

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 Correctional Services

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Forwarding Inmate Mail

I.D. No. COR-19-09-00001-P

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

Proposed Action: Amendment of Part 722 of Title 7 NYCRR.

Statutory authority: Correction Law, section 112

Subject: Forwarding Inmate Mail.

Purpose: To provide clarity and to update current department policy and practice with US Postal Service Rules and practices.

Text of proposed rule: The Department of Correctional Services amends, adds to and repeals and reserves the following sections of 7 NYCRR, Part 722.

Amend section 722.1(c) as indicated below:

(c) No mail will be forwarded to a released inmate unless a change of address order is on file. *Mail will be forwarded for a period of two months.*

Add new sections (d) and (e) to Part 722.2, renumber existing section 722.2(d) to (f) and amend the newly numbered 722.2(f) as indicated below:

(d) *Facilities must comply with the United States Postal Service Requirements which require the facility to assume financial responsibility for forwarding any inmate mail it opens. Each facility will be required to establish a procedure to verify the presence of inmates at the facility prior to opening inmates' mail. When the facility opens the letter of an inmate no longer at the facility, it has the option of using the facility mail pouch or returning it to the Post Office for forwarding. When it is returned to the*

Post Office for forwarding, it must be placed in a new envelope, be properly addressed and be stamped with the appropriate amount of postage.

(e) *Facilities are also required to assume responsibility for any accountable mail for which they sign. Accountable mail is deemed to be any mail which requires a signature to be received. Once the facility signs for accountable mail, it will assume responsibility for any financial cost of forwarding it to the inmate. The facility will forward legal (i.e., from a judge, clerk of court or attorney), accountable mail forthwith and assume financial liability if forwarded through the Post Office. Non-legal accountable mail may be forwarded in the facility's mail pouch if forwarded within five business days.*

[d](f) The correspondence unit at the facility which receives the mail is responsible for checking to see if the inmate is in the facility and for the proper delivery or forwarding of all inmate mail.

Add new section (b) to Part 722.3, renumber existing sections 722.3(b), (c) & (d) to 722.2(c), (d) & (e) and amend the newly numbered section 722.3(c) as indicated below:

(b) *Forwardable mail is considered to be: first class mail; mail with endorsements, i.e., special services requested to forward or provide address correction; second and personal third class mail whereby an inmate has completed a Change of Address Order, Form 2101, guaranteeing postage.*

[b](c) *Non-forwardable mail is considered to be: [G]general distribution mail addressed to "Box Holder," "Occupant," or similar impersonal addresses and second and personal third class mail for which the inmate has not completed a Change of Address Order, form 2101. [should not be accepted at the facility but rather returned in bulk to the post office.]Non-forwardable mail should be disposed of as it cannot be returned to the Post Office.*

[c](d) Holding of mail or disposing of it other than as outlined herein may be construed as a violation of statutes concerning obstruction of mails. It is therefore extremely important that mail be forwarded without delay following the instructions set forth below.

[d](e) The correspondence unit is responsible for forwarding inmate mail.

Amend sections 722.4(a)(1), (a)(2), (a)(3)(ii); add a new note following section 722.4(a)(3)(iii); amend sections 722.4(b)(2) and (b)(4), as indicated below; and repeal and reserve section 722.4(c).

(a) Reception facility. An employee delegated by the superintendent shall inform newly received inmates of:

(1) the department's correspondence procedures as set forth in Part 720 of this[e] Title;

(2) United States postal regulations regarding forwarding of mail (see section 722.7subdivision [a][c] of this part[section]); and

(3) their responsibilities regarding the forwarding of mail when transferred or discharged which are to:

(i) *complete a Change of Address Order, Form 2101 at the current facility prior to transfer, when possible, to guarantee the postage for the forwarding of second class mail (magazines and newspapers), and/or personal third class materials (i.e., catalogues, newsletters, and photographs); and[notify the facility from which he/she is transferred of what mail, other than first class or legal mail, to redirect and what charges will be accepted; and]*

(ii) *consider the possibility of transfer before ordering publications or subscriptions or placing mail orders.*

Note: When the Change of Address Order, Form 2101 cannot be completed prior to transfer, the inmate should fill out the form and send it to the Correspondence Unit of the receiving facility. The receiving facility will mail it back to the transferring facility.

(b) Other facilities. An employee designated by the superintendent shall:

(2) *provide incoming inmates with change of address order, form 2101, to inmates who did not complete the form at the transferring facility[to be returned to the correspondence unit at the facility from which he/she was transferred];*

(4) collect completed forms, *send to the correspondence unit* and forward to the appropriate *transferring facility*.

(c) Repeal and reserve this section.

Add new section 722.5(a)(1) and renumber existing sections (a) (1)-(3) to (a)(2)-(4), amend newly numbered section 722.5(a)(4) and add new section 722.5(a)(5) as indicated below:

(a) Transfer.

(1) *An employee designated by the Superintendent shall provide transferring inmates with a Change of Address Order, Form 2101, to be sent to the Correspondence Unit of the transferring facility.*

(2)[1] The correspondence unit of the transferring facility shall, upon notification via the facility "Change Sheet," pull the file card(s) for the inmate(s) transferred from the active file noting facility transferred to and refile in the transfer file.

(3)[2] Forward all first-class and legal mail to the inmate at his/her new facility.

(4)[3] If a completed change of address order, form 2101, is filled out at the facility or received from the inmate after transfer, readdress all other forwardable mail as specified by the inmate. The receiving facility shall pay any postage due and debit the inmate's account, or encumber it if the inmate does not have enough money to cover the charges.

(5) *If the inmate refuses to guarantee postage for some or all personal third class mail, it will be disposed of, as it cannot be returned to the Post Office.*

Amend section 722.5(b)(1); add new section 722.5(b)(3)(iii) and renumber existing sections (b)(3)(iii) and (b)(3)(iv) to (b)(3)(iv) and (b)(3)(v); amend section 722.5(b)(4)(ii); and add new section 722.5(b)(4)(iii) as indicated below:

(b) Releases.

(1) When the inmate to be released signs for his/her property, he/she shall be given a change of address order, form 2101, and instructed to complete it and turn it in when the inmate picks up and signs for his/her money.

(3) If the inmate files a change of address order, form 2101, the correspondence unit shall:

(iii) *Dispose of second or personal third class mail for which the inmate has refused to guarantee postage;*

(iv)[iii] after a two-month period, stamp all mail received "Not Here" and return to the post office; and

(v)[iv] retain the change of address order, form 2101, in a dead file for a year to document inmate's instructions.

(4) If a completed change of address order, form 2101, has not been filed:

(ii) stamp all *first class and forwardable* mail received for that particular inmate "Not Here" and return to the post office.

(iii) *Dispose of any second or personal third class non-forwardable mail received for that particular inmate.*

Amend section 722.5(c)(3)(ii); and repeal and reserve section 722.5(c)(3)(iii) as indicated below:

(c) "Out-to-Court."

(3)(i) If an inmate does not file a change of address order (form 2101), all mail, including legal mail, will be held until the inmate's return.

(ii) The senders of legal mail shall be advised by form letter (see section 722.7 subdivision (b) [subparagraph [iii]] of this part[paragraph]) that the inmate is temporarily absent from the facility and that the legal mail received for the inmate will be held until the inmate's return.

(iii) Repeal and reserve this section.

Amend sections 722.5(d)(3) and (e)(ii); add new section 722.5(e)(iii) and renumber existing section (e)(iii) to (e)(iv); and amend 722.5(e)(2); and as indicated below:

(d) "Out to Hospital Inmates".

(3) If the inmate has not filed a change of address order (form 2101), all mail, including legal mail, will be held until the inmate's return. The senders of legal mail shall be advised by form letter (see section 722.7, subdivision (b)[] of this part[]) that the inmate is temporarily absent from the facility and that the legal mail received for the inmate will be held until the inmate's return.

(e) Turned over to another jurisdiction.

(1) If the inmate files a change of address order, form 2101, the correspondence unit shall:

(i) readdress forwardable mail, as specified by the inmate, for a period of six months;

(ii) after a six-month period, stamp all mail received "Not Here" and return to the post office; [and]

(iii) *dispose of any second or personal third class non-forwardable mail received for that particular inmate, and*

(iv)[iii] retain the change of address order, form 2101, in a dead file for a year to document inmate's instructions.

(2) If a completed change of address order, form 2101, has not been filed, stamp all *first class and forwardable* mail received for that particular inmate "Not Here" and return to the post office.

Dispose of non-forwardable second and personal third class mail for that particular inmate.

Amend section 722.6 (a) to include a copy of form 2101 and amend section 722.6 (b)(5) as indicated below:

(a) Complete a change of address order, form 2101.

See Appendix in this issue of the Register.

(b) Give particular attention to:

(1) legible printing of date;

(2) effective date of change;

(3) name and department identification number (DIN);

(4) new facility for transferred inmates or new addresses for released inmates;

(5) *check* () [line out] "do" or "do not" as it relates to guarantee of postage; and

(6) ensure that the form is signed and dated.

Add new Part 722.7 as indicated below.

Section 722.7. Attachments.

722.7(a) Attachment "A", *US Postal Service Forwarding Rules and Rates.*

Class	Rules	Rates
. . . 1st. (Including Post Cards and Priority Mail)	Will not be forwarded if it has been opened.	No additional fees.
. . . 2nd. . . (Magazines, Newspapers)	Subject to additional postage for forwarding at the transient rate computed on each individually addressed copy.	The transient rate is for the first two ounces and each additional ounce or fraction, or at the 4th Class rate, whichever is lower. Should be marked "2nd Class."
. . . 3rd. (Catalogs, Newspapers, Photographs, etc.)	Subject to collection of additional postage, must weigh less than 16 oz.	Rates based on each 2 oz. or fraction of 2 oz.
. . . 4th. (Parcel Post)	Subject to collection of forwarding postage at 4th Class rate upon delivery.	Rates vary according to distance and weight. Outsize and over 15 pound items have different rate schedule.
Certified, C.O.D. Insured, Registered Special Delivery and Special Handling	Subject to any ordinary forwarding postage charges. Will not be forwarded to a foreign country.	No additional fees.

722.7(b). Form Letter.

DATE

ADDRESSEE

RE: Legal Mail for Inmate

INMATE NAME, DIN

Dear Sir/Madam:

Legal mail for the above-named inmate was recently received from your office. Please be advised that this inmate is temporarily absent from this facility, and may not return in the immediate future. To avoid the confusion and delay that can accompany repeated attempts to forward this mail, it will be held at this facility until the inmate's return. If your correspondence requires a timely response from the inmate, you may wish to ascertain the current whereabouts of the inmate by contacting the Inmate Records Coordinator of this facility at (phone number). You may then direct a second copy to the inmate at the temporary location.

Sincerely,

Superintendent

Text of proposed rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, New York State Department of Correctional Services, 1220 Washington Avenue - Building 2 - State Campus, Albany, NY 12226-2050, (518) 457-4951, email: Maureen.Boll@DOCS.state.ny.us.

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

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

Regulatory Impact Statement

Statutory Authority:

Section 112 of the Correction Law assigns to the commissioner of correction the powers and duties of management and control of correctional

facilities, the inmates confined therein and the government and fiscal concerns thereof.

Legislative Objective:

By vesting the commissioner with this rulemaking authority, the legislature intended the commissioner prescribe regulations that are reasonable with respect to implementation by staff and are consistent with state and federal mandates.

Needs and Benefits:

Local post offices provide mail to correctional facilities with bulk delivery service only, sorting all mail by facility address. The US Postal Service's responsibility ends when such mail is delivered to the facility address. It then becomes the responsibility of department staff to ensure that each inmate receives all mail that is addressed to them. A postal change of address form is not honored by the US Postal Service for the forwarding of inmate mail in the event of an inmate transfer or release from custody. Therefore the Commissioner has promulgated this regulation to develop procedures to ensure timely and accurate forwarding of inmate mail within reasonable timeframes and at reasonable costs to the Department. The Commissioner has previously determined that the Department will bear any associated postage costs for the forwarding of first class and legal mail ("forwardable mail"), as long as the inmate remains within the custody of the department. New sections 722.2(d), 722.2(e), 722.3(b) and amended section 722.3(c) center on the Department's responsibility with regard to the forwarding of first class and legal mail as opposed to second and third class mail. Amended sections 722.4(a)(3)(ii), the new note after section 722.4(a)(3)(iii), new sections 722.5(a)(1), 722.5(a)(5) and 722.5(e)(iii), and amended sections 722.5(b)(3)(iii), 722.5(b)(4)(iii) and 722.5(e)(2), provide clarification with regard to the duty of staff to inform inmates of their responsibility to assume postage costs for the forwarding of second and third class mail, via the completion of Department form 2101, "Change of Address Order" and clarify the disposition of second and third class mail in the event the inmate refuses to bear these postage costs or is indigent, since the Post Office will not accept the return of such mail.

These changes were necessary in order for the regulation to accurately reflect the Department's current policies and practices with regard to the forwarding of inmate mail, as well as the rules and practices of the United States Postal Service as they impact the Department with regard to the forwarding of inmate mail. A new section 722.7 was created for the purpose of including the "US Postal Service Forwarding Rules and Rates" chart and department form letter as attachments, rather than leave them in the text. This is consistent with how the department generally attaches forms and/or exhibits to policy statements.

Costs:

a. To regulated parties: There are no new costs associated to the regulated parties. The regulation currently requires inmates to accept any associated postage costs to forward their second and third class mail if they want to receive them at their new facility. The maximum cost of mailing a magazine or newspaper which weighs over three pounds is \$4.80 for first class mail. The inmate can decline to have his or her second and third class mail forwarded or they can contact the vendor to advise them of their new address.

b. To agency, the state and local governments: There are no new costs associated to the agency. The regulation currently requires the department to bear any associated postage costs for the forwarding of first class, legal and accountable mail as long as the inmate remains in the custody of the department. Costs can be eliminated or reduced by using the interdepartmental mail system for forwarding inmate mail which is not time sensitive.

c. Source of information: Bureau of Internal Controls.

Local Government Mandates:

There are no new mandates imposed upon local governments by these proposals. The proposed amendments do not apply to local governments.

Paperwork:

There are no new reports, forms or paperwork that would be required as a result of amending these rules.

Duplication:

These proposed amendments do not duplicate any existing State or Federal requirement.

Alternatives:

The department considered not promulgating these rules, but it was determined that it was in the best interest of all concerned parties that this regulation should better define the types of mail to be forwarded and the responsibilities of staff and inmates in having their mail forwarded upon the inmate's transfer to another facility, if the inmate leaves the custody of the department or the inmate is temporarily away from the facility, (i.e. out to court, out to hospital, furlough, etc.).

The department considered using the interdepartmental mail system to forward inmates' second and third class mail, however, this is not feasible due to the volume, size, weight and number of magazines, newspapers, catalogues, etc. received on a daily basis for approximately 60,000

inmates. This would be an unreasonable burden to facility staff to forward thousands of second and third class pieces of mail a day. The department also expects inmates to take responsibility for their second and third class mail by either paying the cost associated in forwarding it or by contacting the vendor in order to change their mailing address. If the department assumed responsibility for forwarding an inmate's second and third class mail, there would be little or no motivation for inmates to contact vendors to change their mailing address subsequently creating a growing volume of bulk mail to be forwarded as more inmates are transferred.

Federal Standards:

There are no minimum standards of the Federal government for this or similar subject area.

Compliance Schedule:

The Department of Correctional Services will achieve compliance with the proposed rules immediately.

Regulatory Flexibility Analysis

A regulatory flexibility analysis is not required for this proposal since it will not impose any adverse economic or reporting, recordkeeping or other compliance requirements on small businesses or local governments. This proposal is merely updating and clarifying the regulation with regard to policies and procedures that are currently in practice for the forwarding of inmate mail.

Rural Area Flexibility Analysis

A rural area flexibility analysis is not required for this proposal since it will not impose any adverse economic impact or reporting, recordkeeping or other compliance requirements on rural areas. This proposal is merely updating and clarifying the regulation with regard to policies and procedures that are currently in practice for the forwarding of inmate mail.

Job Impact Statement

A job impact statement is not submitted because this proposed rule will have no adverse impact on jobs or employment opportunities. This proposal is merely updating and clarifying the regulation with regard to policies and procedures that are currently in practice for the forwarding of inmate mail.

Education Department

NOTICE OF ADOPTION

Administration of Immunization Agents by Certified Pharmacists

I.D. No. EDU-47-08-00007-A

Filing No. 437

Filing Date: 2009-04-28

Effective Date: 2009-05-13

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

Action taken: Addition of section 63.9 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6504(not subdivided), 6507(2)(a), 6527(7), 6801(1), (2) and (3), 6802(22), 6828(1) and (2), and 6909(7); and L. 2008, ch. 563

Subject: Administration of immunization agents by certified pharmacists.

Purpose: Establish criteria for the certification of licenses pharmacists and requirements for the administration of immunizations.

Text or summary was published in the November 19, 2008 issue of the Register, I.D. No. EDU-47-08-00007-P.

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

Revised rule making(s) were previously published in the State Register on February 4, 2009.

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

Assessment of Public Comment

The agency received no public comment.

NOTICE OF ADOPTION

Mandatory Continuing Education Requirements for Physical Therapists and Physical Therapist Assistants

I.D. No. EDU-05-09-00010-A

Filing No. 436

Filing Date: 2009-04-28

Effective Date: 2009-05-13

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

Action taken: Addition of section 77.10 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 212(3), 6504(not subdivided), 6507(2)(a), and 6742-a(1), (2), (3), (4), (5) and (6); and L. 2008, ch. 207, section 2

Subject: Mandatory continuing education requirements for physical therapists and physical therapist assistants.

Purpose: Establish continuing education requirements for the physical therapy professions and requirements for the approval of sponsors.

Text or summary was published in the February 4, 2009 issue of the Register, I.D. No. EDU-05-09-00010-P.

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

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

Assessment of Public Comment

The agency received no public comment.

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

Teachers Performing Instructional Support Services

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

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

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

Statutory authority: Education Law, section 207

Subject: Teachers performing instructional support services.

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

Text of proposed rule: 1. A new subdivision (j) shall be added to section 30-1.1 of the Rules of the Board of Regents, effective August 20, 2009, to read as follows:

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

2. Subdivisions (b) and (c) of section 30-1.2 of the Rules of the Board of Regents shall be renumbered to subdivisions (c) and (d) of section 30-1.2 of the Rules of the Board of Regents, effective August 20, 2009.

3. A new subdivision (b) shall be added to section 30-1.2 of the Rules of the Board of Regents, effective August 20, 2009, to read as follows:

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

(1) *A professional educator employed by a board of education or*

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

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

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

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

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

4. Renumbered subdivision (d) of section 30-1.2 of the Rules of the Board of Regents shall be amended, effective August 20, 2009, to read as follows:

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

5. Subdivision (a) of section 30-1.9 of the Rules of the Board of Regents shall be amended, effective August 20, 2009, to read as follows:

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

6. Subdivisions (b) through (e) of section 30-1.9 of the Rules of the Board of Regents shall be renumbered to subdivisions (c) through (f) of section 30-1.9 of the Rules of the Board of Regents, effective August 20, 2009.

7. A new subdivision (b) shall be added to section 30-1.9 of the Rules of the Board of Regents, effective August 20, 2009, to read as follows:

(b) *Except as otherwise provided in subdivision (b) of section 30-1.2 of this Subpart, a board of education or a board of cooperative educational services shall appoint and assign a professional educator in such a manner that he shall devote a substantial portion of his time in at least one designated tenure area except that a professional educator appointed or*

assigned on or after May 1, 2009 to duties described in either paragraph (1) or (2) of this subdivision, shall be appointed to a tenure area for which he holds the proper certification.

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

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

8. Paragraphs (23) through (46) of subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education shall be renumbered to paragraphs (24) through (47) of subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education, effective August 20, 2009.

9. A new paragraph (23) shall be added to subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education, effective August 20, 2009, to read as follows:

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

10. A new section 80-5.21 of the Regulations of the Commissioner of Education shall be added, effective August 20, 2009, to read as follows:

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

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

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

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

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

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

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

Text of proposed rule and any required statements and analyses may be obtained from: Christine Moore, Education Department, 89 Washington Avenue, Room 148 EB, Albany, NY 12234, (518) 473-4921, email: cmoore@mail.nysed.gov

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Commissioner of P-16, Education Department, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 474-3862, email: pl6education@mail.nysed.gov

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

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

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

2. LEGISLATIVE OBJECTIVES:

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

3. NEEDS AND BENEFITS:

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

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

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

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

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

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

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

4. COSTS:

(a) **Costs to State government:** The proposed amendment will not

impose any additional costs on State government, including the State Education Department.

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

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

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

5. LOCAL GOVERNMENT MANDATES:

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

6. PAPERWORK:

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

7. DUPLICATION:

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

8. ALTERNATIVES:

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

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

9. FEDERAL STANDARDS:

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

10. COMPLIANCE SCHEDULE:

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

Regulatory Flexibility Analysis

(a) Small Businesses:

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

(b) Local Governments:

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

1. EFFECT OF RULE:

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

2. COMPLIANCE REQUIREMENTS:

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

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

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

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

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

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

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

3. PROFESSIONAL SERVICES:

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

4. COMPLIANCE COSTS:

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

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

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

6. MINIMIZING ADVERSE IMPACT:

The proposed amendment applies to school districts and BOCES and

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

7. LOCAL GOVERNMENT PARTICIPATION:

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

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

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

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

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

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

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

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

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

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

The proposed amendment also adds a new Section 80-5.21 to the Commissioner's Regulations to establish qualifications for an appointment of a teacher to a position in instructional support services. The proposed

amendment requires that an individual performing instructional support services: (1) hold a valid Permanent or Professional teaching certificate and have at least three years of satisfactory teaching experience, or (2) hold a valid Initial, Provisional, Permanent or Professional certificate and hold an educational degree(s) beyond the baccalaureate level that qualifies such person to be competent and qualified to provide instructional support services.

3. COSTS:

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

4. MINIMIZING ADVERSE IMPACT:

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

5. RURAL AREA PARTICIPATION:

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

Job Impact Statement

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

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

REVISED RULE MAKING NO HEARING(S) SCHEDULED

Physical Education Instruction, Coaching Qualifications, and Extension of Eligibility for Interscholastic Athletics

I.D. No. EDU-09-09-00006-RP

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

Proposed Action: Amendment of section 135.4 of Title 8 NYCRR.

Statutory authority: Education Law, sections 101 (not subdivided), 207 (not subdivided), 305(1) and (2), 803(5) and 3204(2)

Subject: Physical education instruction, coaching qualifications, and extension of eligibility for interscholastic athletics.

Purpose: To revise physical education instruction requirements for elementary programs and establish qualifications and appropriate training of coaches.

Text of revised rule: 1. Subparagraph (i) of paragraph (2) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is amended, effective July 16, 2009, as follows:

(i) Elementary instructional program-grades K through 6. *Pupils in grades K - 6 shall participate in the physical education program as follows:*

(a) all pupils in grades K-3 shall participate in the physical education program on a daily basis. All pupils in grades 4-6 shall participate in the physical education program not less than three times each week. The minimum time devoted to such programs (K-6) shall be at least 120 minutes in each calendar week, exclusive of any time that may be required for dressing and showering; [or]

(b) notwithstanding the provisions of clause (a) of this subpara-

graph, pupils in grades 5-6 who are in a middle school shall participate in the physical education program a minimum of three periods per calendar week during one semester of each school year and two periods during the other semester, or a comparable time each semester if the school is organized in other patterns; or

(c) as provided in an equivalent program approved by the Commissioner of Education;

2. Paragraph (7) of subdivision (c) of section 135.4 of the Regulations of the Commissioner of Education is amended, effective July 16, 2009, as follows:

(7) Basic code for extraclass athletic activities. Athletic participation in all schools shall be planned so as to conform to the following:

(i) General provisions. It shall be the duty of trustees and boards of education:

(a) to conduct school extra class athletic activities in accordance with this Part and such additional rules consistent with this basic code as may be adopted by such boards relating to items not covered specifically in this code. A board may authorize appropriate staff members to consult with representatives of other school systems and make recommendations to the board for the enactment of such rules;

(b) to make the extra class athletic activities an integral part of the physical education program;

(c) to [permit] appoint individuals, whether in a paid or non-paid (volunteer) status, to serve as coaches of interschool athletic teams, other than intramural teams or extramural teams, in accordance with the following:

(1) [certified] Certified physical education teachers may coach any sport in any school[.];

(2) [teachers] Teachers with coaching qualifications and experience certified only in areas other than physical education may coach any sport in any school, provided they have completed:

(i) the first aid requirement set forth in section 135.5 of this Part; and

(ii) an approved pre-service or in-service education program for coaches or will complete such a program within [three] five years of appointment. Such program shall include an approved course in [philosophy, principles and organization of athletics] *Philosophy, Principles and Organization of Athletics*, which shall be completed within two years after initial appointment as a coach, and approved courses in *Health Sciences Applied to Coaching, and Theory and Techniques of Coaching that is sport specific, which shall be completed within five years after initial appointment as a coach*. Such approved programs for coaches will consist of one of the following (credits and hours vary depending upon the contact and endurance involved in the sport): a department-approved college program of from two to eight credits; or a department approved in-service education program, conducted by schools, colleges, professional organizations or other recognized groups or agencies, from 30 to 120 clock hours; or an equivalent experience which is approved by the Commissioner of Education. *Upon application to the Commissioner of Education in a format prescribed by the Commissioner and setting forth the reasons for which an extension is necessary, the period in which to complete such training may be extended to no more than seven years after such appointment; provided that coaches who have a lapse in service due to maternity leave, military leave, or other extenuating circumstances may apply to the Commissioner for an additional extension of no more than two years to complete course work.*

(3) [temporary] Temporary coaching license. Except as provided in subclause (4) of this clause and notwithstanding the provisions of section 80-5.10 of this Title, other persons with coaching qualifications and experience satisfactory to the board of education may be [employed] appointed as temporary coaches of interschool sport teams whether in a paid or non-paid (volunteer) status, when certified teachers with coaching qualifications and experience are not available, upon the issuance by the commissioner of a temporary coaching license. A temporary coaching license, valid for one year, will be issued under the following conditions:

(i) the superintendent of schools shall submit [an application for a temporary coaching license, in which the inability of] a statement to the Department that the district is unable to obtain the services of a certified teacher with coaching qualifications and experience [is demonstrated to the satisfaction of the commissioner];

(ii) candidates for initial temporary licensure shall have completed the first aid requirement set forth in section 135.5 of this Part prior to the first day of coaching;

(iii) candidates for the first renewal of a temporary license shall have completed or be enrolled in an approved course in philosophy, principles and organization of athletics;

(iv) candidates for any subsequent renewal of a temporary license shall have completed [or demonstrate evidence of satisfactory progress towards the completion of] an approved pre-service or in-service

education program for coaches which shall include an approved course in [philosophy, principles and organization of athletics] *Philosophy, Principles and Organization of Athletics, which shall be completed within two years after initial appointment as a coach, and approved courses in Health Sciences Applied to Coaching, and Theory and Techniques of Coaching that is sport specific, which shall be completed within five years after initial appointment as a coach*. Such approved programs for coaches shall consist of one of the following (credits and hours vary depending upon the contact and endurance involved in the sport): a department-approved college program of from two to eight credits; or a department approved in-service education program, conducted by schools, colleges, professional organizations or other recognized groups or agencies, from 30 to 120 clock hours; or an equivalent experience which is approved by the Commissioner of Education. *Upon application in a format prescribed by the Commissioner of Education and setting forth the reasons for which an extension is necessary, the period in which to complete such training may be extended to no more than seven years after such appointment; provided that coaches who have a lapse in service due to maternity leave, military leave, or other extenuating circumstances may apply to the Commissioner for an additional extension of no more than two years to complete course work.*

(4) . . .

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(ii) Provisions for interschool athletic activities for pupils in grades 7 through 12. It shall be the duty of the trustees and boards of education to conduct interschool athletic competition for grades 7 through 12 in accordance with the following:

(a) . . .

(b) Interschool athletic competition for pupils in senior high school grades 9, 10, 11 and 12. Inter-high school athletic competition shall be limited to competition between high school teams, composed of pupils in grades 9 to 12 inclusive, except as otherwise provided in subclause (a)(4) of this subparagraph. Such activities shall be conducted in accordance with the following:

(1) Duration of competition. A pupil shall be eligible for senior high school athletic competition in a sport during each of four consecutive seasons of such sport commencing with the pupil's entry into the ninth grade and prior to graduation, except as otherwise provided in this subclause. If a board of education has adopted a policy, pursuant to subclause (a)(4) of this subparagraph, to permit pupils in the seventh and eighth grades to compete in senior high school athletic competition, such pupils shall be eligible for competition during five consecutive seasons of a sport commencing with the pupil's entry into the eighth grade, or six consecutive seasons of a sport commencing with the pupil's entry into the seventh grade. A pupil enters competition in a given year when the pupil is a member of the team in the sport involved, and that team has completed at least one contest. A pupil shall be eligible for interschool competition in grades 9, 10, 11 and 12 until the last day of the school year in which he or she attains the age of 19, except as otherwise provided in subclause (a)(4) of this subparagraph or in this subclause. The eligibility for competition of a pupil who has not attained the age of 19 years prior to July 1st may be extended under the following circumstances.

(i) If sufficient evidence is presented by the chief school officer to the section to show that the pupil's failure to enter competition during one or more seasons of a sport was caused by illness, accident, or similar circumstances beyond the control of the student, such pupil's eligibility shall be extended accordingly in that sport. *In order to be deemed sufficient, the evidence must include documentation showing that as a direct result of the illness, accident or other circumstance beyond the control of the student, the pupil will be required to attend school for one or more additional semesters in order to graduate.*

(ii) . . .

(2) . . .

(3) . . .

(c) . . .

Revised rule compared with proposed rule: Substantial revisions were made in section 135.4(c)(7).

Text of revised proposed rule and any required statements and analyses may be obtained from Chris Moore, State Education Department, Office of Counsel, State Education Building Room 148, 89 Washington Avenue, Albany, NY 12234, (518) 486-1713, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Johanna Duncan-Poitier, Senior Deputy Commissioner P-16, State Education Department, State Education Building 2M West Wing, 89 Washington Avenue, Albany, NY 12234, (518) 474-3862, email: p16education@mail.nysed.gov

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

Revised Regulatory Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on March 4, 2009, the proposed rule has been substantially revised as follows:

Section 135.4(c)(7)(i)(c) has been revised, for purposes of clarification and consistency, to specify that an approved pre-service or in-service education program for coaches be completed within five years, instead of three years, of appointment, and that such program shall include an approved course in Philosophy, Principles and Organization of Athletics, which shall be completed within two years after initial appointment as a coach, and approved courses in Health Sciences Applied to Coaching, and Theory and Techniques of Coaching that is sport specific, which shall be completed within five years after initial appointment as a coach.

Section 135.4(c)(7)(ii)(b)(1)(i)(3), regarding temporary coaching licenses, was revised for purposes of ensuring consistency with existing Department practice, to permit the superintendent to submit a statement to the Department that the district is unable to obtain the services of a certified teacher with coaching qualifications and experience. This replaces a requirement that the superintendent submit an application demonstrating to the Commissioner's satisfaction the inability of the district to obtain such services.

In addition, existing substantive provisions were reorganized within section 135.4(c)(7)(i)(c).

Section 135.4(c)(7)(ii)(b)(1)(i) has been revised to specify that in order to be deemed sufficient to show that a pupil's failure to enter competition during one or more seasons of a sport was caused by illness, accident, or similar circumstances beyond the control of the student, for purposes of extending such pupil's eligibility to participate in a sport, the evidence must include documentation showing that as a direct result of the illness, accident or other circumstance beyond the control of the student, "the pupil will be required to attend school for one or more additional semesters in order to graduate." This replaces the previous language that in order to be deemed sufficient, the evidence must include documentation showing "the student's education plan has been extended to a fifth year" as a direct result of the illness, accident or other circumstance beyond the control of the student. This revision was necessary to clarify the provision and otherwise ensure consistency with the language in section 135.4(c)(7)(ii)(b)(1)(ii), which allows a similar extension for pupils who are unable to enter competition because of their enrollment in a national or international student exchange program or foreign study program.

As a result of the above changes, the Needs and Benefits, Local Government Mandates and Paperwork sections of the previously published Regulatory Impact Statement are revised to read as follows:

3. NEEDS AND BENEFITS:

The Office of the State Comptroller Audit on Physical Education recommended the change in regulation to accommodate districts with middle schools and the New York State Public High School Athletic Association and the New York State Athletic Administrators' Association have actively pursued a change in Commissioner's Regulation section 135.4(c)(7)(i)(c), relating to the educational requirements of coaches, the timelines to complete required course work and duration of competition for athletes.

The current regulations do not provide flexibility for school districts that have organized their 5th and 6th grades into a middle school. The proposed amendment would revise the physical education instruction requirements for elementary programs to include provisions for pupils in grades 5 and 6 who attend a middle school. This amendment would eliminate scheduling and staffing issues in middle level schools. The proposed change was listed in the recommendations of the Office of the State Comptroller Audit on Physical Education and recommended by administrators in middle level buildings.

Furthermore, the current regulations do not reflect equality of coaching requirements for certified teacher coaches and non-teacher coaches. In addition, new teachers are required to complete a Master's degree within five years of receiving their baccalaureate. This has affected the time available to new coaches to complete the required coaching courses and has af-

ected the number of certified teacher coaches available to school districts for appointment as an interscholastic athletic coach. The proposed amendment would establish equal timelines for coaches to complete required course work, extend the time for completing requirements, and provide authority for additional extensions for individuals who have had a lapse in service due to extenuating circumstances and clarify extension of eligibility for interscholastic athletes. New York State Education Department oversight and control over the required instruction and coaching regulations would remain intact.

Additional changes in regulation on duration of competition are requested to clarify the extension of eligibility rule. The proposed amendment provides that in order to be an acceptable cause for extending a student's eligibility for interscholastic athletics, the chief school officer must present sufficient evidence that includes documentation showing that the pupil will be required to attend school for one or more additional semesters in order to graduate, as a direct result of the illness, accident or other circumstance beyond the control of the student.

5. LOCAL GOVERNMENT MANDATES:

A school district must ensure that all students are provided the required instruction in physical education under section 803 of the Education Law. The proposed amendment provides flexibility for school districts that have organized their 5th and 6th grades into a middle school, by revising the physical education instruction requirements for elementary programs to include provisions for pupils in grades 5 and 6 who attend a middle school.

In addition, a school district that appoints an individual as an athletic coach for interschool athletic team must ensure that the individual possesses New York State Teacher Certification or Coaching Certification under section 803 of the Education Law, regardless of whether that individual is in a paid or non-paid (volunteer) status. The proposed amendment eliminates discrepancies between teacher-coaches and non-teacher coaches appointed by school districts.

A coach who has a lapse in service due to maternity leave, military leave or other extenuating circumstances may apply in a format prescribed by the Commissioner for an additional extension to complete course work, setting forth the reasons for which an extension is necessary.

In order to be an acceptable cause for extending a student's eligibility for interscholastic athletics, the chief school officer must present sufficient evidence that includes documentation showing that the pupil will be required to attend school for one or more additional semesters in order to graduate, as a direct result of the illness, accident or other circumstance beyond the control of the student.

6. PAPERWORK:

A coach who has a lapse in service due to maternity leave, military leave or other extenuating circumstances may apply in a format prescribed by the Commissioner for an additional extension to complete course work, setting forth the reasons for which an extension is necessary.

In order to be an acceptable cause for extending a student's eligibility for interscholastic athletics, the chief school officer must present sufficient evidence that includes documentation showing that the pupil will be required to attend school for one or more additional semesters in order to graduate, as a direct result of the illness, accident or other circumstance beyond the control of the student.

Revised Regulatory Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on March 4, 2009, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

As a result of the above changes, the Compliance Requirements section of the previously published Regulatory Flexibility Analysis for Small Businesses and Local Government is revised to read as follows:

2. COMPLIANCE REQUIREMENTS:

A school district must ensure that all students are provided the required instruction in physical education under section 803 of the Education Law. The proposed amendment provides flexibility for school districts that have organized their 5th and 6th grades into a middle school, by revising the physical education instruction requirements for elementary programs to include provisions for pupils in grades 5 and 6 who attend a middle school.

In addition, a school district that appoints an individual as a coach for an interschool athletic team must ensure that the individual possesses New York State Teacher Certification or Coaching Certification under Article 803 of the Education Law, regardless of whether that individual is in a paid or non-paid (volunteer) status. The proposed amendment eliminates discrepancies between teacher-coaches and non-teacher coaches appointed by school districts. The proposed amendment also clarifies existing language, including clarifying extension of eligibility for interscholastic athletics, and adds provisions permitting coaches to apply to the Commissioner for extensions to complete required coursework.

A coach who has a lapse in service due to maternity leave, military leave or other extenuating circumstances may apply in a format prescribed by the Commissioner for an additional extension to complete course work, setting forth the reasons for which an extension is necessary.

In order to be an acceptable cause for extending a student's eligibility for interscholastic athletics, the chief school officer must present sufficient evidence that includes documentation showing that the pupil will be required to attend school for one or more additional semesters in order to graduate, as a direct result of the illness, accident or other circumstance beyond the control of the student.

Revised Rural Area Flexibility Analysis

Since publication of a Notice of Proposed Rule Making in the State Register on March 4, 2009, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

As a result of the above changes, the Reporting, Record Keeping and Other Compliance Requirements; and Professional Services section of the previously published Rural Area Flexibility Analysis is revised to read as follows:

2. REPORTING, RECORD KEEPING AND OTHER COMPLIANCE REQUIREMENTS; AND PROFESSIONAL SERVICES:

A school district must ensure that all students are provided the required instruction in physical education under section 803 of the Education Law. The proposed amendment provides flexibility for school districts that have organized their 5th and 6th grades into a middle school, by revising the physical education instruction requirements for elementary programs to include provisions for pupils in grades 5 and 6 who attend a middle school.

In addition, a school district that appoints an individual as a coach for an interschool athletic team must ensure that the individual possesses appropriate certification under Article 803 of the Education Law, regardless of whether that individual is in a paid or non-paid (volunteer) status. The proposed amendment eliminates discrepancies between teacher-coaches and non-teacher coaches appointed by school districts.

A coach who has a lapse in service due to maternity leave, military leave or other extenuating circumstances may apply in a format prescribed by the Commissioner for an additional extension to complete course work, setting forth the reasons for which an extension is necessary.

In order to be an acceptable cause for extending a student's eligibility for interscholastic athletics, the chief school officer must present sufficient evidence that includes documentation showing that the pupil will be required to attend school for one or more additional semesters in order to graduate, as a direct result of the illness, accident or other circumstance beyond the control of the student.

Revised Job Impact Statement

Since publication of a Notice of Proposed Rule Making in the State Register on March 4, 2009, the proposed rule has been substantially revised as set forth in the Revised Regulatory Impact Statement submitted herewith.

The proposed amendment, as so revised, relates to required physical education instruction for elementary grades, coaching certification and qualifications and duration of competition extension of athletic eligibility, and will not have a substantial adverse impact on job or employment opportunities. The proposed revised amendment revises the physical education instruction requirements for elementary programs to include provisions for pupils in grades 5 and 6 who attend a middle school, and specifies the qualifications of those to be appointed (whether paid or unpaid) by school districts to fill existing athletic coaching positions or openings but does not adversely affect the number of such positions or openings. The proposed amendment also clarifies evidential requirements for extension of eligibility for interscholastic athletics and adds provisions permitting coaches to apply to the Commissioner for extensions to complete required coursework. Since it is evident from the subject matter of the proposed revised amendment that it will have no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on March 4, 2009 the State Education Department received the following comments: 1. COMMENT: Would the proposed amendment permit a school district to allow an unpaid volunteer to coach provided this individual has First Aid-CPR, is constantly under the direct supervision of the appointed certified coach, is appointed by the Board of Education as a volunteer coach, and is not a relative or a parent?

DEPARTMENT RESPONSE:

The proposed amendment is meant to clarify that the requirements in section 135.4(c)(7)(i)(c) apply to all coaches, regardless of whether in a paid status or in a non-paid (volunteer) status. Therefore a school district may not allow an unpaid volunteer to coach unless the volunteer meets the requirements in section 135.4(c)(7)(i)(c) including, for a volunteer who is not a certified physical education teacher, completion within the timeline prescribed in the regulation of the three required coaching courses: Philosophy, Principles and Organization of Athletics in Education; Health Sci-

ences Applied to Coaching; and Theory and Techniques of Coaching (specific to the sport being coached).

Department of Environmental Conservation

EMERGENCY/PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

2009 Recreational Harvest Limits for Summer Flounder (Fluke) and Black Sea Bass

I.D. No. ENV-19-09-00005-EP

Filing No. 438

Filing Date: 2009-04-28

Effective Date: 2009-04-28

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, 13-0340-b and 13-0340-f

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

Specific reasons underlying the finding of necessity: These regulations are necessary for New York State (NYS) to remain in compliance with the Fishery Management Plan (FMP) for Summer Flounder and Black Sea Bass as adopted by the Atlantic States Marine Fisheries Commission (ASMFC) and avoid a closure of NYS's recreational and commercial fisheries for summer flounder and black sea bass.

Each member state of ASMFC is expected to promulgate regulations that comply with FMPs adopted by ASMFC. These regulations are needed to properly manage the NYS recreational fisheries and prevent the State from exceeding its quota, as assigned by ASMFC. Failure by a state to adopt, in a timely manner, necessary regulations may result in a determination of non-compliance by ASMFC and the imposition of a total closure of the particular fishery in that state. A closure of the NYS's summer flounder fishery could result in significant adverse impacts to the State's economy. New York State must adopt regulations that prevent the recreational harvest of summer flounder and black sea bass from exceeding the State's assigned quota.

The promulgation of this regulation as an emergency rule making is necessary because the normal rule making process would not promulgate these regulations in the time frame necessary for the commencement of the proposed summer flounder season. Traditionally, the summer flounder season in NYS begins in May. New York State determined its 2009 management measures for summer flounder in late March. The National Marine Fisheries Service published the 2009 management measures for summer flounder and black sea bass in the Federal Register on April 1, 2009. If this rule making were to be promulgated by the normal rule making process, it would not be effective until several months after the traditional start of the summer flounder season. New York State anglers, party and charter boat concerns and bait and tackle shops are dependent on the season opening on time. It is in the best interests of NYS's recreational fishing industry not to delay the opening of the summer flounder season by promulgating the proposed regulation through the normal rule making process.

Subject: 2009 Recreational Harvest Limits for Summer Flounder (Fluke) and Black Sea Bass.

Purpose: To ensure that the recreational harvest of summer flounder and black sea bass is in compliance with interstate 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 Atlantic cod remain the same. Species Summer flounder is amended to read as follows:

40.1(f) Table A - Recreational Fishing.

Species	Open Season	Minimum Length	Possession Limit
Summer flounder	May 15 – [Sept 1] June 15, July 3 - Aug 17	[20.5] 21" TL	[4] 2
Black sea bass	All year	[12] 12.5" TL	25

Species Yellowtail flounder through Scup (porgy) all other anglers remains the same. Black sea bass is amended to read as follows:

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 July 26, 2009.

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 13-0105, 13-0340-b and 13-0340-f authorize the Department of Environmental Conservation (DEC) to establish by regulation the open season, size, catch limits, possession and sale restrictions and manner of taking for summer flounder and black sea bass.

2. Legislative objectives:

It is the objective of the above-cited legislation that DEC manages marine fisheries to optimize resource use for commercial and recreational harvesters consistent with marine fisheries conservation and management policies, and interstate fishery management plans.

3. Needs and benefits:

These regulations are necessary for New York to maintain compliance with the Interstate Fishery Management Plan (FMP) for Summer Flounder and Black Sea Bass as adopted by the Atlantic States Marine Fisheries Commission (ASMFC). New York, as a member state of ASMFC, must comply with the provisions of the Interstate Fishery Management Plans adopted by ASMFC. 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 necessary regulations that implement the provisions of the FMPs to remain in compliance with the FMPs. If ASMFC determines a state to be in non-compliance 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.

Under the FMP for summer flounder, ASMFC assigned New York an annual harvest of 365,000 fish for the 2009 recreational season. If the 2009 projected harvest for New York, an estimate based on current regulations, exceeds this assigned quota, the State is required to amend its harvest regulations so that they are sufficiently restrictive to prevent the New York State recreational fishing community exceeding this assigned quota. Under existing regulations, it is likely that New York will exceed the 2009 assigned harvest. Failure to adopt, in a timely manner, these necessary regulations may result in a determination of non-compliance by ASMFC and the imposition of a total closure of fishing for summer flounder in New York State waters. This action could result in significant adverse impacts to the state's economy. According to a report released by NOAA Fisheries, recreational fishing in New York generated \$424 million in total sales in 2006. Summer flounder is one the most popular fish taken by recreational harvesters in New York.

The promulgation of this regulation is necessary for DEC to remain

in compliance with the FMP for summer flounder and to avoid closure of the summer flounder fisheries and the economic hardship that would be associated with such a closure. The regulatory changes in this emergency rule are calculated, and have been approved by ASMFC, to achieve the harvest level necessary to prevent New York from exceeding its assigned summer flounder quota and achieve compliance with the FMP.

Specific amendments to the current regulations include the following:

1. Summer Flounder (Fluke):

a) Implement a split open season for the summer flounder recreational fishery of May 15 through June 15, and July 3 through August 17. The summer flounder season will be closed from June 16 through July 3 and after August 17.

b) Increase the minimum size limit to 21 inches Total Length.

c) Reduce the possession limit to two fish.

2. Black sea bass

a) Increase the minimum size limit to 12.5 inches Total Length.

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 (party/charter businesses, bait and tackle shops) may experience some adverse economic effects through a reduction of the recreational summer flounder season from 110 days in 2008 to 78 days as proposed in the regulations, a reduction of 32 days. Economic opportunities may also be lost due to the increased size limit and reduced bag limit for summer flounder and the increased size limit for black sea bass.

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

DEC will incur limited costs associated with both the implementation and administration of these rules, including the costs relating to notifying 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:

The following significant alternatives have been considered by DEC and rejected for the reasons set forth below:

Summer Flounder.

1. One alternative considered was to keep the summer flounder size limit at 20.5 inches TL with a 2 or 3 fish possession limit. The needed reduction in harvest would have to have come from significantly shortening the fishing season. This alternative seems to provide the greater likelihood of achieving our management objectives for the stock. However, the potential economic consequences of a significantly shortened fishing season for one of the most important recreational fisheries in New York are believed to be particularly damaging to the industry, resulting in significant economic loss to bait and tackle shops, party and charter boat businesses and the supporting local economy. In addition, the closure of a significant portion of the summer flounder fishing season would shift fishing effort onto other species, the local populations of which may not respond positively to an increase in fishing effort. This analysis resulted in a rejection of this alternative.

2. Another alternative considered was to include a four week mid-season closure in the proposed summer flounder management measures for 2009. The Mid-Atlantic Fishery Management Council (MAFMC) is requiring that states that must reduce landings to ensure at least 50% of the percent reduction derive from modification to the fishing season. This alternative may cause potential large economic impacts to party and charter concerns and bait and tackle shops. Furthermore, during a four week fishing closure, recreational fishing effort will likely shift to other fish species not usually targeted by recreational harvesters in large numbers and adversely impact their local populations. The potential large economic impact and a likely shift of fishing effort that would result from significantly shortening the fishing season were the reasons this alternative was rejected. After discussion with the Marine Resources Advisory Council and members of the recreational fishing industry, it was decided to implement a 17 day closure from mid-June until early July. Father's Day weekend, a popular and busy fishing weekend, is included in the closed portion of the 2009 summer flounder season. However, adjusting the closure to accommodate Father's Day would preclude July 4th weekend, an even busier weekend. DEC contacted several fishermen and their preference was July 4th weekend over Father's Day.

3. No Action (no amendment to summer flounder regulations).

The "no action" alternative would leave current summer flounder regulations in place. Under existing regulations, it is likely that New York will exceed the 2009 assigned harvest. Failure to adopt, in a timely manner, these necessary regulations may result in a determination of non-compliance by ASMFC and the imposition of a total closure of fishing for summer flounder in New York State waters and the subsequent economic hardship that would be associated with such a closure. This alternative was rejected.

Black Sea Bass

1. No Action (no amendment to black sea bass regulations).

The "no action" alternative would leave the current black sea bass minimum size limit in place. This option would, however, impede DEC's ability to achieve its management objectives for the stock and likely result in New York failing to remain in compliance with the FMP for black sea bass and a possible closure of all fishing for black sea bass in New York. This would have a much more severe economic impact than the imposition of an increased size limit; therefore, this option was rejected.

2. Another alternate considered was a black sea bass fishing closure during a portion of the black sea bass spawning season. Black sea bass are protogynous hermaphrodites, that is they employ a reproductive strategy wherein young fish begin as females but change to males as they age. The largest fish are almost always males. These fish also have complex spawning behavior wherein the largest males compete for and then spawn sequentially with a number of females. A fishing closure during the spawning season would appear to have some biological justification. This alternative was rejected by the Mid-Atlantic Fishery Management Council in favor of increasing the size limit. New York's options, therefore, were limited and must comply with the federal rule that raises the size limit.

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 Atlantic State Marine Fisheries Commission (ASMFC) facilitates cooperative management of marine and anadromous fish species among the fifteen Atlantic Coast member states. The principal mechanism for implementation of cooperative management of migratory fish is the ASMFC's interstate fishery management plans (FMPs) for individual species or groups of fish. The FMPs are designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

The Atlantic State Marine Fisheries Commission recently adopted quota changes for summer flounder and size limit changes for black sea bass. The Department of Environmental Conservation (DEC) now seeks to amend its summer flounder and black sea bass regulations to comply with the requirements of the ASMFC FMP. There are severe consequences for failure to comply with FMPs. If ASMFC determines a state to be in non-compliance 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. Furthermore, failure to take required actions to protect our marine and anadromous resources may lead to the collapse of the targeted species' populations. Either situation could have a significant adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries.

Those most affected by the proposed rule are recreational fishers, licensed party and charter businesses, and retail and wholesale marine bait and tackle shops operating in New York State (NYS). The Department of Environmental Conservation consulted with the Marine Resources Advisory Council (MRAC) and other individuals who chose to share their views on summer flounder recreational management measures. The response indicates that there is a belief that a long season will provide economic benefits to businesses because their customers will take advantage of the additional opportunities to go fishing for fluke. The responses received by DEC suggest that a long season will result in more charter bookings, more party boat trips, and more bait and tackle sales. In addition, private individuals (mostly boating anglers) indicated their preference for as long a season as possible to enable them more opportunities to fish for summer flounder. Most indicated that a mid-season closure would result in an adverse economic impact on the recreational fishing industry. The proposed rule does reduce the number of days available to recreationally fish for summer flounder, from 110 days in 2008 to 78 days as proposed in the regulations, a reduction of 32 days.

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 party and charter businesses and marine bait and tackle shops because of the reduction in the number of days available for recreational fishers to take summer flounder.

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 FMPs for summer flounder and black sea bass and to avoid closure of the summer flounder and black sea bass fisheries and the economic hardship that would ensue with such a closure. Since these regulatory amendments are consistent with federal and interstate fishery management plans, DEC anticipates that NYS will remain in compliance with the FMPs. Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, including party and charter boat fisheries as well as wholesale and retail 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 collapse of a stock and have a severe adverse impact

on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being proposed in order to provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

7. Small business and local government participation:

The Department of Environmental Conservation received recommendations from the MRAC, which is comprised of representatives from recreational and commercial fishing interests. The proposed regulations are also based upon comments received from recreational fishing organizations, party and charter boat owners and operators, retail and wholesale bait and tackle shop owners, recreational anglers and state law enforcement personnel. 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 summer flounder and black sea bass 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 for Summer Flounder and Black Sea Bass and to avoid closure of the summer flounder and black sea bass fisheries and the economic hardship that would be associated with such closure. The proposed rule reduces the summer flounder recreational fishing season by 32 days, reduced from 110 days in 2008 to 78 days, as proposed in this rule making. The proposed rule will also increase the minimum size limits for summer flounder and black sea bass.

Many currently licensed party and charter boat owners and operators, as well as bait and tackle businesses, will be affected by these regulations. Due to the reduction in the number of fishing days, there may be a corresponding reduction in the number of fishing trips and bait and tackle sales during the upcoming fishing season. The proposed increase in the minimum size limits for summer flounder and black sea bass will affect the availability of legal-sized fish and may, therefore, negatively affect angler incentive for fishing.

2. Categories and numbers affected:

In 2008 there were 558 licensed party and charter businesses in New York State (NYS). There were also a number of retail and wholesale marine bait and tackle shop businesses operating in NYS; however, DEC does not have a record of the actual number. The number of recreational fishers in NYS has been estimated by the National Marine Fisheries Service to be just over 1 million in 2007. However, this Job Impact Statement does not include them 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 summer flounder and black sea bass.

4. Minimizing adverse impact:

In the development of the proposed rule making DEC consulted with the Marine Resources Advisory Council and many individuals who chose to share their views on summer flounder recreational management measures to the DEC. In the long-term, the maintenance of sustainable fisheries will have a positive affect on employment for

the fisheries in question, including party and charter boat owners and operators, wholesale and retail bait and tackle outlets and other support industries for recreational fisheries. Any short-term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Protection of the summer flounder and black sea bass resources is essential to the survival of the party and charter boat businesses and bait and tackle shops that are sustained by these fisheries. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest and to continue to rebuild stocks and maintain them for future utilization.

Based on the above and DEC staff's knowledge and past experience with similar regulations, DEC has concluded that there will not be any substantial adverse impact on jobs or employment opportunities as a consequence of this rule making.

NOTICE OF ADOPTION

Use of State Lands

I.D. No. ENV-21-08-00002-A

Filing No. 434

Filing Date: 2009-04-23

Effective Date: 2009-05-13

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

Action taken: Amendment of Part 190 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101(3)(b), (d), 3-0301(1)(b), (d), (i), (2)(m), (v), 9-0105(1), (3), 9-0303, 9-1105(1) and art. 49; and Executive Law, section 816(3)

Subject: Use of State Lands.

Purpose: To protect public safety, manage public use and protect natural resources on State lands.

Text of final rule: Repeal subdivision (a) of 6 NYCRR section 190.0 and add a new subdivision (a) of section 190.0 to read as follows:

(a) Except as otherwise provided, the provisions of this Part shall apply to all persons entering upon or using State lands under the department's jurisdiction that are administered by the Division of Lands and Forests, the Division of Operations, or both, including but not limited to such lands as unique areas, State forests, reforestation areas, multiple use areas, forest preserve, conservation areas, natural resource management areas, preserves, campgrounds and environmentally sensitive lands, and to those rights owned and managed by the State as conservation easements as defined in section 190.12 of this title.

Paragraphs (13) and (14) of subdivision 190.0(b) are renumbered paragraphs (14) and (15) and a new paragraph (13) is added to read as follows:

(13) "Structure" shall mean any object or improvement constructed, installed or placed on State lands, including but not limited to trails, roads, bridges, ramps, buildings, sheds, lean-tos, picnic tables, monuments, memorials, permanent tree stands or permanent hunting blinds, posts, rails, handrails, steps, fences, pipelines, oil, gas and other well structures, septic systems, fuel tanks, utility lines, including but not limited to telephone, electric and cable, mobile homes, campers, trailers, signs, docks and dams, except that tents, campers, temporary blinds and other temporary objects related to authorized recreational activities shall not be considered structures for the purposes of this definition, provided that such objects are in compliance with rules and regulations governing such activities on State lands.

Subdivision (a) of section 190.8 is repealed and a new subdivision (a) is added to read as follows:

(a) The use of State lands or any structures or improvements thereon for private revenue or commercial purposes is prohibited, except as authorized by section 190.7 of this title and Environmental Conservation Law sections 9-0505, 9-0507 and Article 11. This subdivision does not apply to the exercise of rights of fee owners of private lands subject to conservation easements.

Subdivision (g) of section 190.8 is amended to read as follows:

(g) No person shall deface, remove, destroy or otherwise injure in any manner whatsoever any tree, flower, shrub, fern, *fungi or other plant like organisms*, moss or other plant, rock, *soil*, fossil or mineral or object of archaeological or paleontological interest found or growing on State land, [excepting] *except for personal consumption or under permit from the Commissioner of Environmental Conservation and the [Assistant Commissioner for State Museum and Science Service,] Commissioner of Education*, pursuant to section 233 of the Education Law.

New subdivisions (r) through (ff) of section 190.8 are added to read as follows:

(r) *No person shall operate or possess a snowmobile on forest access roads, truck trails, roads, trails or other areas on State lands outside of the forest preserve which are posted or designated by the department as closed to snowmobile use.*

(s) *No person shall operate or possess a bicycle on forest access roads, truck trails, roads, trails or other areas on State lands outside of the forest preserve which are posted or designated by the department as closed to bicycle use.*

(t) *Operation of mechanically propelled vessels.*

(1) *No person shall operate or possess a mechanically propelled vessel other than an electric powered vessel on State lands outside the forest preserve on the following bodies of water:*

County	State Land	Water Body	UTM Coordinates		USGS Quad
			East	North	
Region 3					
Dutchess	West Mountain State Forest (SF)	Blackberry Pond	614671	4608789	Pawling, Dover Plains, Verbank & Poughquag
Orange	Stewart SF	Beaver Pond	567672	459120	Maybrook
Orange	Stewart SF	Restoration Pond	567041	459043	Maybrook
Orange	Stewart SF	Rowe's Pond	566109	4591959	Maybrook
Orange	Stewart SF	Stick Pond	567133	4594384	Maybrook
Orange	Stewart SF	Pittman-Robertson Pond	569356	4594408	Maybrook
Orange	Stewart SF	Wilkens Pond	567762	4594473	Maybrook
Putnam	White Pond Multiple Use Area (MUA)	White Pond	606593	4592021	Poughquag & Lake Carmel
Putnam	California Hill SF	Waywayanda Lake	601402	4588380	Oscawana Lake
Sullivan	Hickok Brook SF	Hickok Brook Pond	510497	4594568	Highland Lake & Eldred
Region 4					
Columbia	Beebe Hill SF	Barrett Pond	625746	4688111	State Line
Region 6					
Lewis	Bonaparte's Cave SF	Green Pond	470119	4890100	Lake Bonaparte & Harrisville
Lewis	Bonaparte's Cave SF	Duck Pond	470316	4889752	Harrisville

Lewis	Bonaparte's Cave SF	Mud Pond	470711	488576	Harrisville
Oneida	Big Brook SF	Johnny Smith Pond	442498	4808902	Florence
Oneida	Albert J. Woodford SF	Chittning Pond	474260	4751058	Cassville
Region 7					
Broome	Nanticoke Lake MUA	Nanticoke Lake	410712	4687400	Lisle
Cayuga	Bear Swamp SF	Bear Swamp	393547	4733740	Sempronius
Cayuga	Frozen Ocean SF	Frozen Ocean Pond West	383367	4738897	Owasco
Chenango	Genegantslet SF	Balt Pond	436172	4696053	Smithville Flats
Chenango	Long Pond SF	Round Pond	430942	4694538	Smithville Flats
Chenango	McDonough SF	Kopak's Pond	442482	4707412	East Pharsalia
Chenango	McDonough SF	Whaley Pond	442452	4708923	East Pharsalia
Chenango	Whaupanaucan SF	Jeffrey's Pond	461480	4717604	Holmesville
Cortland	Gee Brook SF	Calico Pond	422675	4708894	Cincinnati
Madison	Charles E. Baker SF	Woodland Pond	469210	4734506	Hubbardsville
Onondaga	Morgan Hill SF	Shackham Pond	417573	473216	Tully
Onondaga	Morgan Hill SF	Spruce Pond	416026	4739101	Tully
Tioga	Oakley Corners SF	Oakley Corners Pond	404195	4669050	Newark Valley
Tioga	Oakley Corners SF	Oakley Corners Pond South	404158	4668437	Newark Valley
Tompkins & Cortland	Robinson Hollow SF	Tri-County Pond	396864	4695960	Dryden
Region 8					
Livingston	Ossian SF	Evergreen Pond	268500	4708247	Canaseraga
Steuben	Birdseye Hollow SF	Birdseye Hollow Pond	322949	4693357	Savona
Steuben	Birdseye Hollow SF	Sanford Lake	320620	4688847	Savona
Steuben	Cameron SF	Cameron Pond	301934	4679191	Cameron
Steuben	Cameron SF	Unnamed	301240	4680940	Towlesville

(2) *No person shall operate an inboard or outboard motor rated at greater than 25 horsepower on State lands outside the forest preserve on the following body of water:*

County	State Land	Water Body	UTM Coordinates		USGS Quad
			East	North	
Region 7					
Chenango	Long Pond SF	Long Pond	430390	4696715	Smithville Flats

(u) No person shall enter or remain upon or use any forest access road, truck trail, road, trail, facility or any other area on State lands that are posted or designated by the department as closed to public use.

(v) No person shall set, light, use or maintain a fire or campfire of any kind on State lands which are posted or designated by the department to prohibit campfires. Under no circumstances are campfires allowed on any forest access road, truck trail, road, trail or parking area on State lands.

(w) No person shall erect, construct, install, maintain, store, discard or abandon any structure or any other property on State lands or subsequently use such structure or property on State lands, except if the structure or property is authorized by the department or is:

(1) a geocache that is labeled with the owner's name and address and installed in a manner that does not disturb the natural conditions of the site or injure a tree;

(2) a camping structure or equipment that is placed and used legally pursuant to this Part;

(3) a legally placed trap or appurtenance that is placed and used during trapping season;

(4) a tree stand or hunting blind that does not injure a tree, is properly marked or tagged with the owner's name and address or valid hunting or fishing license number, and is placed and used during big game season, migratory game bird season, or turkey season; or

(5) a wildlife viewing blind or stand that is placed for a duration not to exceed thirty (30) days in one location per calendar year, does not injure a tree, and is properly marked or tagged with the owner's name and address or valid hunting or fishing license number.

(x) On State lands, no person shall erect, construct, occupy or maintain any structure that is affixed to a tree by nails, screws or other means that injure or damage the tree except as otherwise authorized by the department.

(y) No person shall erect, construct, maintain, occupy or use any tree stand that is used, operated, accessed or reached by methods or means which injure or damage a tree on State lands, and no person shall gain access to any structure in a tree on State lands by means that injure or damage the tree.

(z) No person shall drive a trailer or motor vehicle, including the wheels thereof, into a body of water to launch or retrieve a vessel on State lands which the department has posted or designated as closed to trailer launching of boats.

(aa) The Commissioner may prohibit campfires or the use of liquid or gaseous fuel camping stoves or lamps on State lands during periods of high fire danger.

(bb) No person shall possess breakable targets, including but not limited to clay pigeons, on State lands and no person shall target shoot at breakable targets, including but not limited to clay pigeons and glass containers, on State lands. Unless legally engaged in the act of hunting, no person shall discharge firearms on State lands posted or designated as closed to target shooting.

(cc) On State lands, no person shall sponsor, conduct or participate in any organized event of more than twenty people unless otherwise authorized by the department. Examples of organized events include, but are not limited to: sponsored hikes; archery and fishing tournaments; snowmobile, bicycle, horse and orienteering races, runs, rides or competitions (including biathlons and triathlons); encampments; and re-enactments.

(dd) No person shall sponsor, conduct or participate in any research project on State lands except under permit from the department. Examples of research include, but are not limited to, population studies, collection of scientific samples, placement of scientific instruments, seismic exploration and archaeological studies. This subdivision shall not apply to bird population data collection such as, but not limited to, Audubon's Christmas Bird Count, the USGS Breeding Bird Survey and Cornell Lab of Ornithology's e-Bird database; nor shall it apply to any other research exempted by the Department in writing on a case by case basis.

(ee) On State lands, no person shall sponsor, conduct or participate

in: advertising, weddings, commercial film making activities or film making activities that exclude other public use of the area, and other similar events, except under permit from the department.

(ff) No person shall possess paint balls or paint ball guns on State lands, and no person shall sponsor, conduct or participate in any activities associated with the discharging of paint balls on State lands.

Add new Section 190.35 of Part 190 to read as follows:

190.35 Severability.

If a provision of this Part or its application to any person or circumstance is determined to be contrary to law by a court of competent jurisdiction, such determination shall not affect or impair the validity of the other provisions of this Part or the application to other persons and circumstances.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 190.0(a), (b)(13), 190.8(a), (g), (r)-(z), (aa)-(ff), and 190.35.

Text of rule and any required statements and analyses may be obtained from: David M. Forness, NYS DEC, Bureau of State Land Management, 625 Broadway, Albany, NY 12233-4255, (518) 402-9428, email: dmfornes@gw.dec.state.ny.us

Additional matter required by statute: A Negative Declaration has been prepared in compliance with Article 8 of the Environmental Conservation Law.

Revised 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 special resources such as the Adirondack and Catskill Forest Preserve (ECL Section 1-0101(3)(d)), promoting and coordinating management of land resources to assure their protection, taking into account the cumulative impact upon all such resources in promulgating any rule or regulation (ECL Section 3-0301(1)(b)), providing for the care, custody, and control of the Forest Preserve and non-Forest Preserve lands (ECL Section 3-0301(1)(d)) and 9-0105(1)), providing for prevention and abatement of water, land and air pollution (ECL Section 3-0301(1)(i)), prohibiting the construction and storage of structures and personal property on State lands, and allowing for the removal of such by DEC (ECL Section 9-0303), 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)), adopting rules and regulations to effectuate the purposes and to secure proper enforcement of the Environmental Conservation Law, and more particularly, adopting rules and regulations prohibiting any person from entering upon State-owned lands, or restricting the activities of the public on such land, whenever it determines that a serious fire hazard exists thereon (ECL Section 3-0301(2)(m), Section 9-0105(3) and 9-1105(1)). 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 Department's purpose in proposing these Part 190 amendments is to improve its stewardship of lands under its jurisdiction. As more fully described below, this proposed rulemaking will meet the legislative objectives of providing for the beneficial use of the environment by the public and preserving and enhancing natural resources. In addition, the proposed rulemaking will protect the public health and safety, as more fully discussed below. Specifically, this rulemaking proposes restrictions for the following public uses of State lands: snowmobiles; bicycles; mechanically propelled vessels and trailered boats; campfires; permanent tree stands and other structures attached to trees; the construction and storage of structures and personal property; organized events; target shooting; and for private revenue or commercial purposes.

While it is the Department's goal, in keeping with the legislative

objectives, to provide for a spontaneous recreational experience on State lands, regulatory restrictions must sometimes be imposed to prevent unacceptable impacts resulting from public use, particularly in high use areas where the carrying capacity is exceeded. These proposed amendments will enable the Department to protect natural resources while appropriately managing public use to ensure that the public benefits from a safe and satisfying recreating experience.

For example, the proposed regulations will add clarity with respect to where persons are not allowed to operate snowmobiles, bicycles and mechanically propelled vessels will ensure safe enjoyment of State lands by prohibiting their operation in hazardous areas, on ecologically sensitive sites and where user conflicts would occur.

Adding clarity and precision to the regulations will better educate the public about appropriate uses of State lands. In many instances, such education will result in self-regulation by the public, thereby facilitating natural resource protection.

3. Needs and benefits

Article XIV, Section 1 of the New York State Constitution mandates that the Forest Preserve be "forever kept as wild forest lands," and Articles 3 and 9 of the ECL mandate the preservation and protection of all state lands under the Department's jurisdiction by empowering the Department to exercise "care, custody and control" over this land. The purpose of this rulemaking is to clarify and strengthen regulations governing public use of both Forest Preserve and non-Forest Preserve lands.

The applicability provisions of Part 190 need to be revised to clarify that the provisions apply to public use on all lands administered by the DEC Divisions of Lands and Forests or the Division of Operations pursuant to articles 9, 45, 49, 51 and 52 (but not article 11) of the ECL. Part 190 does not apply to wildlife management areas (WMAs), and the new regulation makes that clear. The new language also makes clear that Part 190 applies to all classifications of forest land, such as unique and multiple use areas. This clarification is needed to allow for consistent management and effective stewardship.

Overall public use of State land has increased markedly since the initial adoption of 6 NYCRR Part 190 in 1972. In many areas of the State, private land postings, subdivision development, and increased demands for access to open space have increased public uses of State lands. Also, the nature of public recreation has evolved: shifting away from more traditional passive uses such as hunting, fishing and hiking to more high impact activities such as snowmobiling and bicycling. The proposed regulations are necessary to address the environmental damage and public safety issues resulting from unrestrained snowmobile and mountain bicycle use, uncontrolled campfires, permanent tree stands, unauthorized boat launching, significant increases in litter, increased user conflicts, and the unregulated storage of boats, motor vehicles and other personal property on State lands. As more people utilize State lands, certain roads, trails, campsites, and hunting areas have experienced substantial environmental damage. This increased environmental damage also increases risks to public health and safety. For instance, damage to root systems can kill trees, creating hazards to the public who are recreating beneath them. Unrestrained public recreational activities can cause erosion on fragile mountain slopes, increasing avalanche danger.

The absence of regulations on non-Forest Preserve lands for the control of the public use of snowmobiles, bicycles and mechanically propelled vessels hinders the Department's ability to provide the public with a safe and enjoyable recreational experience. These proposed regulations will enable the Department to exclude snowmobile, bicycle and mechanically propelled vessel use from lands that are ecologically or environmentally sensitive or are unsafe. These regulations also give the Department the ability to address user group conflicts which sometimes occur between snowmobilers and cross country skiers, as well as bicyclists and hikers, and canoeists and motorboat operators.

Additionally, the proposed regulations are needed to prohibit public use of State owned land or facilities and assets that the Department closes or imposes restrictions on for public health, safety, fiscal, and environmental reasons.

Consistent with the Department's constitutional and statutory

mandate, the proposed regulations are needed to prohibit public use of non-Forest Preserve lands or facilities and assets situated thereon for private revenue and commercial purposes. With the exception of the sale of articles by permit on campgrounds, the sale of certain forest products, and the leasing of oil and gas rights and licensed guide services, the use of State lands for private revenue and commercial purposes is not authorized by legislation and is inconsistent with the purposes for which these lands were acquired. The proposed regulation prohibiting fires on truck trails, roads, trails or parking areas, and in other areas where posted by the Department, is necessary to protect public health and safety, particularly during high fire danger conditions and to reduce related problems with littering, and under-age drinking parties.

The proposed regulations are also needed to allow the Department to prohibit, restrict or regulate large organized group events, such as competitive races, tournaments, group hikes, biathlons, conventions and similar large gatherings, and to allow the Department to prohibit, restrict or regulate weddings, advertising, and film making activities which exclude the general public from an area. Research projects also need to be controlled. The attraction and concentration of large numbers of persons to a particular location on State lands has the potential to conflict with the enjoyment of other recreational users and can result in damage to natural resources. Repeated or unregulated research of rare and endangered species or communities can create irreversible damages to the subject area. Regulation of organized events and research projects, through a permit process, is necessary in order to protect the public health and safety as well as the environment. Many of these impacts can be avoided through the imposition of mitigating conditions as part of the permit process, which might include limiting group size, regulating the location and timing of the event, and imposing conditions for addressing human waste.

The proposed regulatory restrictions on target shooting are necessary to protect the safety of the non-shooting and shooting public. The prohibition on the use of breakable targets will also avoid deposition of debris such as glass and clay targets that can be both unsightly and damaging to the environment and human health.

The proposal to prohibit paint ball possession and use will address aesthetic and natural resource impacts. Paint is unsightly, degrades the scenic beauty of State lands, is inconsistent with the purposes for which State land has been acquired by the Department, and requires time-consuming and expensive clean up.

The proposal to prohibit permanent tree stands is needed because their installation harms trees and, on non-Forest Preserve lands, can cause significant decrease in the lumber quality of trees resulting in an economic loss to the State. Permanent tree stands are also extremely dangerous as there are no standards for their construction or maintenance, and they can become unstable and collapse when occupied by people.

Except for campsites (see 6 NYCRR 190.4), there are currently no regulatory prohibitions on the storage of personal property on State lands under the Department's jurisdiction, nor are there any regulatory prohibitions on the erection or construction of structures on State lands. Without such regulations, the Department's ability to effectively enforce against such abuses is hindered. The construction of private buildings and structures, and the storage of personal property on State lands constitute a trespass on State lands, causes the Department to incur solid waste disposal costs, and creates other management, environmental and land use problems. Without the proposed regulations, it is difficult to deter many types of inappropriate behavior on State lands. For example, numerous boats are routinely stored for years along the shoreline of lakes and ponds managed by the Department. Many of these boats are ultimately abandoned, vandalized or sunk.

The proposed rulemaking will enhance the Department's ability to protect State lands for use by future generations. Protection of open space for public use promotes well being not only for those who recreate on these lands, but also for those who are comforted by the knowledge that the land will be there for future generations who desire to escape the noise and stress of everyday life.

Members of the Department's Forest Preserve Advisory Commit-

tee, Accessibility Advisory Committee and the New York State Trails Council and the presidents of Parks and Trails New York, New York State Trappers Association, New York Mountain Bike Coalition, New York Geocachers, New York State Conservation Council, New York Bowhunters, the Conservation Fund Advisory Board, the Conservation Alliance of New York and the New York State Snowmobile Association received notice of the Department's intent to promulgate these regulations along with a copy of the proposed regulations. All parties were invited to submit comments. The responses that were received were carefully considered and accommodated wherever possible.

4. Costs

No costs to the regulated community or the Department are anticipated to result from the adoption of these regulations except for the insignificant fees and administrative costs associated with applying for and processing Temporary Revocable Permits (TRPs) for the specified recreational activities. There may also be some increased costs to those who are ticketed for violating the new regulations, although typically the Department enforcement personnel initially seek to educate the public about new regulations before enforcing against them. The proposed regulations requiring TRPs merely formalize in regulation the current policy that a TRP be obtained prior to undertaking these specified activities; thus, there are no new TRP application costs that will be incurred by the public.

The Department will have minor costs associated with sign installation. Costs incurred by rescue squads and EMTs should be reduced by the rulemaking as it provides additional opportunities to protect public safety and minimizes the potential for accidents. Further, there will be fewer forest fires if the regulations are adopted, and the costs to the State for fighting fires will therefore be reduced. Costs to the Department for disposing of personal property and trash should decrease as a result of the new regulations.

Environmental, social and programmatic costs associated with the abuses discussed above, which are currently internalized, should decrease significantly. For example, the implementation and enforcement of the proposed regulations will reduce the use of certain trails during wet weather, thereby avoiding and mitigating soil erosion, tree decline and death, and stream siltation. The decrease in such hazardous conditions will also enhance public safety. The implementation of the proposed regulations will avoid and mitigate shoreline degradation resulting from irresponsible boat launching, protect timber values or tree health by prohibiting the improper installation of structures or tree stands, protect water quality and habitat of small ponds by banning gas powered motors on designated waterbodies, and decrease the potential risk for forest fires caused by careless human conduct. Currently, the Department has identified more than \$100 million in maintenance, repair and capital improvement needs for its State lands under its jurisdiction. The proposed regulations will lessen environmental degradation and should therefore help to reduce the enormous cost of State land maintenance needs.

5. Local government mandates

This proposal will not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district and may lessen the burden for local governments with respect to fire fighting and search and rescue costs.

6. Paperwork

The regulations will not impose any reporting requirements or other paperwork on any private or public entity, with the possible exception of TRPs as explained above in Section 4.

7. Duplication

The proposed regulations will not duplicate, overlap or conflict with other rules and legal requirements of State and Federal governments. The proposed regulations will help to implement current statutory provisions which protect the natural resource values of State lands.

8. Alternative approaches

The "no action" option is not an acceptable alternative because these regulatory changes are essential to public safety and natural resource protection. The absence of these regulations diminishes the

Department's ability to be a good steward of the lands entrusted to its "care, custody and control," and diminishes the ability of the Department to provide the public with a safe and rewarding recreational experience.

It is important to note that the proposed regulation for controlling bicycle and snowmobile use on State lands is an "affirmative" regulation which would allow bicycle and snowmobile use on non-Forest Preserve lands except on roads, trails and areas posted as closed. This regulatory approach serves as an efficient land management tool to close only those specific roads, trails or areas that are experiencing environmental damage or are unsafe for use. The vast majority of State roads, trails and areas will continue to remain open to bicycle and snowmobile use. The alternative of allowing bicycle and snowmobile use only on roads and trails signed as open would be inefficient and would be an ineffective use of staff resources.

The Department believes that allowing the use of electric powered vessels on the bodies of water that are proposed to be closed to mechanically propelled vessels provides a clean alternative to the use of mechanically propelled vessels. Most of these water bodies are small, contain submerged stumps or are ecologically valuable and sensitive.

The proposed regulatory prohibition on the use of permanent tree stands on State lands (subdivisions 190.8(x) and (y)) is necessary to ensure public safety, protect forest health, and minimize economic loss resulting from degradation in timber value. Proposed section 190.8(w) allows for the use of portable tree stands on State lands, thus providing an alternative for people who wish to use tree stands as hunting aids.

It is not possible for the Department to propose an alternative to the proposed prohibition relating to the use of State lands for private revenue or commercial purposes given the Department's lack of statutory authority for allowing these activities (except as otherwise noted).

The proposed restrictions on the storage of personal property on State lands provide an exception in the form of a Department permit authorizing such activity. Although such permits would likely be rarely issued, this exception provides an alternative to an absolute prohibition on the storage of personal property on State lands.

An alternative to requiring a permit for organized events would be to designate specific areas for these events on State lands. This alternative would eliminate, for these activities, the need for permits but could result in overuse and consequent environmental degradation of the designated group activity areas. Additionally, the lack of permitting requirement would not allow the Department to establish conditions in the permit designed to avoid and mitigate potential impacts and safety issues resulting from an organized event and to require liability protection for the State.

The "no action" alternative with respect to clarifying the applicability section of Part 190 is not acceptable because the State Legislature mandated that the Department provide for the "care, custody and control" of Forest Preserve and non-Forest Preserve lands. Thus, the regulations should be clear as to their applicability. The lack of clarity and consistent application of public recreation restrictions has the potential to confuse the public with respect to what restrictions apply to a particular classification of land. Also, the lack of clarity has the potential to diminish the Department's ability to achieve the legislative objectives of resource preservation.

9. Federal standard

These regulations do not exceed any minimum standards of the Federal government. There are no relevant federal standards related to these regulations.

10. Compliance schedule

This proposed rulemaking does not impose any compliance requirements or mandates, therefore, there is no compliance schedule. The rulemaking will become effective on the date the notice of adoption is published in the State Register.

Revised Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis for small businesses and local government is not submitted with these regulations because the proposal will impose no adverse economic impact or reporting, record

keeping or other compliance requirements on small businesses or local government.

Since there are no identified cost impacts for compliance with the proposed regulations on the part of small businesses and local government, they will bear no economic impact as a result of this proposal. The proposed rule solely relates to the control of public use on state lands.

Revised Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not submitted with this proposal because the proposal will not impose any reporting, record keeping or other compliance requirements on rural areas. The proposed rule solely relates to controlling public use on state lands, thereby ensuring public safety and protection of natural resources.

Revised Job Impact Statement

A Job Impact Statement is not submitted with this proposal because the proposal will have no substantial adverse impact on existing or future jobs and employment opportunities. The proposed rule solely relates to controlling public use on state lands, thereby ensuring public safety and protection of natural resources.

Assessment of Public Comment

This document is a summary of the assessment of public comment. A complete version may be obtained by contacting the DEC contact person listed in the notice of adoption.

190.0 (a) Introduction

This section is amended to clarify what types of State lands classifications are governed by Part 190 by indicating which DEC divisions administer such lands and expanding the existing list of administrative land classifications governed by Part 190.

Commenters suggested that separate regulations be developed for easement lands to allow traditional usage and expanded public recreational use. This is not feasible due to the variable nature of the terms of easements held by the Department. The Department intends to promulgate specific regulations for easement lands if necessitated by public use issues.

Commenters also asked if the proposed regulations cover Wildlife Management Areas. They do not. WMAs are covered by 6 NYCRR Parts 1 through 189.

190.0(b)(13) Definition of Structure

This new definition has been added to address the increasing number of trespasses on State lands, and to ensure that the Department can effectively enforce the statutory prohibitions against persons who erect, use or maintain structures on State lands. This new definition of structure and corresponding restriction with respect to the building of structures on State lands found at Subdivision 190.8(w) should facilitate enforcement of the following statutory prohibitions. ECL Section 9-0303(2) states that, "[n]o building shall be erected, used or maintained upon State lands except under permit from the department." ECL Section 9-0303(4) states that, "[n]o person shall deposit or leave on State land any rubbish or other waste material." ECL Section 9-0303(6) states that, "[t]he department may dispose of any improvements upon State lands under such conditions as it deems in the public interest."

Commenters recommended that trapping and angling should be added to the list of uses for which associated equipment is not considered structures. This suggestion was incorporated into the regulation.

190.8(a) Commercial Use of State land

This subdivision has been repealed and a new subdivision added to clarify that the prohibition relating to commercial use of State lands applies to Forest Preserve as well as Reforestation areas and other areas under the Department's jurisdiction with the exception of specified commercial uses such as permitted vendors at campgrounds (6 NYCRR Section 190.7[a][19]), sale of forest products from reforestation areas (ECL Section 9-0505) leasing of oil and gas rights on Reforestation areas (ECL Section 9-0507), and licensing of guides (ECL Section 11-0533). Notwithstanding the statutory and other exceptions, the State Legislature has mandated that the Department manage lands under its jurisdiction for natural resource protection and public recreation and not for commercial purposes. For example the ECL provides the Department with 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 special resources such as the Adirondack and Catskill Forest Preserve (ECL Section 1-0101(3)(d)),
- promoting and coordinating management of land resources to assure their protection, taking into account the cumulative impact upon all such resources in promulgating any rule or regulation (ECL Section 3-0301(1)(b)),
- providing for the care, custody, and control of the Forest Preserve and non-Forest Preserve land (ECL Section 3-0301(1)(d)) and 9-0105(1)),
- providing for prevention and abatement of water, land and air pollution (ECL Section 3-0301(1)(i)),
- 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)), Section 9-0105(3) and 9-1105(1)), and
- acquisition of lands outside of the Adirondack and Catskill Parks for reforestation and maintenance of forests for watershed protection, the production of timber, and for recreation and kindred purposes (ECL Section 9-0501(1)).

Commenters opined that the ECL does not prohibit commercial use of State lands. The State Legislature sets forth broad purposes for which State lands under the Department's jurisdiction. With the specified limited exceptions, the Legislature did not grant the Department the authority to manage its lands for commercial use.

Commenters also opined that the regulations as proposed could be interpreted to prohibit trapping. The addition of "Article 11" to subdivision 190.8 (a) clarifies that trapping is allowed.

190.8(g) Removing and defacing of natural resources and other materials on State lands

This subdivision has been revised by adding fungi or other plant like organisms, soil, and objects of archaeological or paleontological interest to the existing list of materials that may not be removed from State lands without Department authorization. In response to public comment language has been added to allow for personal consumption of fungi and berries without a permit. In addition, revisions have been made for consistency with section 233 of the State Education law: changing the authorizing entity from the Assistant Commissioner for State Museum and Science Service to the Commissioner of Education.

Comment 1: Subdivision (g) should be re-worded so that inadvertent damage caused by people doing things they are allowed to do is not a violation of the regulations.

Comment 2: Public hearings should be held before these regulations are adopted, especially in regard to the picking of mushrooms.

Comment 3: Collecting berries and mushrooms should be allowed on state lands.

Response:

Under subdivision 190.8(g) it has always been and continues to be unlawful for any person to 'deface, remove, destroy or otherwise injure in any manner whatsoever any tree, flower, shrub, fern, moss or other plant, rock, fossil or mineral found or growing on State Land, except under permit. . .'. This regulatory provision implements ECL Section 9-0303 which states that "[n]o person shall remove any materials belonging to the state from state lands without the authorization of the department." The new regulatory revisions merely expanded the existing regulatory list of things that cannot be removed from State land. The regulation now more accurately reflects the statutory prohibition.

It is not reasonable to suggest that subdivision 190.8(g) would prohibit "inadvertent damage" such as stepping on a fern. Regulations like statutes must be interpreted in a reasonable manner and not in way that would have mischievous or ridiculous results. 'A forced, unnatural, or ridiculous construction, which might tend to bring contempt upon the administration of justice is to be shunned, and a court must avoid such interpretations. . .', which are illogical and never intended by the promulgating agency (see Statutes sections 144-146). Finally, it is highly significant that this subdivision has been in place for over

30 years and has not been interpreted by the courts or DEC in the manner that the commenter suggests.

Comment 4: Are burls, branches, cones and other growths on plants covered by this section of the regulations?

Response: Yes. Under ECL Sections 9-0303 and 9-0505, and subdivision 190.8(g) it would be unlawful for any person to remove burls, branches, cones and other growths on plants from State lands without a permit from the Department.

190.8(r) Operation of snowmobiles

Subdivision 190.8 (r) has been modified from the original proposal based on public comments, factors not originally considered relating to snowmobile design, and a more thorough analysis of associated adverse environmental impacts. The original proposal excluded snowmobiles from all trails unless posted as open to snowmobiles. As modified, snowmobiles will be allowed on all trails unless posted as closed to snowmobiles. The Department considered the following factors in making this revision:

- Snowmobile design has evolved over the last decade to larger machines, which has severely limited their ability to operate on ungroomed trails. Thus, the Department can manage snowmobile use by limiting trail grooming.

- The revised regulation allows the Department to post specific roads and trails as closed to snowmobiles in circumstances and at locations where off-trail or on-trail use could potentially damage the resource or create user conflicts. For example, the Department retains the authority to post deer winter yarding areas, sections of trail in need of repair, active timber sale areas, trail sections connected by a bridge in need of repair or areas being actively harvested for timber as closed to snowmobile use.

Finally, this revision allows local residents to use ungroomed trails to access nearby groomed trails. This use will not create significant environmental impacts (due to the “self limiting” design of modern snowmobiles) and will allow snowmobile access to State Forest trails.

There were comments in support of the originally proposed subdivision. Other commenters opined that the proposed regulations were overly restrictive and would cause financial impacts to the State. The provision restricting snowmobiles to trails only has been removed. The revised regulations allow snowmobile use on roads and trails unless posted as closed.

Commenters also suggested re-routing snowmobile trails to minimize the disruption of wildlife. The Department retains the regulatory authority to close trails and other areas to snowmobiles as necessary to protect natural resources.

Commenters also suggested that Recreation Management Plans (RMPs) are the more appropriate forum in which to address this issue. Any public use controls recommended in RMPs would require regulations to enforce them.

190.8(s) Bicycle use on non-forest preserve lands

Under this new subdivision, bicycles are allowed on truck trails, roads, trails or other areas unless posted as closed with respect to State lands outside the forest preserve. This new subdivision is necessary because the old regulations were inadequate with respect to managing user conflicts and environmental damage resulting from mountain bicycles. This new provision will enable land managers to close trails and areas to bicycle use as necessary to rectify such problems.

Commenters suggested that there are no environmental or safety issues associated with mountain bikes, and that mountain biking should not be considered a “high impact activity.” Impacts from mountain biking are well documented particularly in regard to wildlife and other recreationists, and in regard to wetlands, steep slopes and fragile soils, which are susceptible to erosion. This revised subdivision allows the Department to address such environmental impacts through trail closures.

Commenters also recommended that forest roads and trails should remain open to bicycle use. They will, unless posted as closed by the Department.

190.8(t) Only electric powered vessels allowed on specified ponds

This provision will protect these ponds from environmental degra-

ation that may result from the operation of non-electric powered vessels.

Commenters suggested that Long Pond in Chenango County should not be included on the list of water bodies on which only electric motors are allowed, and that a horsepower restriction would be more appropriate. This suggestion has been incorporated into the regulation. The Department is proposing to limit the motor size which can be used by any person to a maximum of 25 horsepower. This is anticipated to reduce the incidence of boaters speeding and other incompatible boat based recreational uses on the pond, and is likely to impact relatively few anglers. The 25 horsepower maximum was selected to match an existing regulation on nearby Whitney Point Reservoir. The Whitney Point Reservoir restriction was based on extensive public input.

190.8(w) Prohibition on the Storage/abandonment of Structures and Property on State lands

(Note: proposed subdivision 190.8(cc) has been incorporated into adopted subdivision 190.8(w)).

This provision is necessary to address the increasing number of structures and personal property that are being stored and abandoned on State lands, while at the same time continuing to allow structures relating to hunting, trapping, wildlife viewing and camping for limited duration and that are in compliance with all other laws and regulations. This regulatory language implements ECL Section 9-0303, which provides in pertinent part:

- No building shall be erected, used or maintained upon State lands except under permit from the department;
- No person shall deposit or leave on State lands any rubbish or other waste material; and
- The department may dispose of any improvements upon State lands under such conditions as it deems to be in the public interest.

Commenters suggested that there is no reason for tagging trapping cubbies. This subdivision has been revised so as not to require tagging of trapping cubbies.

The suggestion was also made that the word “use” be removed from this subdivision. Revisions have been made to clarify that the “use” of illegally placed structures and property is prohibited. However, there has never been any intention by DEC to prohibit public use of authorized structures and property.

Commenters suggested that boats should be allowed to be stored on State lands. While boats and canoes left on State lands may serve a purpose to the users, they present an aesthetic nuisance to the public and a solid waste liability for the Department.

Commenters opined that time limitations and tagging are unneeded and would only open the user to harassment. Quantifying the duration that certain exceptions may be stored on State lands and tagged with owner identification information allows for fair and effective enforcement. Tagging allows law enforcement personnel to contact the owner in order to request compliance. In the alternative, Department staff would be faced with confiscation and disposal of unclaimed property.

Commenters suggested allowing hunting or fishing license numbers be affixed to structures as identification in lieu of name and address. Subdivision (w) has been modified to allow other means of tagging structures.

190.8 (bb) Prohibition on possession and shooting breakable targets and prohibition on target shooting on areas posted as closed to target shooting

This regulation is necessary to avoid the deposition of debris such as glass and clay targets that can be both unsightly and damaging to the environment and human health. The closure of certain areas to target shooting is necessary for public safety.

Commenters opined that target shooting should continue to be allowed on State lands. This subdivision relates to possession and shooting of breakable targets; shooting at paper or other non-breakable targets would be allowed so long as the area is not posted as closed to target shooting for public safety issues.

Commenters pointed out that the proposed regulation prohibited the

possession of bottles on State land. The regulation has been re-written so that it is lawful to possess glass containers, but unlawful to target shoot at glass containers.

190.8(cc) Organized Events

Organized events of more than twenty people will now require a permit from the Department. Since 6 NYCRR Part 190 went into effect in 1972, public use patterns and forms of recreation have significantly changed. Larger groups undertaking recreational activities at greater intensity levels have resulted in larger and sometimes permanent adverse impacts to natural resources and conflicts with other user groups. This subdivision allows the Department to impose permit conditions on large user groups to avoid and mitigate potential adverse environmental impacts.

Commenters opined that the proposed subdivision was overly restrictive, and that certain types of groups should be allowed to be over 20 people without a permit. The Department's unit management planning process has documented that the unrestricted use of State lands by large groups results in adverse impacts. If such impacts are left unchecked, future generations will inherit over-used State lands in need of costly remediation. Department staff are considering various approaches to expedite the existing temporary revocable permit (TRP) process.

Commenters opined that the proposed subdivision is unenforceable and unconstitutional, and expressed concern that chance meetings of groups whose combined total was over 20 would result in a violation. The ECL authorizes the Department to exercise "care, custody and control" of State lands under its jurisdiction. Placing a restriction on group size is an appropriate exercise of the Department's "care, custody and control" authority and is not a violation of an individual's constitutional rights.

190.8(dd) Research and Population Studies

Commenters expressed concern that the proposed subdivision could be interpreted very broadly, resulting in any observation or counting of objects or animals being considered a violation. The regulations have been revised to allow observational research that does not involve disturbance of the subject.

Commenters also expressed concern that the permitting process could delay important research. Department staff are considering various approaches to expedite the existing temporary revocable permit (TRP) process.

Commenters suggested that the Department may be exceeding its authority by proposing regulations that would restrict research activities on easement lands where the rights of administration and inspection had not been conveyed to the State. The rights of the public to use easement lands are largely determined by the terms of each easement. The existing language of Part 190 and as amended by this rulemaking continue to apply to easement lands to the extent that the State acquired the right of public access.

190.8(ee) Advertising, weddings, film making

This section has been added to address certain activities that dominate an area of State land to such an extent that they exclude others from using the property.

Commenters opined that the proposed subdivision was overly restrictive and unnecessary, specifically regarding recreational filming and photography. The proposed regulations have been revised to allow small-scale film making and non-commercial photography and filming.

General Comments

Numerous comments were received relating to dogs on leashes. This rulemaking does not address dog leash issues.

Concerns were expressed that the proposed regulations will limit hunting and fishing opportunities on State lands. The regulations have been revised to avoid impacting persons legally engage in fishing and hunting.

Commenters opined that the proposed regulations are biased against non-hiking recreationists. Mechanized recreation results in greater potential environmental impacts and therefore necessitates greater restrictions than passive recreational pursuits. The revised regulation

lessens the original proposed restrictions on bicycles and snowmobiles.

Commenters opined that the Department should have conducted public hearings and greater public outreach. The rulemaking complied with the State Administrative Procedure Act. The Department provided a 45-day public comment period as required by statute. The regulations were posted on the Department's web site and in the State Register.

Commenters opined that the regulations should establish a minimum level of activity that is acceptable, would require a permit, or would result in prosecution. If an activity is not allowed, then any level of that activity is a violation of the regulations. If a permit is required for an activity to be undertaken on State lands, then any level of that activity requires a permit.

Commenters requested that State parks be kept open to the public. State Parks are managed by the Office of Park, Recreation and Historic Preservation. This rulemaking does not close any State lands under the Department's jurisdiction, but allows the Department to close certain areas due to dangerous and hazardous conditions.

Insurance Department

NOTICE OF ADOPTION

Plan of Conversion by Commercial Mutual Insurance Company

I.D. No. INS-36-08-00008-A

Filing Date: 2009-04-22

Effective Date: 2009-04-22

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

Action taken: Approval of a plan by Commercial Mutual Insurance Company to convert from an advance premium co-operative property/casualty insurance company to a stock property/casualty insurance company.

Statutory authority: Insurance Law, section 7307

Subject: Plan of conversion by Commercial Mutual Insurance Company.

Purpose: To convert an advance premium co-operative property/casualty insurance company to a stock property/casualty insurance company.

Text or summary was published in: the September 3, 2008 issue of the Register, I.D. No. INS-36-08-00008-P.

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

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

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.

Public Service Commission

NOTICE OF ADOPTION

Certificate of Environmental Compatibility and Public Need for the Re-build, and O&M of Transmission Facilities

I.D. No. PSC-39-06-00024-A

Filing Date: 2009-04-24

Effective Date: 2009-04-24

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

Action taken: On 4/21/09 the PSC adopted an order approving the terms

of a Joint Proposal, with exceptions and modifications, and granting Niagara Mohawk Power Corporation d/b/a National Grid, for a Certificate of Environmental Compatibility and Public Need.

Statutory authority: Public Service Law, sections 4(1) and 122(1)

Subject: Certificate of Environmental Compatibility and Public Need for the re-build, and O&M of transmission facilities.

Purpose: To approve, with modifications, Certificate of Environmental Compatibility and Public Need for the re-build of facilities.

Substance of final rule: The Commission, on April 21, 2009, adopted an order approving, the terms of a Joint Proposal, with exceptions and modifications, and granting Niagara Mohawk Power Corporation d/b/a National Grid, for a Certificate of Environmental Compatibility and Public Need for the reconstruction, operation and maintenance of approximately 21 Miles of 115 kV double-circuit transmission facilities from the Gardenville Substation in West Seneca to Structure 199 in Concord, Erie County, 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, 3 Empire State Plaza, Albany, New York 12223-1350, (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. (06-T-1040SA1)

NOTICE OF ADOPTION

Major Electric Rate Filing

I.D. No. PSC-39-08-00014-A

Filing Date: 2009-04-24

Effective Date: 2009-04-24

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

Action taken: On 4/21/09, the PSC adopted an order approving in part Consolidated Edison Company of New York, Inc.'s request to make various changes in the rates, charges, rules and regulations contained in its schedules for electric service.

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

Subject: Major electric rate filing.

Purpose: To approve Consolidated Edison Company of New York, Inc.'s request for a three year rate increase.

Substance of final rule: The Commission, on April 21, 2009, adopted an order setting electric rates for Consolidated Edison Company of New York, Inc., 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-0539SA1)

NOTICE OF ADOPTION

Property Tax Refunds from the Town of Mount Pleasant, New York

I.D. No. PSC-40-08-00015-A

Filing Date: 2009-04-24

Effective Date: 2009-04-24

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

Action taken: On April 21, 2009, the PSC adopted an order approving the petition of Consolidated Edison Company of New York, Inc. for allocation of property tax refunds from the Town of Mount Pleasant, New York.

Statutory authority: Public Service Law, section 113(2)

Subject: Property tax refunds from the Town of Mount Pleasant, New York.

Purpose: To approve property tax refunds from the Town of Mount Pleasant, New York.

Substance of final rule: The Commission, on April 21, 2009, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. for allocation of property tax refunds from the Town of Mount Pleasant, New York, 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-M-0618SA1)

NOTICE OF ADOPTION

Waiver of the Reporting Requirements of 16 NYCRR 31.1(f) Through (l)

I.D. No. PSC-46-08-00012-A

Filing Date: 2009-04-22

Effective Date: 2009-04-22

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

Action taken: On 4/21/09, the PSC adopted an order approving the petition of Consolidated Edison Company and AT&T Mobility LLC for a waiver of the reporting requirements of 16 NYCRR § 31.1(f)-(l) for the leasing of space in electric transmission facilities.

Statutory authority: Public Service Law, section 70

Subject: Waiver of the reporting requirements of 16 NYCRR § 31.1(f) through (l).

Purpose: To approve a waiver of the reporting requirements of 16 NYCRR 31.1(f) through (l).

Substance of final rule: The Commission, on April 21, 2009, adopted an order approving the petition of Consolidated Edison Company of New York, Inc. and AT&T Mobility LLC for a waiver of the reporting requirements of 16 NYCRR § 31.1(f) through (l) for the leasing of space in electric transmission facilities for wireless communication equipment, 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-M-0520SA1)

NOTICE OF ADOPTION

Policies and Procedures for TOA and LOE

I.D. No. PSC-49-08-00015-A

Filing Date: 2009-04-23

Effective Date: 2009-04-23

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

Action taken: On 4/21/09, the PSC adopted an order granting the Director of the Office of Telecommunications, authority to issue 6 month Temporary Operating Authority certificates (TOA) and to provide Limited Orders of Entry (LOE) for cable television companies.

Statutory authority: Public Service Law, sections 215, 216 and 228

Subject: Policies and procedures for TOA and LOE.

Purpose: To authorize the Director of the Office of Telecommunications, to issue 6 month TOA certificates and LOE.

Substance of final rule: The Commission, on April 21, 2009, adopted an order granting the Director of the Office of Telecommunications, authority to issue six month Temporary Operating Authority certificates and to provide Limited Orders of Entry for cable television companies, 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-V-1289SA1)

NOTICE OF ADOPTION

Hourly Pricing Provision - UCAP Charge

I.D. No. PSC-49-08-00017-A

Filing Date: 2009-04-23

Effective Date: 2009-04-23

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

Action taken: On 4/21/09, the PSC approved Central Hudson Gas and Electric Corporation's request to make various changes to its schedule for Electric Service PSC No. 15—Electricity, eff. 5/1/09.

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

Subject: Hourly Pricing Provision - UCAP Charge.

Purpose: To approve the method used to determine capacity charges included in the Hourly Pricing Provision UCAP charge.

Substance of final rule: The Commission, on April 21, 2009, approved Central Hudson Gas and Electric Corporation's tariff revisions to revise the purchased capacity rate utilized in the determination of the UCAP charge paid by customers taking service under the Company's Hourly Pricing Provision.

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-1365SA1)

NOTICE OF ADOPTION

To Transfer Ownership Interests in a 67 MW Generation Facility

I.D. No. PSC-08-09-00004-A

Filing Date: 2009-04-22

Effective Date: 2009-04-22

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

Action taken: On 4/7/09, the PSC adopted an order approving the joint petition of EPCOR Power LLC, EPCOR Power Enterprises LLC, and Castleton Energy Center LLC, to transfer ownership interests to Castleton Energy, of EPCOR Castleton in a 67 MW generation facility.

Statutory authority: Public Service Law, section 70

Subject: To transfer ownership interests in a 67 MW generation facility.

Purpose: To approve the transfer ownership interests in a 67 MW generation facility.

Substance of final rule: The Commission, on April 21, 2009, adopted an order approving the joint petition of EPCOR Power LLC, EPCOR Power Enterprises LLC, and Castleton Energy Center LLC, to transfer ownership interests to Castleton Energy, of EPCOR Castleton for a 67 MW gas-fired generation facility located in Castleton-on-Hudson, New York, 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-0059SA1)

NOTICE OF ADOPTION

Water Rates and Charges

I.D. No. PSC-09-09-00021-A

Filing Date: 2009-04-22

Effective Date: 2009-04-22

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

Action taken: On 4/21/09, the PSC approved a request filed by Edgewood Lakes, Inc. to make a change in the rates and charges contained in its tariff schedule P.S.C. No. 4—Water, to become effective to May 1, 2009.

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 in annual operating revenues by \$3,818 or 36% and increase the balance of the escrow surcharge account.

Substance of final rule: The Commission, on April 21, 2009, adopted an order approving the request of Edgewood Lakes, Inc. to increase its annual water revenues by about \$3,818 or 36% and to increase its escrow account surcharge from \$40 to \$100 per quarter, and to bill its customers an additional \$60 on May 1, 2009 for ongoing needed repairs to the water system, 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-0121SA1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Approval of a Transfer of Ownership Interests in Real Property at a Generation Plant Site

I.D. No. PSC-19-09-00003-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 from Caithness Long Island LLC requesting approval of a transfer of ownership interests in real property at its generation plant site.

Statutory authority: Public Service Law, section 70

Subject: Approval of a transfer of ownership interests in real property at a generation plant site.

Purpose: Consideration of approval of a transfer of ownership interests in real property at a generation plant site.

Substance of proposed rule: The Public Service Commission is considering a petition from Caithness Long Island LLC requesting approval of a transfer of ownership interests in real property at its generation plant site. The real property would be transferred to the Town of Brookhaven in accordance with requirements established by the Town's Planning Board. The Commission may adopt, reject or modify, in whole or in part, the relief proposed.

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: jaclyn_brilling@dps.state.ny.us

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

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

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

(09-E-0348SP1)

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Whether to Permit the Use of the Eagle MPplus Electronic Volume Corrector for Use in Commercial and Industrial Accounts

I.D. No. PSC-19-09-00004-P

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

Proposed Action: The Public Service Commission is considering whether to approve, deny or modify, in whole or in part, a petition filed by Corning Natural Gas Corporation for the approval to use the Eagle MPplus Electronic Volume Corrector.

Statutory authority: Public Service Law, section 67(1)

Subject: Whether to permit the use of the Eagle MPplus Electronic Volume Corrector for use in commercial and industrial accounts.

Purpose: To permit gas utilities in New York State to use the Eagle MPplus Electronic Volume Corrector.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or part, the petition filed by Corning Natural Gas Corporation, to use the Eagle MPplus Electronic Volume Corrector used to correct the gas flow measurements created by differences in transmission line temperature and pressure.

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, Three Empire State Plaza, Albany, New York 10007, (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, Three Empire State Plaza, Albany, NY 10007, (518) 474-6530, email: jaclyn_brilling@dps.state.ny.us

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

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

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

(09-G-0352SP1)