hands-on use of the equipment in a controlled environment.

(3) A record of such instruction including the name of the individual being trained, the name of the individual delivering the training, and the date on which the training was provided shall be maintained by the employer until such time as the firefighter is no longer

ger employed by the employer or the employer delivers a subsequent training on this topic, whichever comes first.

Section 800.7(h)

Employer Duties. In addition to the duties set forth in Parts 800.7(f) and (g), employers covered by this Part shall have the following duties:

(1) To ensure the adequacy of the safety ropes and system components, the employer shall routinely inspect and ensure that:

(i) Existing safety ropes and system components meet the codes, standards, and recommended practices adopted by the Commissioner;

(ii) Existing safety ropes and system components still perform their function by taking precautions to identify any of their limitations through reasonable means, including, but not limited to:

(a) Checking the labels or stamps on the equipment; and

(b) Checking any documentation or equipment specifications; and

(c) contacting the supplier or approval agency.

(iii) Firefighters are informed of the limitations of any safety rope or system components;

(iv) Firefighters are not allowed or required to use any safety rope or system components beyond their limitations;

(v) Existing or new safety ropes and system components have no visible defects that limit their safe use;

(vi) Safety ropes and system components are used, cleaned and maintained according to the manufacturer's instructions;

(vii) Firefighters are instructed in identifying to the employer any defects the firefighter may find in safety ropes and system components; and

(viii) Any identified defects are corrected or immediate action is taken to eliminate the use of the equipment by:

(a) Ensuring that escape rope and system components with defects which are repairable are tagged as unsafe and stored in such a manner that they cannot be used until repairs are made;

(b) Ensuring that escape rope and system components that cannot be repaired are immediately destroyed or rendered unusable as an escape rope and system components; and

(c) Ensuring that any escape rope that has been utilized under load for the purpose of self rescue / emergency escape is immediately removed from service, destroyed, or rendered unusable as an escape rope and immediately replaced.

(2) The employer's routine inspection cycle required by this paragraph shall be based upon the volume of activity the Department undertakes but, in no case, any less frequently than once each month.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. LAB-26-09-00007-EP, Issue of July 1, 2009. The emergency rule will expire December 2, 2009.

Text of rule and any required statements and analyses may be obtained from: Thomas J McGovern, NYS Department of Labor, State Office Campus, Bldg. 12, Rm. 509, Albany, NY 12240, (518) 457-4380, email: thomas.mcgovern@labor.state.ny.us

Regulatory Impact Statement

Statutory Authority: The legislature placed the amendment in Article 2 Section 27a of the Labor Law, Public Employee Safety and Health Act. Section 4 of the Act directs the Commissioner to promulgate rules to provide for the enforcement of the amendment and require that the latest edition of the National Fire Protection Association's standard on Life Safety Ropes and System Components be adopted.

The Commissioner has broad authority to promulgate rules and regulations under New York State Labor Law Article 2, Section 27a; Article 2, Section 27; Article 7, Section 200.

Legislative Objective: The intent of the Legislature was to insure that firefighters are provided with the appropriate ropes and system components to allow self-rescue from upper stories of buildings should they become trapped. The Legislature also specified the national consensus standard to which life safety ropes and system components must conform as well as the testing criteria that must be followed by the manufacturer.

Needs and Benefits: Firefighters occasionally become trapped on upper stories during fire suppression activities. Many times the firefighter is rescued by ladders or aerial apparatus; however, there are cases where the

trapped fire fighter cannot be reached or the rapid development of the emergency situation does not allow for rescue by other means and those cases could result in death or serious injury. One such case involved 6 trapped firefighters who were forced to jump from a fourth story. Four were seriously injured and two died of their injuries. Some of these injuries and deaths were attributable, in part, to either the lack of rescue ropes or the failure of the rope involved.

Costs: The ropes and system components needed to equip a firefighter for self rescue can be obtained for as little as \$60.00. New York City has provided each of its firefighters with a system that costs more than \$400.00. The proposed rule contains no minimum cost threshold. This allows the employer to take appropriate steps to reduce the cost of providing the equipment required by the rule, so long as the employer provides equipment appropriate for the risks identified in its risk assessment. Moreover, the equipment need only be provided to interior structural firefighters who work in areas where they could become trapped. Employers need not purchase or provide ropes and rescue devices to apparatus drivers and fire policemen or other employees not expected to perform interior structural firefighting.

Additional costs would be incurred for training in instructing employees in the use of the selected equipment and self rescue techniques. These costs will vary but as an example of the potential costs associated with the rule, one manufacturer sells a system which costs \$400.00 while the training in the system use is \$250.00 per person. On the other hand, the manufacturer will offer train the trainer instruction to a Fire Department Trainer for a one time cost; this instruction will then permit the Department to train its affected employees at a much lower cost than it would incur if it purchased the manufacturer's training for each of its members. Also, as mentioned elsewhere in this rulemaking, fire departments may also consider other methods to reduce training costs such as using in-house trainers and consolidating training classes with fellow departments to maximize training resources.

Paperwork: The paperwork requirements contained in the proposed rule are minimal. The employer must certify that the hazard assessment has been completed and must maintain that document. The employer must also keep training record identifying all employees trained under the rule. Since other standards and laws already require that training records be maintained, this provision will have minimal impact on the employer.

Local Government Mandates: Fire protection is a function of local government and as such the monetary burden of providing this equipment will be borne by the local government responsible for fire protection. The legislature did not provide funding for mandate relief.

Duplication: This rule does not duplicate any state or federal regulations.

Alternatives: The legislation requiring promulgation of the rule provided little room for any alternative to be considered. The amendment specifically requires equipment that meets a defined national consensus standard for specific purposes. The alternatives provided by the Department involve the judgment of the Department with regard to the risks faced by its employees performing interior structural firefighting and the ropes and equipment needed to mitigate that risk. The agency determined that the employer would be best suited to survey the hazards in the local protection area and select the equipment based upon the hazards firefighters would be exposed to, as opposed to imposing its own stringent requirements specifying the type of equipment needed.

Federal Standards: There are no federal standards with like requirements.

Compliance Schedule: The provisions of the amendment are effective on May 18, 2008 and employers will be required to be in compliance by November 1, 2008. The effective date of the rule will be upon adoption. The compliance aspects are not difficult and under normal inspection protocols an employer would be given 30 days to comply.

Regulatory Flexibility Analysis

Effect of the Rule: The proposed rule does not apply to small businesses. The rule will apply to all local governmental entities that employ a firefighter except for the City of New York. Not all governmental entities employ firefighters. With regard to fire departments that will be affected by this rule, the rule requires them to conduct an assessment of the potential risk of entrapment at elevations faced by their employees, identify those employees subject to this risk, obtain protective equipment for these employees, and train them in its proper use. There should be little or no cost to performing the risk assessment. Basically a fire department must identify a responsible party to determine whether there are buildings or other structures within the district or in neighboring districts where the department provides mutual aid firefighting services which are of sufficient height that they pose a risk of entrapment at elevations. The individual must then identify those firefighters within their department who perform interior structural firefighting to determine how much equipment needs to be purchased, and must then review available equipment and determine which equipment to purchase. This process should, at most, take a couple of hours to conduct. It should ideally be conducted by an of-

ficer of the fire department, not a consultant, so no professional services should be needed. The most significant potential effect of the rule will be the costs associated with purchasing protective equipment. In some areas of the state, compliance costs are expected to be less than \$100.00 per firefighter. For all governmental entities that do employ firefighters, the effect of the rule would be limited by the results of the hazard assessment conducted by the fire department; costs would accrue depending on the nature of the hazard identified and the number of firefighters that would require the protective equipment addressed in the rule. Further details regarding potential costs are discussed below under the section entitled "Compliance Costs." Local Governments with hazards requiring the provision of protective equipment and training for firefighters may collaborate on the training and use quantity buying practices to reduce costs. Training requirements could also be met by utilizing free training provided by the Department of State, Office of Fire Prevention and Control, although that agency does not have the resources to train every firefighter affected by this rule.

Compliance Requirements: The enabling legislation requires that each employer that employs firefighters must provide emergency escape rope and system components appropriate for the risk to which firefighters in their employ are exposed. To determine this, the employer must conduct an assessment of the types of structures in the fire protection area, determine what the hazard to employees would be and then provide the appropriate harnesses, ropes and equipment so that employees may perform self rescue should they become trapped at an elevation expected to cause injury should the individual be required to jump. The law also requires that the employer provide training in the use of the provided equipment and inspect and assure the safety of the equipment. The authorizing legislation was also specific as to the design and testing of the provided equipment citing a national consensus standard, The National Fire Protection Association Standard 1983, "Life Safety Rope and Equipment for Emergency Responders". The law requires the commissioner to adopt the latest edition which is the 2006 edition. NFPA 1983-2006 established the design, construction and testing requirements for emergency escape and life safety ropes and system components and all such equipment must bear a label attesting to its conformance.

To meet the statutory compliance requirements the proposal includes the following steps that the employer must take:

1. Conduct a hazard assessment to establish the risk.
2. Identify employees subject to the risk.
3. Select the appropriate ropes and system components.
4. Provide properly fitted ropes and system components (many belts and harnesses are sized) to each employee at risk.
5. Train each employee in the use of the selected rope and system components.
6. Inspect the ropes and system components at least once each month to assure they are safe for use.

Professional Services: Training on the required subject matter is provided free of charge by the Office of Fire Prevention and Control. OFPC classes are limited and would not meet the needs of all employers. There are also many experts in the field who provide rope training and smaller employers could collaborate and share the expense of training. Under provisions of the executive law, career departments must have a Municipal Training Officer who would be capable of providing the training. See New York Executive Law § 156(6).

Compliance Costs: Purchase of the ropes and system components would be relatively inexpensive in suburban fire protection areas. As the height and complexity of structures increase, the equipment will become more expensive and the required training more comprehensive. Many suppliers can provide ropes and attachment devices at a price range from \$ 20.00 to \$50.00. Harnesses or escape belts can run from \$50.00 to \$100.00. On the high end of the cost spectrum, the system developed and used by FDNY costs approximately \$400.00 per firefighter and the Manufacturer (Petzl) requires that the employer participate in their training program at \$250.00 per person. They will provide train-the-trainer services.

In an effort to estimate the cost of compliance with the proposed rule, the Department contacted three fire departments of different size. A suburban volunteer department purchased a harness for \$150.00 which is suitable for not just emergency escape but for other technical rope rescues that the department performs. The Chief stated that he had purchased escape rope in bulk and cut it into prescribed length. He estimates that the rope cost about \$30.00 per member. He also purchased "Crosby Hooks" (an anchoring device designed for this purpose) at \$40.30 each. He estimates that it cost \$230.30 to equip each member with individual equipment assigned to them. 50 sets were purchased for a total of \$11,015.00. Since the Chief and one other member are OFPC Level 2 instructors certified to teach rope work no cost was incurred for training.

Albany Fire Department, a career fire department, reports that after conducting a risk assessment they chose a "Manufactured System" which costs \$410.00. The Fire Department Training Division will be trained by

FDNY in the use of the system. Additional costs will be incurred in sending the trainers to NYC and time away from duty for each firefighter to receive training. Albany FD has opted to issue each firefighter a system for their exclusive use. They will require 260 sets at a cost of \$106,600.00. The City has applied for a grant to finance the cost. Outside of NYC there are an estimated 5500 career firefighters in NYS. Following Albany FD's assessment of the risks (which is representative of the majority of areas covered by career fire departments), the statewide cost could be \$2,255,000 for equipment alone.

On the other hand, a volunteer fire department in a rural area consisting of one and two story homes and agricultural buildings conducted a risk assessment and determined that a Belt, 30 feet of rope, and two carabineers were all that was necessary. The department already has a number of harnesses which are serviceable and utilized for high angle rescue. These harnesses will be issued to interior structural firefighters at no additional cost. The cost of the escape rope was set at \$30.00, and two carabineers at \$8.99 each. The rope and the Carabineers will be attached to the firefighters' airpacs. This Department has 12 airpacs. Training in rope work has consistently been provided by a member who is certified to teach rope work. As a result, this department can be adequately equipped for \$552.00.

Since the determination of what equipment is necessary under the rule and the numbers of firefighters who will need the equipment will be based on the department assessment, such figures will be inexact. However, other potential costs under the rule are standardized, for example, the requirement that the equipment purchased meet the NFPA standards. If each local government bought one copy of the NFPA Standard at \$34.50 per copy, the cost would be \$55,441.50.

Economic and Technological Feasibility: The emergency regulation does not impose any new technological requirements. Economic feasibility is addressed above under compliance costs.

Minimizing Adverse Impact: The regulation is necessary to implement Labor Law, Section 27-a(4)(c), as enacted by chapter 433 of the Laws of 2007 and amended by chapter 47 of the Laws of 2008, and to that extent, does not exceed any minimum State standards. Section 27-a(4)(c) requires the Commissioner to adopt the codes, standards and recommended practices promulgated by the most recent edition of the National Fire Protection Association 1983, Standard on Fire Service Life Safety Ropes and System Components, and as are appropriate to the nature of the risk to which the firefighter shall be exposed. This regulation has been carefully drafted to minimize the potential impact of the statute by allowing employers to assess risks based upon individual needs of their fire departments, by identifying those firefighters who are subject to such risk, and by identifying the types and quantity of equipment necessary to address the risk. Once the risk assessment has been performed, the regulation requires distribution of ropes and rescue equipment only to those interior structural firefighters who the assessment identifies as being at risk of entrapment. Moreover, the regulation requires that written training records be made available to the Department only upon request, limits required hands-on training only to those firefighters identified as being at risk through the risk assessment, and limits the inspection of the life safety rope systems to one time each month. These requirements help minimize potential adverse impacts. For example, if the proposal required every fire fighter to be provided equipment and undergo training, costs and record keeping requirements would have increased; if inspection was required more than once a month, it may have been unnecessarily burdensome, if less than once a month, it may have compromised the suitability of the equipment or the safety of the firefighters.

Small Business and Local Government Participation: This regulation will have no impact on small business. The regulation applies to all governmental entities that employ a firefighter. This rule reflects input obtained through consultation with the Executive Director of the New York State Association of Fire Chiefs and the NYS Department of State, Office of Fire Prevention and Control (OFPC). An initial meeting was held in the summer of 2007 and corrected or improved copies of the proposed rule were circulated among the agencies for consensus. The Proposed rule was also reviewed by the Department of State Counsel and their comments were incorporated into the proposed rule. Input was also solicited from the NYS Professional Firefighters Association, the NYS AFL CIO, and the Counsel for the Firemen's Association of the State of New York. The Department's Public Employee Safety and Health program staff also conducted outreach and information sessions at a dozen different meetings of fire departments and fire-related associations around the state and feedback received at these sessions was also considered by the Department in arriving at this final language.

The Department also posted the proposed rule on the Division of Safety and Health web page and filed it as an emergency rule.

Comments received through all these outreach efforts primarily requested that the document include direction to employers with regard to the selection of appropriate equipment and with regard to the identification of employees who might be at risk of entrapment such that they would

require ropes and system components. As a result of these comments, the rule was altered to include additional guidance on conducting a risk assessment and the definitions were changed to make it clear who would need to be equipped and what job duties would require ropes and system components.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The rule will apply to all public employers who employ firefighters. As many as 800 employers in rural or suburban areas will be affected by this rule.

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

The rule will require the employer to maintain training records to show that the firefighters have been trained. Employers are already required to maintain training records by other rules such as the OSHA requirements promulgated under 12NYCRR Part 800. The proposed rule does not appear to impose an additional recordkeeping burden on the employer and will require a minimum amount of effort to comply. The training record must be maintained until the training is repeated, for a period of one year.

Compliance with the overall rule will be less and less burdensome as the size of the employer decreases. The employer must perform a hazard assessment to determine the level of risk to which its employees are exposed and use that information to select the appropriate equipment to be provided. Depending on the height and types of structures in the area where the employer provides fire protection, the equipment could be a little as a rope, belt, and attachment devices.

The employer must also train employees in the techniques of self rescue. Many Fire Departments have the expertise in-house to provide this service, particularly in rural areas where building size and configurations may limit the risks addressed by the rule. Moreover, in rural areas rope work is part of high angle rescue work which a number of fire departments in mountainous areas provide. Individuals trained in high angle rescue techniques would require little or no extra training to meet the requirements of this proposed rule.

Training provided by the State Office of Fire Prevention and Control also covers the criteria involved. However, this office does not have sufficient staff resources to provide the training on a statewide basis. Some rope and rescue system manufacturers will provide training in their equipment; there will typically be a cost associated with this service, however.

Another option open to employers is to group together and hire a professional trainer to provide a train-the-trainer course for individuals from a number of departments who would then train the members of their own department. This method would make the expense of hiring a contractor a shared expense.

3. Costs:

There are two primary areas of cost imposed by the rule: the cost of purchasing and maintaining the equipment and the cost of providing the required training. The cost of the equipment would fluctuate by department, depending upon the risks identified in the risk assessment conducted by the Department and the equipment needed to address the risk. Each firefighter who is at risk of entrapment at elevation must be provided with properly fitted (belts and harnesses come in different sizes) self-rescue rope and other components such as a belt and carabiners. A rural fire department employer could reasonably outfit each employee covered by the rule for as little as \$100.00; if employers were to coordinate purchases and buy these items in bulk that cost could be reduced substantially. We should note that some of the manufactured systems cost as much as \$400.00. In most rural areas such expensive systems should not be necessary.

Costs associated with the provision of training in systems are discussed above. If training is provided in-house, costs would be minimal or none at all. A professional trainer could be provided by a manufacturer "free of charge" if the employer purchases a sufficient number of units of equipment. [Note: although this is classified as a free service, it is really a service whose cost is included in the equipment purchase cost.] If the professional trainer's services are not provided along with the purchase, the charges for the trainer's time could range up to \$500.00.

4. Minimizing adverse impact:

The only adverse impact resulting from the proposed rule are the costs associated with compliance. As discussed previously, covered employers can try to minimize such costs through coordination with other fire departments to purchase equipment in bulk and through train the trainer sessions which will allow one or more members to deliver the training to their fellow firefighters.

5. Rural area participation:

The proposed rule was posted on the department web site along with a contact. Numerous emails and phone calls were taken during the 6 months it was posted.

Meetings were held with employer groups such The New York State Association of Fire Chiefs and Regional Fire Administrators from around

the state. The rule was discussed with the Counsel for The Firemen's Association of the State of New York.

Meetings were also held with representatives of the Office of Fire Prevention and Control and with Department of State Counsel.

Comments from these meetings and contacts were used to develop the rule.

Job Impact Statement

This rule concerns the provision of safety ropes and system components for public sector Fire Fighters. It is apparent from the nature and purpose of the rule that it will not have a substantial adverse impact on jobs and employment.

NOTICE OF ADOPTION

Provision of Safety Ropes and System Components for Firefighters at Risk of Being Trapped at Elevations

I.D. No. LAB-26-09-00007-A

Filing No. 1281

Filing Date: 2009-11-12

Effective Date: 2009-12-02

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

Action taken: Addition of Section 800.7 to Title 12 NYCRR.

Statutory authority: Labor Law, art. 2, sections 27 and 27-a; title 7, section 200

Subject: Provision of safety ropes and system components for firefighters at risk of being trapped at elevations.

Purpose: To insure that firefighters are provided with appropriate ropes and system components for self-rescue and emergency escape.

Text or summary was published in the July 1, 2009 issue of the Register, I.D. No. LAB-26-09-00007-EP.

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

Text of rule and any required statements and analyses may be obtained from: Thomas McGovern, NYS Department of Labor, State Office Campus, Bldg. 12, Rm. 509, Albany, NY 12240, (518) 457-4380, email: thomas.mcgovern@labor.state.ny.us

Assessment of Public Comment

1. On May 15, 2009, the Department received a letter from Hinman Straub, Attorneys at Law, 121 State Street, Albany, New York 12207-1693 (518-436-0751) as representatives of the New York State Professional Fire Fighters Association (NYSPPFA) stating their opposition to "any expansion of the types of devices or other equipment that may be considered acceptable," arguing that "the original intent of this law was to be very specific in providing safety ropes and system components. To now expand the types of equipment is contrary to that intent an otherwise not acceptable to the NYSPPFA."

It is the Department's contention that there has been no such expansion of types of devices or equipment. All provisions of the regulation are based either in the statutory language of Labor Law § 27-a(4)(c) or, as required by that statute, in the adoption of "the codes, standards and recommended practices promulgated by the most recent edition of National Fire Protection Association 1983, Standard on Fire Service Life Safety Rope and System Components" (NFPA 1983 Standard).

2. On or about July 14, 2009, the Department received a letter from Bond, Schoenick & King, PLLC, 111 Washington Avenue, Albany, New York 12210-2211 (518-533-3000) as representatives of the New York State Association of Fire Chiefs, Inc. (NYS AFC) disputing the statements in the July 1, 2009 New York Register "that the Proposed Regulation was prepared following consultation and input from and meetings with the Executive Director of NYSAFC and the Counsel for the Fireman's Association of the State of New York ("FASNY")" by stating that while such organizations "spoke to the Department concerning the Emergency Regulations, they were not consulted with or provided opportunity to comment on the Proposed Regulations."

The Department denies these statements.

3. On August 14, 2009, the Department received a second letter from Bond, Schoenick & King, PLLC, also on behalf of NYSAFC, alleging that the Proposed Regulation, "is extremely vague, imprecise, ambiguous and unclear," that it is "technically flawed and patently inconsistent with the customary and recommended standards and practices of the firefighting community," and "gives no fundamental guidance or direction as to how the fire service should comply with same." The August 14, 2009 letter goes on to make the specific allegations that the use of emergency escape ropes is not a safe option, that the requirement for a risk assessment

contains no objective criteria with which to measure "reasonable risk," the form of the written assessment, that the NFPA 1983 Standard should not be used to determine the creation or proper use of emergency escape systems or the adequacy of combining System Components, and that the Proposed Regulation contains no guidance on the form of proper training.

Upon information and belief, all of these arguments and more were raised by the NYSAFC in its Article 78 proceeding against the Department in the Supreme Court, Albany County, Index No. 9744-08. The Department has made a Motion to Dismiss this proceeding on the grounds, among other things, that the requirements set forth in the Proposed Regulation are identical to those set forth in statute, that the use of emergency escape ropes is required by statute, that the Court of Appeals has warned the Department of Labor against using Section 27-a to "second-guess" decisions of persons such as fire chiefs in balancing the risks and hazards inherent in certain employment against protection of the public (see *Williams v. City of New York*, 2 NY2d 352, 367-368 (2004)), and that the adoption of the NFPA 1983 Standard is mandated by statute. The Motion to Dismiss was fully submitted on April 8, 2009 and the parties are awaiting a decision.

Public Service Commission

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

The Commission Adopted an Order to Grant in Whole or in Part on an Emergency Basis, the Transfer of Property Right Petition

I.D. No. PSC-48-09-00014-EP

Filing Date: 2009-11-17

Effective Date: 2009-11-17

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

Proposed Action: The Public Service Commission adopted an order approving, on an emergency basis, the petition on behalf of Central Hudson Gas & Electric Corporation seeking Commission approval pursuant to Public Service Law Section 70 to grant certain property rights valued at approximately \$4,600 and located in the Town of LaGrange to Dutchess County, which is required to receive federal funding to complete the Rail Trail project and contribute to the economic development and general welfare of Central Hudson's service territory.

Statutory authority: Public Service Law, section 70

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

The specific reasons underlying the finding of necessity, above, are as follows: The Public Service Commission approved the petition on behalf of Central Hudson Gas & Electric Corporation seeking Commission approval pursuant to Public Service Law Section 70 to transfer certain property rights valued at approximately \$4,600 and located in the Town of LaGrange to Dutchess County because such approval is required to satisfy federal funding deadlines and completion and success of the Rail Trail project which will contribute to the economic development and general welfare of Central Hudson's service territory.

Subject: The Commission adopted an order to grant in whole or in part on an emergency basis, the transfer of property right petition.

Purpose: The Commission adopted an order to grant in whole or in part on an emergency basis, the transfer of property right petition.

Substance of emergency/proposed rule (Full text is posted at the following State website: www.dps.state.ny.us): The Public Service Commission approved, on an emergency basis, the petition on behalf of Central Hudson Gas & Electric Corporation (Central Hudson) seeking Commission approval pursuant to Public Service Law Section 70 to transfer property rights valued at approximately \$4,600 and located in the Town of LaGrange to Dutchess County, which is required to receive federal funding, complete the Rail Trail project and contribute to the economic development and general welfare of Central Hudson's service territory.

This notice is intended: to serve as both a notice of emergency adoption and a notice of proposed rule making. The emergency rule will expire February 14, 2010.

Text of rule may be obtained from: 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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.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 the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is 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.

Rural Area Flexibility Analysis

A rural area flexibility analysis is 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.

Job Impact Statement

A job impact statement is not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-M-0739SA1)

NOTICE OF ADOPTION

Water Rates and Charges

I.D. No. PSC-44-08-00015-A

Filing Date: 2009-11-13

Effective Date: 2009-11-13

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

Action taken: On 11/12/09, the PSC adopted an order authorizing Heritage Hills Water Works Corporation to increase its base rates by \$156,000, or 11.5% and authorizing the company to implement a meter replacement program surcharge designed to recover the costs.

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

Subject: Water rates and charges.

Purpose: To approve an increase its annual water revenues by \$156,000, or 11.5% and authorizing a meter replacement program.

Substance of final rule: The Commission, on November 12, 2009, adopted an order authorizing Heritage Hills Water Works Corporation (company) to increase its base rates by \$156,000, or 11.5% and authorizing the company to implement a meter replacement program surcharge designed to recover the costs of a 15-year meter replacement program, effective November 30, 2009, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-W-1201SA1)

NOTICE OF ADOPTION

Water Rates and Charges

I.D. No. PSC-21-09-00006-A

Filing Date: 2009-11-13

Effective Date: 2009-11-13

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

Action taken: On 11/12/09, the PSC adopted an order approving Fried-

lander Water Supply to increase its annual water revenues by \$2,233 or 66.5%, and to increase its restoration service charge.

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

Subject: Water rates and charges.

Purpose: To approve an electronic tariff and to increase its annual water revenues by \$2,233 or 66.5%.

Substance of final rule: The Commission, on November 12, 2009, adopted an order approving Friedlander Water Supply to increase its annual water revenues by \$2,233 or 66.5%, and to increase its restoration service charge from a flat fee of \$10 at all times, to \$50 during normal business hours, \$75 outside of normal business hours, and to \$100 on weekends and public holidays, effective November 28, 2009, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-W-0383SA1)

NOTICE OF ADOPTION

Transfer of a Gas Transmission Pipeline and Lightened Regulation of AET

I.D. No. PSC-30-09-00015-A

Filing Date: 2009-11-17

Effective Date: 2009-11-17

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

Action taken: On 11/12/09, the PSC adopted an order approving the joint petition by Seneca Power Partners, L.P. (SPP) and Alliance Energy Transmissions, LLC (AET) for the transfer of a gas transmission pipeline from SPP to AET & approved the lightened regulation of AET.

Statutory authority: Public Service Law, sections 4(1), 66(1) and (13)

Subject: Transfer of a gas transmission pipeline and lightened regulation of AET.

Purpose: To approve the transfer of a gas transmission pipeline and lightened regulation of AET.

Substance of final rule: The Commission, on November 12, 2009, adopted an order approving the joint petition by Seneca Power Partners, L.P. (SPP) and Alliance Energy Transmissions, LLC (AET) for the transfer of a gas transmission pipeline from SPP to AET and approved the lightened regulation of AET as a gas corporation, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-G-0490SA1)

NOTICE OF ADOPTION

Issuance of Up to \$20 Million in Long-Term Securities

I.D. No. PSC-34-09-00018-A

Filing Date: 2009-11-13

Effective Date: 2009-11-13

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

Action taken: On 11/12/09, the PSC adopted an order approving the petition of Long Island Water Corporation to issue and sell up to \$20 million of long-term debt through December 31, 2010.

Statutory authority: Public Service Law, section 89-f

Subject: Issuance of up to \$20 million in long-term securities.

Purpose: To approve the issuance of up to \$20 million in long-term securities.

Substance of final rule: The Commission, on November 12, 2009, adopted an order approving the petition of Long Island Water Corporation to issue and sell up to \$20 million of long-term debt through December 31, 2010, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-W-0596SA1)

NOTICE OF ADOPTION

Approval of Financing and Transfer of Ownership Interests in Two 79.9MW Generation Facilities

I.D. No. PSC-35-09-00012-A

Filing Date: 2009-11-16

Effective Date: 2009-11-16

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

Action taken: On 11/12/09, the PSC adopted an order approving the joint petition of PPL Generation LLC and J-POWER USA Generation, L.P. for the transfer of ownership interests in two 79.9 MW generation facilities located on Long Island, New York.

Statutory authority: Public Service Law, sections 69 and 70

Subject: Approval of financing and transfer of ownership interests in two 79.9MW generation facilities.

Purpose: To approve the financing and transfer of ownership interests in two 79.9MW generation facilities.

Substance of final rule: The Commission, on November 12, 2009, adopted an order approving the joint petition of PPL Generation LLC (PPL) and J-POWER USA Generation, L.P. (J-Power) for the transfer of ownership interests in two 79.9 MW generation facilities located on Long Island, New York from PPL to J-POWER and approving the financing supporting the purchase of the facilities, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (09-E-0539SA1)

NOTICE OF ADOPTION

Specific Commercial and Industrial Electric and Gas Energy Efficiency Programs

I.D. No. PSC-36-09-00003-A

Filing Date: 2009-11-13

Effective Date: 2009-11-13

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

Action taken: On 11/12/09, the PSC order approving, with modifications, selected electric and gas Energy Efficiency Portfolio Standard (EEPS) programs for the commercial and industrial customer market sector and defer consideration of certain others.

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

Subject: Specific commercial and industrial electric and gas energy efficiency programs.

Purpose: To approve with modifications, electric and gas energy efficiency programs and defer consideration of certain others.

Substance of final rule: The Commission, on November 12, 2009, adopted an order approving, with modifications, selected Energy Efficiency Portfolio Standard (EEPS) electric and natural gas energy efficiency programs designed to serve the commercial and industrial (C&I) customer market segment. The approved programs include the Commercial & Industrial Custom Efficiency Program (electric) and Commercial and Industrial Custom Gas Efficiency Program (gas) to be administered by Consolidated Edison Company of New York, Inc. (Con Edison); the Commercial High-Efficiency Heating and Water Heating Program (gas) to be administered by Niagara Mohawk Power Corporation d/b/a National Grid (Niagara Mohawk); and the Non-Residential Small Business Direct Installation Programs (electric) and Non-Residential Commercial/Industrial Custom Rebate Programs (electric and gas) to be administered by New York State Electric and Gas Corporation (NYSEG) and Rochester Gas and Electric Corporation (RG&E). Action is deferred on the Commercial High-Efficiency Heating and Water Heating Programs (gas) proposed to be administered by The Brooklyn Union Gas Company d/b/a National Grid NY (KEDNY) and KeySpan Gas East Corporation d/b/a National Grid (KEDLI) due to substantial changes recently proposed by KEDNY/KEDLI, subject to the terms and conditions set forth in the order.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(08-E-1127SA7)

NOTICE OF ADOPTION

Street Lighting

I.D. No. PSC-36-09-00009-A

Filing Date: 2009-11-12

Effective Date: 2009-11-12

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

Action taken: On 11/12/09, the PSC adopted an order approving an amendment to Niagara Mohawk Power Corporation d/b/a National Grid's Schedule for Electric Service—P.S.C. No. 214—Street Lighting.

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

Subject: Street Lighting.

Purpose: To approve minor conforming changes to the street lighting tariff schedule.

Substance of final rule: The Commission, on November 12, 2009, adopted an order approving Niagara Mohawk Power Corporation d/b/a National Grid's (Company) revisions to its electric street lighting tariff schedule, P.S.C. No. 214 – Electricity, to provide a consistent format for all information and pricing within each service classification and include language regarding the Company's current practices.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-E-0633SA1)

NOTICE OF ADOPTION

Revisions to PSC No. 4 - Gas

I.D. No. PSC-37-09-00017-A

Filing Date: 2009-11-12

Effective Date: 2009-11-12

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

Action taken: On 11/12/09, the PSC allowed Orange and Rockland Utilities, Inc.'s tariff revisions to PSC No. 4—Gas to go into effect on 12/1/09.

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

Subject: Revisions to PSC No. 4 - Gas.

Purpose: To approve the revisions to PSC No. 4 - Gas.

Substance of final rule: The Commission, on November 12, 2009, allowed Orange and Rockland Utilities, Inc. to revise its gas tariff provisions related to alternate fuel reserve requirements for customers served on S.C. No. 3 – Interruptible Sales and S.C. No. 8 – Interruptible Transportation, PSC No. 4 - Gas, to go into effect on December 1, 2009.

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

Text of rule may be obtained from: Leann Ayer, Public Service Commission, Three Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann_ayer@dps.state.ny.us An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

Assessment of Public Comment

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-G-0638SA1)

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Major Electric Rate Filing

I.D. No. PSC-48-09-00009-P

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

Proposed Action: The Commission is considering a proposal filed by Central Hudson Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Electric Service — P.S.C. No. 15.

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

Subject: Major electric rate filing.

Purpose: To consider a proposal to increase annual electric revenues by approximately \$15.2 million.

Public hearing(s) will be held at: 11:00 a.m., Jan. 26, 2010 at Poughkeepsie Municipal Bldg., Council Chambers, 3rd Fl., 62 Civic Center Plaza, Poughkeepsie, NY; 6:00 p.m., Jan. 26, 2010 at Kingston City Hall, 420 Broadway, Kingston, NY.

*There could be requests to reschedule the hearings. Notification of the start of the hearing or any subsequent scheduling changes will be available at the DPS website (www.dps.state.ny.us) under Case 09-E-0588.

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

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

Substance of proposed rule: The Commission is considering a proposal filed by Central Hudson Gas and Electric Corporation (Central Hudson) which would increase its annual electric delivery revenues by about \$15.2 million or 5.98%. The statutory suspension period for the proposed filing runs through June 27, 2010. The Commission may adopt in whole or in part or reject terms set forth in Central Hudson's proposal, a multi-year rate plan, and/or other negotiated proposals.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-E-0588SP1)

**PROPOSED RULE MAKING
HEARING(S) SCHEDULED**

Major Gas Rate Filing

I.D. No. PSC-48-09-00011-P

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

Proposed Action: The Commission is considering a proposal filed by Central Hudson Gas and Electric Corporation to make various changes in the rates, charges, rules and regulations contained in its Schedule for Gas Service — P.S.C. No. 12.

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

Subject: Major gas rate filing.

Purpose: To consider a proposal to increase annual gas delivery revenues by approximately \$4.0 million.

Public hearing(s) will be held at: 11:00 a.m., Jan. 26, 2010 at Poughkeepsie Municipal Bldg., Council Chambers, 3rd Fl., 62 Civic Center Plaza, Poughkeepsie, NY; 6:00 p.m., Jan. 26, 2010 at Kingston City Hall, 420 Broadway, Kingston, NY.

*There could be requests to reschedule the hearings. Notification of the start of the hearing or any subsequent scheduling changes will be available at the DPS website (www.dps.state.ny.us) under Case 09-G-0589.

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

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

Substance of proposed rule: The Commission is considering a proposal filed by Central Hudson Gas and Electric Corporation (Central Hudson) which would increase its annual gas delivery revenues by about \$4.0 million or 6.08%. The statutory suspension period for the proposed filing runs through June 27, 2010. The Commission may adopt in whole or in part or reject terms set forth in Central Hudson's proposal, a multi-year rate plan, and/or other negotiated proposals.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-G-0589SP1)

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

To Consider the Accounting Revenues and Costs Associated with a Proposed Compressor Project

I.D. No. PSC-48-09-00010-P

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

Proposed Action: The Commission is considering a petition filed by Corning Natural Gas Corporation for a determination of the accounting for revenues and costs pertaining to a proposed compressor project.

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

Subject: To consider the accounting revenues and costs associated with a proposed Compressor Project.

Purpose: Revenues and costs pertaining to a proposed Compressor Project.

Substance of proposed rule: The Public Service Commission is considering whether to accept or reject in whole or in part a petition by Corning Natural Gas Corporation (Corning) for a determination of the accounting for revenues and costs pertaining to a proposed compressor project. The Commission may approve, reject or modify, in whole or in part, the relief requested by Corning.

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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(09-G-0791SP1)

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

Approval of a Transfer of Franchises or Stocks

I.D. No. PSC-48-09-00012-P

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

Proposed Action: The Commission is considering the petition of United Water Owego-Nichols Inc. for approval of a change in ownership, pursuant to 89-h of the Public Service Law.

Statutory authority: Public Service Law, section 89-h

Subject: Approval of a Transfer of Franchises or Stocks.

Purpose: To allow United Water Owego-Nichols Inc. to be transferred to United Waterworks Inc. from United Water Toms River Inc.

Substance of proposed rule: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition by United Water Owego-Nichols Inc. to transfer ownership to United Waterworks Inc. (UWW) from United Water Toms River Inc. (UWTR). UWTR will transfer all of its United Water Owego-Nichols' Stock to UWW. This is an internal paper reorganization of subsidiary companies for the purpose of aligning regulatory companies and streamlining financial reporting. There appear to be no costs associated with the transaction. The Commission shall consider all other related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.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. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@dps.state.ny.us

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-W-0797SP1)

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

Uniform System of Accounts - Request for Accounting Authorization

I.D. No. PSC-48-09-00013-P

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

Proposed Action: The Commission is considering the petition of United Water Westchester Inc. for approval to defer increased purchased water costs and additional expenses from Westchester Joint Water Works.

Statutory authority: Public Service Law, section 89-c(10)

Subject: Uniform System of Accounts - Request for Accounting Authorization.

Purpose: To allow United Water Westchester Inc. to defer items of expense beyond the end of the year in which it was incurred.

Substance of proposed rule: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition by United Water Westchester Inc. (company) for permission to defer (1) \$226,186 of incurred costs related to the 2008 and 2009 Westchester Joint Water Works (WJWW) rate increases; (2) \$73,340 of costs relating to the 2009 WJWW increase which are being protested by the company; (3) \$57,119 of costs relating to 2007 and 2008 retro-active adjustments for power and chemicals; and (4) fees paid to consultants for required analysis.

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) 474-6530, email: leann_ayer@dps.state.ny.us

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

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.
(09-W-0778SP1)

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

The New York State Reliability Council's Revisions to its Rules and Measurements

I.D. No. PSC-48-09-00015-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 whether to adopt, modify, or reject, in whole or in part, revisions to the rules and measurements of the New York State Reliability Council (NYSRC) contained in Version 25 of the NYSRC's Reliability Rules.

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4) and (5)

Subject: The New York State Reliability Council's revisions to its rules and measurements.

Purpose: To adopt revisions to various rules and measurements of the New York State Reliability Council.

Substance of proposed rule: The Public Service Commission (PSC) is

considering whether to adopt, modify, or reject, in whole or in part, revisions to the rules and measurements of the New York State Reliability Council (NYSRC) contained in Version 25 of the NYSRC's Reliability Rules, which were filed with the PSC on November 2, 2009.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: leann_ayer@dps.state.ny.us

Data, views or arguments may be submitted to: Jaclyn A. Brillling, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: Secretary@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.
(05-E-1180SP8)

Department of State

EMERGENCY RULE MAKING

Qualifying Experience and Education for Real Estate Appraisers

I.D. No. DOS-48-09-00004-E

Filing No. 1287

Filing Date: 2009-11-16

Effective Date: 2009-11-16

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

Action taken: Amendment of sections 1103.1, 1103.3, 1103.7, 1103.8, 1103.10, 1103.12(a), 1103.21, 1103.22(f), 1107.2, 1107.4(b)-(d), 1107.5 and 1107.9; repeal of sections 1103.9, 1105.1, 1105.2, 1105.3, 1105.4, 1105.5, 1105.6, 1105.7 and 1105.8; and addition of new sections 1103.9, 1105.1, 1105.2, 1105.3, 1105.4, 1105.5, 1105.6 and 1105.7 to Title 19 NYCRR.

Statutory authority: Executive Law, section 160-d

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

Specific reasons underlying the finding of necessity: The Federal Appraisal Qualifications Board (AQB), in accordance with the authority granted to said body pursuant to Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), establishes the minimum education, experience and examination requirements for real property appraisers to obtain state certification. States are required to implement appraiser certification requirements that are no less stringent than those issued by the AQB.

In 2004, the AQB adopted significant revisions to the education requirements for real estate appraisers. States were required to adopt these requirements by January 1, 2008. A failure to do would have resulted in the State losing Federal recognition of the State program. Legislation was therefore passed permitting the Department of State to adopt the required revisions by rule making. The Department has adopted emergency rules which have been in place since January 1, 2008 so that New York's appraiser program would not lose federal recognition.

If New York were to lose Federal recognition of its appraiser program, federal financial institutions and many State financial institutions would be prohibited from accepting appraisals from New York real estate appraisers. This would include virtually all mortgage and refinance transactions. Appraisers licensed or certified by the State of New York would be prohibited from preparing an appraisal for any such transaction and New York consumers would be forced to go out of state in order to obtain an appraisal. The hardship and disruption for the State's financial community, as well as for buyers and sellers of real estate within the State would be significant.

Subject: Qualifying experience and education for real estate appraisers.

Purpose: To amend current regulations in order to conform said regulations with recent statutory amendments.

Substance of emergency rule: Section 1103.1 of Title 19 NYCRR is amended to specify the course work and education required for licensure as an appraiser assistant, licensed real estate appraiser and certified real estate appraiser.

Section 1103.3(f) of Title 19 NYCRR is amended to specify that course waivers may only be granted in 15 hour segments.

Section 1103.7 of Title 19 NYCRR is amended to permit the Department of State to approve courses of study for appraiser assistants.

Section 1103.8 of Title 19 NYCRR is repealed and a new section 1103.8 is added to specify the course content and hours of study required for licensure as an appraiser assistant, licensed and certified real estate appraiser.

Section 1103.9 of Title 19 NYCRR is repealed and a new section 1103.9 is added to specify the course content and hours of study required for general real estate appraiser certification.

Section 1103.10 of Title 19 NYCRR is amended to specify the educational requirements for the 15 hour National USPAP course.

Section 1103.12(a) of Title 19 NYCRR is amended to provide that students must physically attend 90 percent of each course offering in order to satisfactorily complete said course.

Sections 1103.21 and 1103.22(f) of Title 19 NYCRR is amended to set forth the registration fees for schools and instructors.

Section 1105.1 of Title 19 NYCRR is repealed and a new section 1105.1 is adopted to permit test providers who are approved by the Appraiser Qualifications Board to administer appraiser examinations in New York State.

Section 1105.2 of Title 19 NYCRR is repealed and a new section 1105.2 is adopted to set forth the procedure for test providers to obtain approval from the Department of State to administer appraiser examinations in New York State.

Section 1105.3 of Title 19 NYCRR is repealed and a new section 1103 is adopted to set forth the procedure and requirements for registering and scheduling exam candidates for appraiser examinations.

Section 1105.4 of Title 19 NYCRR is repealed and a new section 1105.4 is adopted to permit the Department to prescribe New York State specific examination questions.

Section 1105.5 of Title 19 NYCRR is repealed and a new section 1105.5 is adopted to require exam providers to report examination results to the Department of State in such form and manner as prescribed by the Department of State.

Section 1105.6 of Title 19 NYCRR is repealed and a new section 1105.6 is adopted to set forth the procedures associated with suspension and denials of approval to offer appraiser examinations.

Section 1105.7 of Title 19 NYCRR is repealed and a new section 1105.7 is adopted to require test providers to copy the Department of State on any reports sent to the Appraisal Qualifications Board.

Section 1105.8 of Title 19 NYCRR is repealed.

Section 1107.2 of Title 19 NYCRR is amended to specify that licensees must complete 28 hours of approved continuing education every two years, including the 7 hour National USPAP update course in order to renew their license or certification.

Section 1107.4(b)-(d) of Title 19 NYCRR is amended to specify that no more than 14 hours of continuing education credit may be offered for authorship of an appraisal course of study or publication.

Section 1107.5 of Title 19 NYCRR is amended to specify that licensees must complete 28 hours of approved continuing education every two years, including the 7 hour National USPAP update course in order to renew their license or certification.

Section 1107.9 Title 19 NYCRR is amended to remove a dated provision that, for all licenses and certifications expiring on or before December 31, 2003, licensees were required to complete the 15 hour Ethics and Professional Practice Program or a course prescribed by subdivision b of section 1107.9.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire February 13, 2010.

Text of rule and any required statements and analyses may be obtained from: Whitney A. Clark, Esq., NYS Department of State, Division of Licensing Services, 80 South Swan Street, P.O., Box 22001, Albany NY 12231, (518) 473-2728

Regulatory Impact Statement

1. Statutory authority:

Executive Law section 160-d authorizes the New York State Board of Real Estate Appraisal to adopt regulations in aid or furtherance of the statute. One of the purposes of Article 6-E is to ensure that licensed and certified real estate appraisers meet certain minimum requirements for licensure. To meet this purpose, the Department of State, in conjunction with the New York State Board of Real Estate Appraisal, has issued rules and regulations which are found at Parts 1103, 1105 and 1107 of Title 19 NYCRR and is proposing this rule making.

2. Legislative objectives:

Executive Law, Article 6-E, requires the Department of State to license and regulate real estate appraisers. The statute requires prospective licensees to meet certain minimum requirements for licensure, including completion of approved qualifying education. These statutory requirements were changed during the 2007 Legislative Session in order to require the Department of State to implement such minimum requirements for licensure as are imposed on the State by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee required States to enact such minimum standards for licensure and/or certification. The rule making advances the legislative objective by conforming the education regulations with the requirements of the Appraisal Subcommittee in accordance with the 2007 statutory amendment.

3. Needs and benefits:

The Federal Appraisal Qualifications Board (AQB), in accordance with the authority granted to said body pursuant to Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), establishes the minimum education, experience and examination requirements for real property appraisers to obtain state certification. States are required to implement appraiser certification requirements that are no less stringent than those issued by the AQB.

In 2004, the AQB adopted significant revisions to the education requirements for real estate appraisers. States were required to adopt these requirements by January 1, 2008. A failure to have done so would have resulted in the State losing Federal recognition of the State program.

During the 2007 legislative session, a bill was passed to require the Department of State to adopt education requirements that are no less stringent than those required by the AQB. In response to this bill, the Department has adopted emergency rules which have been in effect since January 1, 2008. If the Department had failed to adopt these requirements, the New York appraisal program would have lost Federal recognition. This would have resulted in federal financial institutions and many State financial institutions being prohibited from accepting appraisals from New York real estate appraisers. This would include virtually all mortgage and refinance transactions. Appraisers licensed or certified by the State of New York would have been prohibited from preparing an appraisal for any such transaction and New York consumers would have been forced to go out of state in order to obtain an appraisal. The hardship and disruption for the State's financial community, as well as for buyers and sellers of real estate within the State would have been significant.

To ensure that the AQB mandate is met, and to conform the existing education regulations with the statutory amendments, this rule making is necessary.

4. Costs:

a. Costs to regulated parties:

The Department of State currently licenses and certifies 7,311 real estate appraisers. Prospective licensees will face increased education costs due to a greater number of required course hours. Currently, each appraiser course costs approximately \$300 resulting in an

anticipated cost of \$2,100 for the assistant appraiser courses, \$3,000 for the certified residential courses and \$3,300 for the certified general courses. The costs for continuing education are not expected to increase as a result of this rule making.

b. Costs to the Department of State:

The rule does not impose any costs to the agency, the state or local government for the implementation and continuation of the rule.

5. Local government mandates:

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

6. Paperwork:

The rule does not impose any new paperwork requirements. Insofar as prospective licensees are already required to satisfactorily complete qualifying education, conforming the regulations with the recent statutory amendments will not result in additional paperwork requirements.

7. Duplication:

This rule does not duplicate, overlap or conflict with any other state or federal requirement.

8. Alternatives:

The Department of State discussed the need to adopt the rule making at several meetings of the New York State Appraisal Board. Few comments were received that suggested alternatives to the current proposal. General comments were received, including the expressed concern that increasing the educational hours required for certification and licensure would make it more difficult to become licensed and certified. Because the Department is required to propose this rule making by Federal mandate, the hour requirements as set forth in the rule making could not be reduced.

One alternative that is being considered is a legislative amendment to permit on-line qualifying education. While this would not decrease the hours of education required for certification and licensure, it would provide an educational option and flexibility to prospective students.

9. Federal standards:

Title XI of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 establishes the Appraisal Qualifications Board (AQB) which establishes the minimum education, experience and examination requirements for real property appraisers to obtain state certification. States are required to implement appraiser certification requirements that are no less stringent than those issued by the AQB. This rule making conforms the education regulations with the required federal standard.

10. Compliance schedule:

Prospective licensees were required to comply with the rule on January 1, 2008. Insofar as the AQB conducted outreach to the regulated public about the relevant changes effected by this rule making, licensees and prospective licensees were notified about the changes and have been able to comply with the rule on the effective dates found in previous emergency adoptions of the rule.

Regulatory Flexibility Analysis

1. Effect of rule:

The rule will apply to prospective real estate appraisers who are applying for licensure pursuant to Article 6-E of the Executive Law after January 1, 2008. During the 2007 legislative session, a bill was passed to amend Article 6-E of the Executive Law to require the Department of State to enact such education and experience requirements for licensure or certification as a real estate appraiser that are no less stringent than those requirements imposed on States by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee required States to enact certain minimum requirements for licensure and/or certification as a real estate appraiser. The rule making merely conforms existing education regulations to the new statutory amendment and requirements of the Appraisal Subcommittee. The rule making will not have any foreseeable impact on jobs or employment opportunities for real estate appraisers.

The rule does not apply to local governments.

2. Compliance requirements:

Insofar as the existing statute and regulations already require mini-

um education and experience requirements for licensure, the rule making will not add any new reporting, record-keeping or other compliance requirements.

The rule does not impose any compliance requirements on local governments.

3. Professional services:

Licensees will not need to rely on any new professional services in order to comply with the rule. Licensees are already required to satisfy minimum education and experience qualifications pursuant to Article 6-E of the Executive Law. Insofar as licensees must already attend and complete approved education courses, conforming the regulations with the statute will not result in the need to rely on any new professional services. The Department expects existing education providers to begin offering new approved courses in accordance with the amended statute and the rule making.

The rule does not impose any compliance requirements on local governments.

4. Compliance costs:

The rule making will not result in any new compliance costs. Prospective licensees are already required to complete, and pay for, qualifying education pursuant to Article 6-E of the Executive Law. Insofar as licensees must already complete and pay for approved education courses, conforming the education regulations with the recent statutory amendments will not result in any new compliance costs.

The rule does not impose any compliance costs on local governments.

5. Economic and technological feasibility:

Since the rule does not provide any new record keeping requirements on prospective licensees, it will be technologically feasible for these persons to comply with the rule.

6. Minimizing adverse economic impact:

The Department of State has not identified any adverse economic impact of this rule. The rule does not impose any additional reporting or record keeping requirements on licensees and does not require prospective licensees to take any affirmative acts to comply with the rule other than those acts that are already required pursuant to Executive Law, Article 6-E.

7. Small business participation:

Prior to proposing the rule, the Department discussed the proposal at numerous public meetings of the New York State Real Estate Appraisal Board, the minutes of which were posted on the Department's website. The public was given an opportunity to issue comments during the public comment period of these meetings. In addition, the Notice of Proposed Rule Making will be published by the Department of State in the State Register. The publication of the rule in the State Register will provide notice to local governments and additional notice to small businesses of the proposed rule making. Additional comments will be received and entertained.

Rural Area Flexibility Analysis

A rural flexibility analysis is not required because this rule does not impose any adverse impact on rural areas, and the rule does not impose any new reporting, record keeping or other compliance requirements on public or private entities in rural areas.

Article 6-E of the Executive Law was amended during the 2007 legislative session, to, in relevant part, require the Department of State to enact such education and experience requirements for licensure or certification as a real estate appraiser that are no less stringent than those requirements imposed on States by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee required States to enact certain minimum requirements for licensure and/or certification as a real estate appraiser. The rule making merely conforms existing education regulations to the new statutory amendment and requirements of the Appraisal Subcommittee. Insofar as the existing statute and regulations already require minimum education and experience requirements for licensure, the rule making will not add any new reporting, record-keeping or other compliance requirements on public or private entities in rural areas.

Job Impact Statement

A job impact statement is not required because this rule will not have any substantial impact on jobs or employment opportunities for licensed or certified real estate appraisers.

During the 2007 legislative session, a bill was passed to amend Article 6-E of the Executive Law. In pertinent part, the bill required the Department of State to enact such education and experience requirements for licensure or certification as a real estate appraiser that are no less stringent than those requirements imposed on States by the Federal Appraisal Subcommittee. Effective January 1, 2008, the Appraisal Subcommittee required States to enact certain minimum requirements for licensure and/or certification as a real estate appraiser. This rule making merely conforms existing education regulations to the new statutory amendment and requirements of the Appraisal Subcommittee. The rule making will not have any foreseeable impact on jobs or employment opportunities for real estate appraisers.

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 December 17, 2009, in Lancaster, Pa. At the public hearing, the Commission will consider: 1) action on certain water resources projects; 2) a compliance matter involving one project; 3) the rescission of a previous docket approval; 4) a request for an extension of an approval; 5) a request for an administrative hearing; 6) the 2010 Regulatory Program Fee Schedule; and 7) amendments to the SRBC Comprehensive Plan. 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: December 17, 2009, at 1:00 p.m.

ADDRESS: Lancaster Marriot at Penn Square, 25 South Queen Street, Lancaster, PA 17603.

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, Secretary to the Commission, 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 actions or presentations on the following items: 1) a special presentation by Secretary of the Pennsylvania Department of Environmental Protection John Hanger; 2) presentation of the Frederick L. Zimmermann Award; 3) hydrologic conditions of the basin; 4) FY-2011 funding of the Susquehanna Flood Forecast and Warning System; 5) the 2010 Annual Water Resources Program; 6) a Low Flow Monitoring Plan for the basin; 7) ratification/approval of grants/contracts; and 8) the FY-2009 Audit Report. The Commission will also hear a Legal Counsel's report.

Public Hearing – Compliance Matter:

1. Project Sponsor: TYCO Electronics Corporation. Project Facility: Lickdale, Union Township, Lebanon County, Pa.

Public Hearing – Projects Scheduled for Action:

1. Project Sponsor and Facility: Chesapeake Appalachia, LLC (Susquehanna River – Hicks), Great Bend Township, Susquehanna County, Pa. Application for surface water withdrawal of up to 0.750 mgd.

2. Project Sponsor and Facility: East Resources, Inc. (Susquehanna River – Welles), Sheshequin Township, Bradford County, Pa. Application for surface water withdrawal of up to 0.850 mgd.

3. Project Sponsor and Facility: Eastern American Energy Corporation (West Branch Susquehanna River – Moore), Goshen Township, Clearfield County, Pa. Application for surface water withdrawal of up to 2.000 mgd.

4. Project Sponsor and Facility: Fortuna Energy Inc. (Fall Brook – Tioga State Forest C.O.P.), Ward Township, Tioga County, Pa. Application for surface water withdrawal of up to 2.000 mgd.

5. Project Sponsor and Facility: Fortuna Energy Inc. (Fellows Creek – Tioga State Forest C.O.P.), Ward Township, Tioga County, Pa. Application for surface water withdrawal of up to 2.000 mgd.

6. Project Sponsor and Facility: Fortuna Energy Inc. (Susquehanna River – Thrush), Sheshequin Township, Bradford County, Pa. Modification to increase surface water withdrawal from 0.250 mgd up to 2.000 mgd (Docket No. 20080909).

7. Project Sponsor and Facility: Montgomery Water and Sewer Authority, Clinton Township, Lycoming County, Pa. Application for groundwater withdrawal of up to 0.252 mgd from Well 2R.

8. Project Sponsor and Facility: Nissin Foods (USA) Co., Inc., East Hempfield Township, Lancaster County, Pa. Modification to increase consumptive water use from 0.090 mgd up to 0.150 mgd (Docket No. 20021021).

9. Project Sponsor and Facility: Southwestern Energy Company (Lycoming Creek – Reichenbach), Lewis Township, Lycoming County, Pa. Application for surface water withdrawal of up to 1.500 mgd.

10. Project Sponsor and Facility: Southwestern Energy Company (Lycoming Creek – Wascher), Lewis Township, Lycoming County, Pa. Application for surface water withdrawal of up to 1.500 mgd.

11. Project Sponsor and Facility: Southwestern Energy Company (Lycoming Creek – Parent), McIntyre Township, Lycoming County, Pa. Application for surface water withdrawal of up to 1.500 mgd.

12. Project Sponsor and Facility: Southwestern Energy Company (Lycoming Creek – Schaefer), McIntyre Township, Lycoming County, Pa. Application for surface water withdrawal of up to 1.500 mgd.

13. Project Sponsor and Facility: Sunbury Generation LP, Monroe Township and Shamokin Dam Borough, Snyder County, Pa. Modification for use of up to 0.100 mgd of the approved surface water withdrawal by natural gas companies (Docket No. 20081222).

Public Hearing – Request for Extension:

1. Project Sponsor and Facility: Sunnyside Ethanol, a wholly owned subsidiary of Consus Ethanol, LLC, Curwensville Borough, Clearfield County, Pa. Request for a waiver of the 120-day period for applying for extension and a retroactive 2-year extension for the project scheduled to expire on December 5, 2009 (Docket No. 20061203).

Public Hearing – Project Scheduled for Rescission Action:

1. Project Sponsor: Eastern American Energy Corporation. Pad ID: Whitetail Gun and Rod Club #1, ABR-20090418, Goshen Township, Clearfield County, Pa.

Public Hearing – Request for Administrative Hearing:

1. Petitioner Delta Borough, York County, Pennsylvania; RE: Delta Borough Public Water Supply Well No. DR-2; Docket No. 20090315, approved March 12, 2009.

Public Hearing – 2010 Regulatory Program Fee Schedule

The revisions implement annual adjustments previously established by the Commission in March 2005. Other changes include annual compliance and monitoring fees for projects approved or modified after December 31, 2009; an increase in certain water withdrawal application fees for new and modified projects in the smaller withdrawal categories; and comprehensive format changes to the fee schedule document to aid applicants, including separate charts for different types of fees and a new application fee worksheet.

Public Hearing – Comprehensive Plan Amendments

The Commission will also consider amendments to its Comprehensive Plan for the Water Resources of the Susquehanna River Basin. The proposed amendments include the addition of the 2010 Annual Water Resources Program and a “Low Flow Monitoring Plan” (both to be considered separately at this meeting), as well as all water resources projects approved by the Commission during 2009.

Opportunity to Appear and Comment:

Interested parties may appear at the above hearing to offer written or oral comments to the Commission on any matter on the hearing agenda, or at the business meeting to offer written or oral comments on other matters scheduled for consideration at the business meeting. The chair of the Commission reserves the right to limit oral statements in the interest of time and to otherwise control the course of the hearing and business meeting. Written comments may also be mailed to the Susquehanna River Basin Commission, 1721 North Front Street, Harrisburg, Pennsylvania 17102-2391, or submitted electronically to Richard A. Cairo, General Counsel, e-mail: rcairo@srbc.net or Stephanie L. Richardson, Secretary to the Commission, e-mail: srichardson@srbc.net. Comments mailed or electronically submitted must be received prior to December 11, 2009, to be considered.

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

Dated: November 17, 2009.

Stephanie L. Richardson
Secretary to the Commission.

Urban Development Corporation

EMERGENCY RULE MAKING

The Downstate Revitalization Fund Program

I.D. No. UDC-48-09-00001-E

Filing No. 1280

Filing Date: 2009-11-13

Effective Date: 2009-11-13

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

Action taken: Addition of Part 4249 to Title 21 NYCRR.

Statutory authority: Urban Development Corporation Act, section 5(4); L. 2008, ch. 174; L. 2008, ch. 57, part QQ, section 16-r

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

Specific reasons underlying the finding of necessity: The specific reasons underlying the finding of necessity, above, are as follows: Effective provision of economic development assistance in accordance with the enabling legislation requires the creation of the Rule. Program assistance will address the dangers to public health, safety and welfare by providing financial, project development, or other assistance for the purposes of supporting investment in distressed communities in the downstate region, and in support of such projects that focus on: encouraging business, community and technology-based development and supporting innovative programs of public and private cooperation working to foster new investment, job creation and small business growth.

Subject: The Downstate Revitalization Fund Program.

Purpose: Provide the basis for administration of The Downstate Revitalization Fund including evaluation criteria and application process.

Text of emergency rule: PART 4249

DOWNSTATE REVITALIZATION FUND PROGRAM

Section 4249.1 General

These regulations set forth the types of available assistance, evaluation criteria, application and project process and related matters for the Downstate Revitalization Fund (the "Program"). The Program was created pursuant to § 16-r of the New York State Urban Development Corporation Act, as added by Chapter 57 of the Laws of 2008 (the "Act") for the purposes of supporting investment in distressed communities in the downstate region and in support of projects that focus on encouraging business, community, and technology-based development, and supporting innovative programs of public and private cooperation working to foster new investment, job creation and small business growth.

Section 4249.2 Definitions

For purposes of these regulations, the terms below will have the following meanings:

(a) "Corporation" shall mean the New York State Urban Development Corporation doing business as Empire State Development Corporation.

(b) "Distressed communities" shall mean areas as determined by the Corporation meeting criteria indicative of economic distress, including land value, employment rate; rate of employment change; private investment; economic activity, percentages and numbers of low income persons; per capita income and per capita real property wealth; and such other indicators of distress as the Corporation shall determine.

(c) "Downstate" shall mean the geographical area defined by the Corporation. The defined geographical area will be disseminated to eligible parties by the Corporation.

Section 4249.3 Types of Assistance

The Program offers assistance in the form loans and/or grants to for-profit businesses, not-for-profit corporations, public benefit corporations, municipalities, and research and academic institutions, for activities including, but not limited to, the following:

(a) support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including, but not limited, to smart growth and energy efficiency initiative; intellectual capital capacity building;

(b) support for the attraction or expansion of a business including, but not limited to, those primarily engaged in activities identified as a strategic industry and minority-owned and women-owned business enterprises as defined by subdivisions (c) and (g) of section nine hundred fifty-seven of the general municipal law;

(c) support for land acquisition and/or the construction, acquisition or expansion of buildings, machinery and equipment associated with a project; and

(d) support for projects located in an investment zone as defined by paragraph (i) of subdivision (d) of section 957 of the General Municipal Law.

4249.4 Eligibility

(a) Eligible applicants shall include, but not be limited to, business improvement districts, local development corporations, economic development organizations, for profit businesses, not-for-profit corporations, public benefit corporations, municipalities, counties, research and academic institutions, incubators, technology parks, private firms, regional planning councils, tourist attractions and community facilities.

(b) The Corporation shall be eligible for assistance in the form of loans, grants, or monies contributing to projects for which the Corporation or a subsidiary act as developer.

(1) The Corporation may act as developer in the acquisition, renovation, construction, leasing or sale of development projects authorized pursuant to this Program in order to stimulate private sector investment within the affected community.

(2) In acting as a developer, the Corporation may borrow for purposes of this subdivision for approved projects in which the lender's recourse is solely to the assets of the project, and may make such arrangements and agreements with community-based organizations and local development corporations as may be required to carry out the purposes of this section.

(3) Prior to developing and such project, the Corporation shall secure a firm commitment from entities, independent of the Corporation, for the purchase or lease of such project. Such firm commitment shall be evidenced by a memorandum of understanding or other document describing the intent of the parties.

(4) Projects authorized under this subdivision whether developed by the Corporation or a private developer, must be located in distressed communities, for which there is demonstrated demand within the particular community.

(c) No full-time employee of the state or full-time employee of any agency, department, authority or public benefit corporation (or any subsidiary of a public benefit corporation) of the state shall be eligible to receive assistance under this initiative, nor shall any business, the majority ownership interest of which is beneficially controlled by any such employee, be eligible for assistance under this initiative.

Section 4249.5 Evaluation criteria

(a) The Corporation shall give priority in granting assistance to those projects:

(1) with significant private financing or matching funds through other public entities;

(2) likely to produce a high return on public investment;

(3) with existence of significant support from the local business community, local government, community organizations, academic institutions and other regional parties;

(4) deemed likely to increase the community's economic and social viability;

(5) with cost benefit analysis that demonstrates increased economic activity, sustainable job creation and investments;

(6) located in distressed communities;

(7) whose application is submitted by multiple entities, both public and private; or

(8) such other requirements as determined by the Corporation as are necessary to implement the provisions of the Program.

Section 4249.6 Application and Approval Process

(a) The Corporation may, at its discretion and within available appropriations, issue requests for proposals and may at other times accept direct applications for program assistance.

(b) Promptly after receipt of the application, the Corporation shall review the application for eligibility, completeness, and conformance with the applicable requirements of the Act and this Rule. Applications shall be processed in full compliance with the applicable provisions of the Act's 16-r.

(c) If the proposal satisfies the applicable requirements and initiative funding is available, the proposal may be presented to the Corporation's directors for adoption consideration in accordance with applicable law and regulations. The directors normally meet once a month. If the project is approved for funding and if it involves the acquisition, construction, reconstruction, rehabilitation, alteration or improvement of any property, the Corporation will schedule a public hearing in accordance with the Act

and will take such further action as may be required by the Act and applicable law and regulations. After approval by the Corporation and a public hearing the project may then be reviewed by the State Public Authorities Control Board ("PACB"), which also generally meets once a month, in accordance with PACB requirements and policies. Following directors' approval, and PACB approval, if required, documentation will be prepared by the Corporation. Notwithstanding the foregoing, no initiative project shall be funded if sufficient initiative monies are not received by the Corporation for such project.

Section 4249.7 Confidentiality

(1) To the extent permitted by law, all information regarding the financial condition, marketing plans, manufacturing processes, production costs, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Corporation, which is submitted by such person or entity to the Corporation in connection with an application for assistance, shall be confidential and exempt from public disclosures.

Section 4249.8 Expenses

(a) An application fee of \$250 must be paid to the Corporation for projects that involve acquisition, construction, reconstruction, rehabilitation alteration or improvement of real property, the financing of machinery and equipment and working capital loans and loan guarantees before final review of an application can be completed. This fee will be refunded in the event the application is withdrawn or rejected.

(b) The Corporation will assess a commitment fee of up to two percent of the amount of any Program loan involving projects for acquisition, construction, reconstruction, rehabilitation, alteration or improvement of real property, the financing of machinery and equipment and working capital payable upon acceptance of commitment with up to 1 percent rebated at closing. No portion of the commitment fee will be repaid if the commitment lapses and the project does not close. The Corporation will assess a fee of up to 1 percent, payable at closing, of the amount of any Program grant involving the acquisition, construction, reconstruction, rehabilitation, alteration or improvement of real property or the financing of machinery and equipment or any loan guarantee.

(c) The applicant will be obligated to pay for expenses incurred by the Corporation in connection with the project, including, but not limited to, expenses related to attorney, appraisals, surveys, title insurance, credit searches, filing fees, public hearing expenses and other requirements deemed appropriate by the Corporation.

Section 4249.9 Affirmative action and non-discrimination

Program applications shall be reviewed by the Corporation's affirmative action department, which shall, in consultation with the applicant and/or proposed recipient of the program assistance and any other relevant involved parties, develop appropriate goals, in compliance with applicable law (including section 2879 of the public authorities law, article fifteen-A of the executive law and section 6254(11) of the unconsolidated laws) and the Corporation's policy, for participation in the proposed project by minority group members and women. Compliance with laws and the Corporation's policy prohibiting discrimination in employment on the basis of age, race, creed, color, national origin, gender, sexual preference, disability or marital status shall be required.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires February 10, 2010.

Text of rule and any required statements and analyses may be obtained from: Antovk Pidedjian, New York State Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@empire.state.ny.us

Regulatory Impact Statement

1. Statutory Authority: Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968, as amended (the "Act"), provides, in part, that the corporation shall, assisted by the commissioner of economic development and in consultation with the department of economic development, promulgate rules and regulations in accordance with the state administrative procedure act.

Section 12 of the Act provides that the corporation shall have the right to exercise and perform its powers and functions through one or more subsidiary corporations.

Section 16-r of the Act provides for the creation of the downstate revitalization fund. The corporation is authorized, within available appropriations, to provide financial, project development, or other assistance from such fund to eligible entities as set forth in this subdivision for the purposes of supporting investment in distressed communities in the downstate region, and in support of such projects that focus on: encouraging business, community, and technology-based development, and supporting innovative programs of public and private cooperation working to foster new investment, job creation and small business growth.

2. Legislative Objectives: Section 16-r of the Act sets forth the Legislative intent of the Downstate Revitalization Fund to provide financial assis-

tance to eligible entities in New York with particular emphasis on: supporting investment in distressed communities in the downstate region, and in support of projects that focus on encouraging business, community, and technology-based development, and supporting innovative programs of public and private cooperation working to foster new investment, job creation, and small business growth.

It further states such activities include but are not limited to: support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including, but not limited to, smart growth and energy efficiency initiatives, intellectual capital capacity building; support for the attraction or expansion of a business including, but not limited to, those primarily engaged in activities identified as a strategic industry and minority-owned and women-owned business enterprises as defined by subdivisions (c) and (g) of section nine hundred fifty-seven of the general municipal law; support for land acquisition and/or the construction, acquisition or expansion of buildings, machinery, and equipment associated with a project; and support for projects located in an investment zone as defined by paragraph (i) of subdivision (d) of section 957 of the general municipal law.

The Legislative intent of Section 16-r of the Act is to assist business in downstate New York in a time of need and to promote the retention and creation of jobs and investment in the region.

The adoption of 21 NYCRR Part 4249 will further these goals by setting forth the types of available assistance, evaluation criteria, application and project process and related matters for the Downstate Revitalization Fund.

3. Needs and Benefits: Chapter 53 of the Laws of 2008, page 884, lines 5 thru 15 allocated \$35 million to support investment in projects that would promote the revitalization of distressed areas in the downstate region. As envisioned, the program would focus new investments on business, community and technology-based development. While the downstate region has experienced relatively strong growth in recent years, there still remain a significant number of areas that demonstrate high levels of economic distress. As measured by the poverty rate, the Bronx, at over 30%, ranks as the poorest urban county in the U.S. Brooklyn (Kings County) continues to rank among the top ten counties with the highest poverty rates in the country (22.6%). Overall, the poverty rate in New York City is just over 20%. The Community Service Society study, Poverty in New York City, 2004: Recovery?, concluded that if the number of New York City residents who live in poverty resided in their own municipality, they would constitute the 5th largest city in the U.S. Beyond the New York metro area in the Hudson Valley, the poverty rate exceeds 9%. Disproportionate levels of unemployment, population and job loss have left significant areas of the downstate region with shrinking revenue bases and opportunities for economic revitalization.

If it is assumed that at least half of the \$35 million allocation to the Fund is used for new capital investment, this would support approximately 160 construction-related jobs, generating an additional \$10 million in personal income in downstate distressed areas. The Corporation used the Implan® regional economic analysis system to model employment and personal income multipliers for construction spending to estimate the direct, indirect and induced jobs related to the Fund amounts assumed to be devoted to capital spending on infrastructure and construction-related activity.

New York State may collect approximately \$0.66 million in personal income tax and sales tax on income spending. To estimate the personal income tax revenues generated by this spending, the Corporation assumed the tax calculation for single or married filing separately on taxable income over \$20,000, using the standard deduction and 6.85% on income over \$20,000. Sales tax was estimated on taxable disposable income earned by wage earners. The Corporation assumed that 75% of gross income is disposable income and 40% of that is taxable.

This level of capital spending (assumed to be primarily on site development, infrastructure, building rehabilitation and new construction) will provide the basis for further investment in a broad range of economic activity.

4. Costs: The Fund as identified in Chapter 53 of the Laws of 2008, page 884, lines 17 thru 27 will be funded through the issuance of Personal Income Tax bonds. In addition to the interest costs, it is expected that fees and costs associated with issuing bonds, including the Corporation's fee, underwriting, banking and legal fees, will be approximately 1.6%.

The costs to municipalities and other regulated parties involved would depend on the extent to which they participate in and support the proposed projects. For municipalities, this may involve matching funds or the commitment of other public resources for project development. Participation is voluntary and would be considered on a case-by-case basis depending on the location of the municipality involved.

5. Paperwork / Reporting: There are no additional reporting or paperwork requirements as a result of this rule on regulated parties. Standard applications used for most other Corporation assistance will be employed

keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients. The rule provides that the Corporation may, however, require applicants to submit materials prior to submission of a formal application to determine if a proposal meets eligible criteria for Fund assistance.

6. **Local Government Mandates:** The Fund imposes no mandates – program, service, duty, or responsibility – upon any city, county, town, village, school district or other special district. To the contrary, the Fund offers local governments potentially enhanced resources, either directly or indirectly, to encourage economic and employment opportunities for their citizens. Participation in the program is optional; local governments who do not wish to be considered for funding do not need to apply.

7. **Duplication:** The regulations do not duplicate any existing state or federal rule.

8. **Alternatives:** The Fund proposed regulations provide for a variety of potential program outcomes, by type of assistance, eligible applicants, and eligible uses. These program criteria were informed through an extensive strategic planning process managed for Downstate ESDC by the management consultant A. T. Kearney. Their report, *Delivering on the Promise of New York State*, developed a strategy for the State to capitalize on its rich and diverse assets to encourage the growth of the Innovation Economy.

The following are three examples of alternatives that were provided during the outreach portion of the rulemaking process. All of the suggestions offered were from members of the small business community and local governments who responded to the Corporations request for input. All of the suggestions were included in the rules and regulations submitted with this Regulatory Impact Statement.

1. Regulations should be drafted to give priority to projects in developed areas that use smart growth principles, and that promote energy efficiency and conservation.

Section 4249.3, Part (a) provides for “support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including but not limited to, smart growth and energy efficiency initiatives.”

2. Regulations should clearly define “distressed communities” using specific, objective criteria.

Section 4249.2, Part (a) defines “Distressed Communities”

3. A streamlined application and reporting process is important to encourage small business participation.

ESDC uses one standard application for this, and many other economic development programs. The information required under Section 4249.6 “Application and approval process” from all applicants is needed for the corporation to make sound investment decisions. Private financing institutions request similar, if not more robust information from their applicants.

9. **Federal Standards:** There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. **Compliance Schedule:** The regulation shall take effect immediately upon adoption.

Regulatory Flexibility Analysis

1. **Effects of Rule:** “Small business” is defined by the State Economic Development law to be an enterprise with 100 or fewer employees. The vast majority – roughly 98 percent – of New York State businesses are small businesses.

We applied this criterion to ESD's models of the Downstate economy to determine how many small businesses could benefit from the Downstate Revitalization Fund. We limited the analysis to industries that are likely to have eligible businesses: manufacturing, transportation and warehousing, information, finance and insurance, professional and technical services, management of companies and enterprises, and arts, entertainment and recreation.

Across these 7 broad sectors our analysis indicates that approximately 115,000 small businesses will be eligible for funding under the Downstate Revitalization Fund.

In addition approximately 2,000 municipalities and local economic development-oriented organizations will be eligible for funding.

2. **Compliance Requirements:** There are no compliance requirements for small businesses and local governments in these regulations.

3. **Professional Services:** Applicants do not need to obtain professional services to comply with these regulations.

4. **Compliance Costs:** To the extent that there are existing capabilities at the local level to administer projects involving Downstate Revitalization Fund investments, there should be relatively little, if any additional administration costs.

5. **Economic and Technological Feasibility:** Compliance with these regulations should be economically and technologically feasible for small businesses and local governments.

6. **Minimizing Adverse Impact:** This rule has no adverse impacts on small businesses or local governments because it is designed to provide financing for joint discretionary and competitive economic development

projects for distressed communities. In addition the rule specifies that project evaluation criteria include significant support from the local business community, local government, community organizations, academic institutions, and other regional parties. Because this program is open to for-profit businesses confidentiality features are included in the application process.

7. **Small Business and Local Government Participation:** The National Federation of Independent Business, New York Farm Bureau, and the New York Conference of Mayors were consulted during this rulemaking and comments requested. In addition, 17 rural organizations, cooperatives, and agricultural groups and 10 local government associations were also notified.

ESDC received 10 responses to its outreach to interested parties on the proposed regulations. Much of the responses received consisted of general supporting statements for the programs or critique of the enabling legislation.

Listed are several comments received on the proposed rules related to the Downstate Revitalization Fund and our response to the comment.

1. Regulations should be drafted to give priority to projects in developed areas that use smart growth principles, and that promote energy efficiency and conservation.

Section 4249.3, Part (a) provides for “support for projects identified through collaborative efforts as part of the overall growth strategy for the local economy, including but not limited to, smart growth and energy efficiency initiatives.”

2. Regulations should clearly define “distressed communities” using specific, objective criteria.

Section 4249.2, Part (a) defines “Distressed Communities”

3. A streamlined application and reporting process is important to encourage small business participation.

ESDC uses one standard application for this, and many other economic development programs. The information required under Section 4249.6 “Application and approval process” from all applicants is needed for the corporation to make sound investment decisions. Private financing institutions request similar, if not more robust information from their applicants.

4. Regulations should allow for municipal comments when the applicant is not a municipality.

Section 4249.5, Part 3 gives preference to projects with the “existence of significant support from the local business community, local government, community organizations, academic institutions and other regional parties.”

Rural Area Flexibility Analysis

1. **Types and Estimated Numbers of Rural Areas:** The ESD Downstate region is almost non-rural character. Of the 44 counties defined as rural by the Executive Law § 481(7), none are in the Downstate region Of the 9 counties that have certain townships with population densities of 150 persons or less per square mile, only two counties – Dutchess and Orange – are in the Downstate region.

2. **Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:** The rule will not impose any new or additional reporting or recordkeeping requirements; no affirmative acts will be needed to comply; and, it is not anticipated that applicants will have to secure any professional services in order to comply with this rule.

3. **Costs:** The costs to municipalities and other regulated parties involved would depend on the extent to which they participate in and support the proposed projects. For municipalities, this may involve matching funds or the commitment of other public resources for project development.

4. **Minimizing Adverse Impact:** The purpose of the Downstate Revitalization Fund Program is to maximize the economic benefit of new capital investment in distressed areas of the downstate region. The statute stipulates that projects must be located in distressed communities for which there is a demonstrated demand. This suggests that cooperation among state, local, and private development entities will seek to maximize the Program's effectiveness and minimize any negative impacts.

5. **Rural Area Participation:** This rule maximizes geographic participation by not limiting applicants to those only in urban areas or only in rural areas, except for the requirement that applicants must be in downstate counties and be in distressed communities. The extent of local government support for a project is a significant criteria for project acceptance. A public hearing may also be required under the NYS Urban Development Corporation Act. The National Federation of Independent Business, New York Farm Bureau, and the New York Conference of Mayors were consulted during this rulemaking and comments requested. In addition, 17 rural organizations, cooperatives, and agricultural groups and 10 local government associations were also asked for their review and comment.

Job Impact Statement

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve

the economy of Downstate New York through strategic investments to support investments in distressed communities in downstate regions and to support projects that focus on encourage responsible development.
There will be no adverse impact on job opportunities in the state.