

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.

State Commission of Correction

NOTICE OF ADOPTION

DOCCS Variances

I.D. No. CMC-21-12-00005-A

Filing No. 730

Filing Date: 2012-07-17

Effective Date: 2012-08-01

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

Action taken: Amendment of section 7603.2; and addition of section 7603.3(b)(5) to Title 9 NYCRR.

Statutory authority: Correction Law, section 45(6) and (15)

Subject: DOCCS variances.

Purpose: To allow for a DOCCS variance to facility capacity regulations when necessary for inmate programming or other important needs.

Text or summary was published in the May 23, 2012 issue of the Register, I.D. No. CMC-21-12-00005-P.

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

Text of rule and any required statements and analyses may be obtained from: Brian M. Callahan, Associate Attorney, New York State Commission of Correction, Alfred E. Smith State Office Building, 80 S. Swan Street, 12th Floor, Albany, New York 12210, (518) 485-2346, email: Brian.Callahan@scoc.ny.gov

Assessment of Public Comment

The New York State Commission of Correction (hereinafter “Commission”) received formal comment from Brian Fischer, Commis-

sioner of the New York State Department of Corrections and Community Supervision (hereinafter “DOCCS”), and Donn Rowe, President of the New York State Correctional Officers and Police Benevolent Association, Inc. (hereinafter “NYSCOPBA”), the labor union representing all correction officers, correction sergeants, institution safety officers and community correctional center assistants employed by DOCCS.

In its comments, NYSCOPBA initially cites various statistics to support its premise that “working in New York’s corrections system is far less safe today than it was four years ago.” For this reason, NYSCOPBA has called upon the Governor and Legislature to support an evaluation of the state’s correctional system with regard to security, staffing ratios, bed capacity, and the double-bunking and double-celling of inmates. Until such evaluation is accomplished, NYSCOPBA claims that “an honest evaluation of prison safety, security, and welfare cannot be made, including the programmatic and other important inmate needs intended to be addressed by the Commission in the proposed regulations herein.” The Commission disagrees with this presumption, as the proposed regulation does not seek to evaluate or address the programmatic and other important needs of the inmate population. Rather, the proposed regulation will only allow DOCCS to apply for a variance to capacity regulations where it can establish that a programmatic or other important inmate need cannot be met, or would be inordinately delayed, in the absence of a variance.

NYSCOPBA further contends that there remain a significant number of double-celling and double-bunking approvals that “create prison conditions which fail to meet the Commission’s minimum housing standards and lead to overcrowded and dangerous conditions of confinement increasing the risk of harm to officers, civilians and prisoners alike.” The Commission also strongly disagrees with this contention, as all double-celling in the DOCCS system complies with the regulations set forth in sections 7621.6 and 7621.7 of Title 9 NYCRR, and double-bunking in the DOCCS system currently consists of only a total of 116 beds in two (2) facilities, all granted by Commission variance.

Lastly, NYSCOPBA correctly notes that, as the regulations are presently designed, variances provide short-term relief for temporary conditions, as opposed to permanent, long-term exceptions to Commission regulations. To that end, the current regulations require any DOCCS variance application to provide a remediation plan and timetable for compliance. With regard to the proposed regulation, NYSCOPBA contends that “variances could continue until such time as DOCCS can no longer support its programmatic or other important needs, and further removes the requirement that such variances are intended to be temporary in nature.” Further, NYSCOPBA argues that “there would be almost no limit to such variance applications since the basis upon which to seek and grant same would be expanded almost without limit if it can be advanced as an ‘other important needs of one or more inmates.’ ”

As this argument completely ignores its constitutional and statutory function and duty, the Commission must further disagree therewith. Created by Article 17, section 5 of the New York Constitution, the Commission of Correction is an independent agency within the Executive branch charged by Article 3 of the Correction Law with the oversight and regulation of all correctional facilities in New York State, including those operated by DOCCS. In the wake of the Attica

prison riots of 1971, Correction Law Article 3 was ratified to restructure the Commission of Correction (L.1975, c. 865, § 2). As proposed, the overall purpose of the bill was “creating and encouraging a strong and vigorous watchdog organization [to] make our correctional system accountable to the people.” McKinney’s 1975 Session Laws of New York, p. 1705. Similarly, Governor Hugh L. Carey’s accompanying memorandum stated that the “purpose of these bills is to establish a full-time and vigorous watchdog organization to oversee the performance of the State and local correctional system...” Id., at 1781. Carey further declared that “[i]t is of utmost importance that there be some independent and effective oversight of the operations of this system to assure the public that its performance meets or exceeds acceptable standards.” Id. As amended, the proposed regulations will still require DOCCS to make an application to the Commission for any variance to its body of regulations. The ability to approve or deny any variance, for any suitable length of time, will remain in the independent, sound discretion of the Commission.

As an alternative to the proposed regulation, NYSCOPBA proposes that “such variance applications should be made subject to a public hearing requirement prior to the Commission’s determination to either to provide interested parties and the public an opportunity to obtain and present relevant information regarding such variances. The Commission hereby elects not to incorporate NYSCOPBA’s proposed alternative into the regulation because it believes the desired effect already exists. The Commission considers variance applications from DOCCS, and all other correctional facilities, at its monthly agency meeting, which is subject to the Open Meetings Law. The agenda is published in advance of each meeting, even emailed to various individuals and agencies, including NYSCOPBA. This current process provides interested individuals and agencies the opportunity to provide the Commission relevant information and its opinion in advance of the meeting, an opportunity that NYSCOPBA has previously utilized.

Conversely, the comments submitted by DOCCS voice its strong support for the regulatory amendment as proposed, recognizing “that in certain limited situations, there may be a sound and rationale basis for requesting a variance that is unrelated to the need for additional capacity.” The Commission agrees, as the stated benefits were the primary purpose of the proposal.

Department of Corrections and Community Supervision

NOTICE OF ADOPTION

Buffalo CF, Arthurkill CF, Correctional Camps, Summit CF, Mid-Orange CF, Fulton CF and Oneida CF

I.D. No. CCS-20-12-00004-A

Filing No. 698

Filing Date: 2012-07-16

Effective Date: 2012-08-01

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

Action taken: Repeal of sections 100.8, 100.60, 100.65, 100.67 100.71, 100.98 and 100.120 of Title 7 NYCRR.

Statutory authority: Correction Law, section 70

Subject: Buffalo CF, Arthurkill CF, Correctional Camps, Summit CF, Mid-Orange CF, Fulton CF and Oneida CF.

Purpose: To remove the reference to correctional facilities that are no longer in operation.

Text or summary was published in the May 16, 2012 issue of the Register, I.D. No. CCS-20-12-00004-P.

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

Text of rule and any required statements and analyses may be obtained from: Maureen E. Boll, Deputy Commissioner and Counsel, NYS Department of Corrections and Community Supervision, 1220 Washington Ave-

nue - Harriman State Campus - Building 2, Albany, NY 12226-2050, (518) 457-4951, email: Rules@Doccs.ny.gov

Assessment of Public Comment

The agency received no public comment.

Education Department

EMERGENCY RULE MAKING

Occupational Therapy

I.D. No. EDU-11-12-00010-E

Filing No. 692

Filing Date: 2012-07-13

Effective Date: 2012-07-15

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

Action taken: Amendment of section 76.4; repeal of sections 76.5 and 76.6; renumbering of section 76.7 to section 76.5; and addition of new sections 76.6, 76.7, 76.8 and 76.9 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207 (not subdivided), 6504 (not subdivided), 6507(2)(a) and 7906(4) and (7); and L. 2011, ch. 460

Finding of necessity for emergency rule: Preservation of public health and general welfare.

Specific reasons underlying the finding of necessity: The proposed amendment to the Regulations of the Commissioner of Education is necessary to conform the Commissioner’s Regulations to the requirements of Chapter 460 of the Laws of 2011. Chapter 460 amended Article 156 of the Education Law to amend the scope of practice of occupational therapists, to provide for the supervision of limited permittees in occupational therapy, to provide for practice as exempt individuals by occupational therapy assistant students, to authorize and provide for the definition of practice of occupational therapy assistants, to provide that occupational therapist assistants shall be subject to the disciplinary and regulatory authority of the Board of Regents and the Department, and to make various technical changes to these sections of the Education Law.

The proposed amendment is necessary to implement the new law. The Board of Regents adopted the proposed amendment as an emergency rule at its February meeting, with an effective date of February 14, 2012, consistent with the effective date of the law, and readopted the emergency rule at the April Regents meeting to ensure the rule remains continuously in effect until it can be presented for adoption as a permanent rule.

A Notice of Proposed Rule Making was published in the State Register on March 14, 2012. The proposed rule includes provisions governing the topics of this emergency rule, as described above and, in addition, provisions governing the supervision of holders of limited permits in occupational therapy and supervision of occupational therapy assistants. The 45-day public comment period expired on April 30, 2012.

Further revisions to the proposed rule are anticipated in response to public comment. Pursuant to the State Administrative Procedure Act, the revised proposed rule cannot be adopted as a permanent rule until after its publication in the State Register and expiration of a 30-day public comment period. However, the April emergency rule will expire on July 14, 2012. A lapse in the rule could potentially disrupt the practice of occupational therapy pursuant to Chapter 460 of the Laws of 2011.

Emergency action at the June 18-19, 2012 Regents meeting is necessary for the preservation of the public health and general welfare in order to ensure that the emergency rule remains continuously in effect until the revised proposed rule can be adopted and made effective as a permanent rule.

It is anticipated that the revised proposed rule will be presented for adoption as a permanent rule at the September 10-11, 2012 Regents meeting, following its publication in the State Register and expiration of the 30-day public comment period for revised rule makings required under the State Administrative Procedure Act.

Subject: Occupational Therapy.

Purpose: To implement chapter 460 of the Laws of 2011, relating to the profession of occupational therapy.

Text of emergency rule: 1. Section 76.4 of the Regulations of the Commissioner of Education is amended, effective July 15, 2012, as follows:

(a) ...

(b) Limited permits may be renewed once for a period not to exceed one year at the discretion of the department because of personal or family illness or other extenuating circumstances which prevented the permittee from becoming licensed[, provided that the permittee has not failed the licensing examination in occupational therapy].

2. Section 76.5 of the Regulations of the Commissioner of Education is repealed, and 76.7 of the Regulations of the Commissioner of Education is renumbered 76.5, effective July 15, 2012.

3. Section 76.6 of the Regulations of the Commissioner of Education is renumbered 76.8, and new sections 76.6, 76.7, and 76.9, are added, effective July 15, 2012, to read as follows:

76.6 Definition of occupational therapy assistant practice and the use of the title occupational therapy assistant.

(a) An "occupational therapy assistant" shall mean a person authorized in accordance with this Part who provides occupational therapy services under the direction and supervision of an occupational therapist or licensed physician and performs client related activities assigned by the supervising occupational therapist or licensed physician. Only a person authorized under this Part shall participate in the practice of occupational therapy as an occupational therapy assistant, and only a person authorized under this Part shall use the title "occupational therapy assistant."

(b) As used in this section, client related activities shall mean:

(1) contributing to the evaluation of a client by gathering data, reporting observations and implementing assessments delegated by the supervising occupational therapist or licensed physician;

(2) consulting with the supervising occupational therapist or licensed physician in order to assist him or her in making determinations related to the treatment plan, modification of client programs or termination of a client's treatment;

(3) the utilization of a program of purposeful activities, a treatment program, and/or consultation with the client, family, caregiver, or other health care or education providers, in keeping with the treatment plan and under the direction of the supervising occupational therapist or licensed physician;

(4) the use of treatment modalities and techniques that are based on approaches taught in an occupational therapy assistant educational program registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, and that the occupational therapy assistant has demonstrated to the occupational therapist or licensed physician that he or she is competent to use; or

(5) the immediate suspension of any treatment intervention that appears harmful to the client and immediate notification of the occupational therapist or licensed physician.

76.7 Requirements for authorization as an occupational therapy assistant.

To qualify for authorization as an occupational therapy assistant pursuant to section 7906(7) of the Education Law, an applicant shall fulfill the following requirements:

(a) file an application with the Department;

(b) have received an education as follows:

(1) completion of a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department; or

(2) completion of a postsecondary program in occupational therapy satisfactory to the Department and of at least two years duration;

(c) have a minimum of three months clinical experience satisfactory to the state board for occupational therapy and in accordance with standards established by a national accreditation agency which is satisfactory to the Department;

(d) be at least eighteen years of age;

(e) be of good moral character as determined by the Department;

(f) register triennially with the Department in accordance with the provisions of subdivision (h) of this section, sections 6502 and 7906(8) of the Education Law, and sections 59.7 and 59.8 of this Subchapter;

(g) pay a fee for an initial license and a fee for each triennial registration period that shall be one half of the fee for initial license and for each triennial registration period established in Education law for occupational therapists; and

(h) except as otherwise provided by Education Law section 7907(2), pass an examination acceptable to the Department.

76.9 Occupational therapy assistant student exemption. To be permitted to practice as an exempt person pursuant to section 7906(4) of the Education Law, an occupational therapy assistant student shall be enrolled in a program as set forth in section 76.7(b)(1) of this Part and may work with an occupational therapy assistant who is acting as a fieldwork educator. Such student shall be directly supervised by an occupational therapist in accordance with standards established by a national accreditation agency which is satisfactory to the Department. Any such work performed by an occupational therapy assistant as a

fieldwork educator shall be subject to the supervision requirements of section 76.8 of this Part.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-11-12-00010-P, Issue of March 14, 2012. The emergency rule will expire September 10, 2012.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, Administrative Assistant, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY, (518) 474-6400, email: legal@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 6504 of the Education Law provides that admission to the professions shall be supervised by the Board of Regents, and administered by the Education Department, assisted by a state board for each profession.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Subdivision (4) of section 7906 of the Education Law authorizes the Commissioner of Education to define in regulation the direct supervision of an occupational therapy assistant student engaged in occupational therapy as an exempt person.

Subdivision (7) of section 7906 of the Education Law authorizes the Commissioner of Education to define occupational therapy assistants and to promulgate regulations governing standards for authorization to practice as an occupational therapy assistant, including those relating to education, experience, examination and character, and authorizes the Board of Regents to establish an application fee for such authorization to practice.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment to section 76.4(b) of the Regulations of the Commissioner of Education carries out the intent of the aforementioned statutes by removing the provision that prohibits a holder of a limited permit in occupational therapy from receiving a renewal of the permit in the event the holder has failed the licensing examination.

The proposed adoption of a new section 76.6 of the Commissioner's regulations carries out the intent of the aforementioned statutes by defining occupational therapy practice and providing that only a person authorized by the Department shall participate in the practice of occupational therapy assistant and use the title occupational therapy assistant.

The proposed adoption of a new section 76.7 of the Commissioner's regulations carries out the intent of the aforementioned statutes by establishing standards for authorization to practice as an occupational therapy assistant, including those relating to education, experience, examination, and character, and by establishing fees for initial licensure and for triennial registration.

The proposed adoption of a new section 76.9 of the Commissioner's regulations carries out the intent of the aforementioned statutes by setting requirements for an occupational therapy student to qualify for the statutory exemption allowing him or her to practice under supervision.

3. NEEDS AND BENEFITS:

The changes to the existing law governing the practice of occupational therapy that were enacted by Chapter 460 of the Laws of 2011 authorized the Department to establish, in regulation, several significant components of the practice, including the requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of occupational therapy assistant students. These regulations are necessary to implement the provisions of Chapter 460.

4. COSTS:

(a) Cost to State government: It is anticipated that the costs to the State Education Department in implementing the requirements of Chapter 460 of the Laws of 2011 will be offset by the licensure and registration fees authorized by the law.

(b) Cost to local government: None.

(c) Cost to private regulated parties: As authorized by Chapter 460 of the Laws of 2011, the proposed regulations also establish fees for licensure and triennial registration.

(d) Costs to the regulatory agency: As stated in "Costs to State Government," the proposed amendment does not impose costs on the State Education Department beyond those covered by the proposed licensure and registration fees for occupational therapy assistants.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed amendments do not require additional paperwork.

7. DUPLICATION:

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

8. ALTERNATIVES:

Alternatives to the supervision requirements for occupational therapy assistant students were considered. Virtually all of such students in New York State attend programs accredited by the National Board for Certification in Occupational Therapy (NBCOT), and there is no other recognized national body for accreditation of such programs. NBCOT has established accreditation standards governing the fieldwork of occupational therapy assistant students, and it is believed that these are adequate to protect the public. The alternative would be to create new standards, but this may create a duplicative set of standards that may not be consistent with those used by a given educational program. It was also noted that the NBCOT accreditation standards permit supervision of students by either occupational therapists or occupational therapist assistants. The statute is clear, however, in requiring that students be directly supervised by an occupational therapist.

9. FEDERAL STANDARDS:

There are no Federal standards regarding the matters addressed by these regulations.

10. COMPLIANCE SCHEDULE:

The proposed amendment must be complied with on its stated effective date. No additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

The proposed amendments would implement various changes to existing law governing the practice of occupational therapy that were enacted by Chapter 460 of the Laws of 2011, including requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of occupational therapy assistant students.

The amendments do not regulate small businesses or local governments. It does not impose any reporting, recordkeeping, or other compliance requirements on small business or local governments beyond those inherent in the statute, or have any adverse economic effect on them. Because it is evident from the nature of the proposed amendments that they do not affect small businesses or local governments, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses and local governments is not required and one has not been prepared.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendments apply to all occupational therapy assistants and those occupational therapists and physicians who supervise these professionals who live in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The purpose of the proposed amendment is to implement chapter 460 of the Laws of 2011 which made a variety of changes to the law affecting the practice of occupational therapy and the authorization of occupational therapy assistants. As authorized by chapter 460, the proposed amendment will establish qualifications to be authorized to practice as an occupational therapy assistant, and will not require regulated parties, including those that are located in rural areas of the State, to hire professional services to comply.

3. COSTS:

The proposed section 76.7(g) of the Commissioner's regulations establishes a fee for an initial license and for each triennial registration for an occupational therapy assistant. The establishment of this fee is mandated by statute. The proposed regulation would set this fee at one half that amount imposed on occupational therapists, which would yield a fee of \$147 for initial licensure and three year registration, and a fee of \$90 for the subsequent three year re-registrations. Currently, these fees are set at \$103 for initial licensure and three year registration, and at \$54 for the subsequent three year registrations only. The increase is required because occupational therapists are now subject to discipline and moral character review by the Department, and the cost of these processes must be covered by fee revenue.

4. MINIMIZING ADVERSE IMPACT:

The proposed fee structure was determined to be the minimum needed to support additional costs. It is on a par with fee structures in other professions.

5. RURAL AREA PARTICIPATION:

The State Education Department solicited comments on the proposed amendments from the New York State Occupational Therapy Association (NYSOTA), and Department staff attended a meeting of the Capital

District NYSOTA (which includes Schenectady, Rensselaer, Columbia and Greene counties) in Albany and the Hudson-Taconic NYSOTA (which includes Ulster, Sullivan, Dutchess and Delaware counties) in Middletown to discuss these proposed amendments.

Job Impact Statement

The proposed amendments would implement various changes to existing law governing the practice of occupational therapy that were enacted by chapter 460 of the Laws of 2011, including requirements for eligibility and scope of practice for occupational therapy assistants, and requirements for supervision of occupational therapy assistant students. Because it is evident from the nature of the amendment that it will not affect job and employment opportunities, no affirmative steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required, and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the March 14, 2012 State Register, the State Education Department received the following comments.

1. COMMENT:

Generally, the extent of the requirements contained in the regulations governing supervision of occupational therapy assistants will inhibit the hiring of individuals in these professions or cause lay-offs of these professionals. It was noted specifically that no other similarly educated professionals are required to have a written supervision plan, which is required by the proposed regulations.

DEPARTMENT RESPONSE:

The Department considers the supervision requirements in the proposed amendments appropriate to the circumstances of the profession of occupational therapy. The key element to the supervision of both holders of limited permits in occupational therapy and of occupational therapy assistants in the proposed regulations is the development of a supervision plan. The plan would be unique for each supervised professional and would be tailored to the ability and experience of that professional, to the setting where services are being provided, and to the complexity of the client needs. The Department believes that the supervision plan, if properly developed, will meet the supervision requirements for each individual, and will not be so burdensome as to cause a disruption in the workplace for these professionals.

The occupational therapy profession is unique in that once an evaluation of a client's needs is determined, and a treatment plan is developed, the therapeutic activities that ensue may be performed by an occupational therapist or an occupational therapy assistant under supervision. Unlike other professions, there is generally no restriction on the therapeutic activities which may be performed by an occupational therapy assistant as long as they are within the scope of practice. Nor is there a requirement that a supervisor be in physical proximity to the occupational therapy assistant. Under these circumstances, the Department perceives a need for supervision requirements which are sufficient to protect the public, but are flexible enough to meet the needs of the profession.

2. COMMENT:

The requirements contained in the regulations governing supervision of holders of limited permits in occupational therapy are too restrictive and unnecessary, given the fact that such individuals have completed their education requirements, including clinical fieldwork. Some comments characterized these supervision requirements as equating holders of limited permits to occupational therapy assistants.

DEPARTMENT RESPONSE:

The Department has considered the comment, and agrees that the supervisor of a holder of a limited permit need not, in all instances, initiate, direct and participate in the initial evaluation of the client, nor in all instances, participate on a regular basis in the delivery of occupational therapy services. The extent of the supervisor's involvement in these activities may vary depending on the client needs and the experience and training of the holder of the limited permit. Therefore, we have revised the proposed regulation to provide that the extent of the involvement of the supervisor in these activities is to be addressed in the supervision plan.

3. COMMENT:

The requirement that the ratio of supervised holders of limited permits in occupational therapy and occupational therapy assistants to supervisors be five to one is arbitrary, and should be left to the discretion of the supervisor of these professionals.

DEPARTMENT RESPONSE:

Some reasonable limitation on the number of professionals one individual occupational therapist or physician may supervise is necessary, and a five to one ratio is considered appropriate by the Department. In discussions with interested parties before the promulgation of this regulation, a provision was developed and included in the proposed regulation which would provide for the supervision of the full-time equivalent of five individuals, to recognize a setting where part-time individuals are being supervised.

4. COMMENT:

The requirement that the supervisor consider the input of the holder of a limited permit in occupational therapy or occupational therapy assistant in developing a supervision plan is inappropriate and not consistent with the level of expertise and training of the supervising professionals.

DEPARTMENT RESPONSE:

The proposed regulation at section 76.8(c) requires that the determination of the level and type of supervision be based upon consultation with the supervised occupational therapy assistant. No similar requirement is found with regard to supervision of holders of limited permits in section 76.4(c). The Department recognizes that in many instances, an experienced occupational therapy assistant has been working with a given client population for a long time with positive results. It is appropriate for input to be provided by the supervised occupational therapy assistant so that the level and type of supervision will not disrupt successful therapeutic relationships that are in place.

5. COMMENT:

The requirement that the supervision plan specify how professional development of a holder of a limited permit in occupational therapy or an occupational therapy assistant be fostered should not be included in regulation, as regulations should not force one professional to foster another.

DEPARTMENT RESPONSE:

The Department considers the professional development of licensed professionals to be a basic element of competent practice, and considers it appropriate, therefore, that the supervision plan address professional development.

6. COMMENT:

The provision in section 76.4(b) that would prohibit the renewal of a limited permit in occupational therapy for an individual who has failed the licensing examination should not be removed. This diminishes the public protection role of the State Board for Occupational Therapy.

DEPARTMENT RESPONSE:

This provision conforms the existing regulation to a change in statute.

7. COMMENT:

The proposed amendment to section 76.9 is appreciated, as it permits occupational therapy assistants to participate in the supervision of occupational therapy assistant students engaged in clinical practice, to the extent permitted by statute. Alternatively, one comment suggested that the amendment would prevent an occupational therapy assistant student from working with an occupational therapy assistant as a fieldwork educator.

DEPARTMENT RESPONSE:

Education Law section 7906(4) permits an occupational therapy student to engage in clinical practice, but only under the direct supervision of an occupational therapist. The Department is aware that accreditation standards applicable to this clinical practice authorize the use of occupational therapy assistants as fieldwork educators. The proposed regulation recognizes the role of such fieldwork educators to the extent permitted under existing law.

EMERGENCY RULE MAKING

Procedures for Hearings on Charges Against Tenured School Employees

I.D. No. EDU-19-12-00004-E

Filing No. 725

Filing Date: 2012-07-17

Effective Date: 2012-07-22

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

Action taken: Amendment of Subpart 82-1 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1), (2) and 3020-a, as amd. by L. 2012, ch. 57, part B

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary to implement Education Law section 3020-a, as amended by Part B of Chapter 57 of the Laws of 2012, relating to hearings on charges against tenured school employees.

As part of its 2011 legislative agenda, the Board of Regents sought a number of modifications to the tenured teacher hearing process set forth in Education Law § 3020-a to address spiraling costs and the extraordinary length of time arbitrators utilized to conduct hearings. This legislation was introduced in the Assembly and Senate. The Governor's proposed 2012-13 State Budget incorporated some of these reforms, and the State Budget as adopted by the Legislature incorporated a number of important programmatic and fiscal reforms.

The changes take place immediately, and apply to all charges against tenured educators filed with the clerk or secretary of the school district or employing board on or after April 1, 2012.

The new amendments modify the manner in which an arbitrator is selected if the parties fail to agree on an arbitrator selection within 15 days of receipt of the list. Education Law § 3020-a(3)(b)(iii) states that "[i]f the employing board and the employee fail to agree on an arbitrator to serve as a hearing officer from the list of potential hearing officers, or fail to notify the commissioner of a selection within such fifteen day time period, the commissioner shall appoint a hearing officer from the list." This provision authorizes the Commissioner to select the arbitrator if the parties fail to agree within 15 days of receipt of the list. It does not apply to NYC where there is an alternative procedure.

The proposed amendment requires the Commissioner to establish a schedule for "maximum rates of compensation of hearing officers based on customary and reasonable fees for service as an arbitrator and provide for limitations on the number of study hours that may be claimed" (emphasis added). The purpose of this amendment is to give the Commissioner the authority to control costs.

Pursuant to Education Law § 3020-a(3)(c)(i)(B), the proposed amendment authorizes the Department to monitor and investigate a hearing officer's compliance with the timelines set forth in the statute. The Commissioner may exclude any hearing officer who has a record of continued failure to commence and conclude hearings within the timelines prescribed in the statute.

The proposed amendment continues the requirement that an accurate "record" of the proceedings be kept at the expense of the Department and furnished upon request to the employee and the board of education. However, in accordance with the new law, the proposed amendment permits the Department to take advantage of any new technology to transcribe or record the hearings in an accurate, reliable, efficient and cost effective manner.

In conformity with the new law, the amendment also imposes a one year limitation for the submission of claims for reimbursement for services rendered. The purpose of this amendment is to encourage timely submission of claims so that accurate budget assumptions can be made and claims can be paid for in a reasonable time.

The rule is being adopted as an emergency measure upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to immediately revise Subpart 82-1 of the Commissioner's regulation to conform to and implement the provisions of section 3020-a of the Education Law, as amended by Chapter 57 of the Laws of 2012.

Emergency action is also needed to ensure that the proposed amendment remains continuously in effect until it can be adopted as a permanent rule. The proposed amendment was adopted as an emergency measure at the April Regents meeting and became effective April 24, 2012. Pursuant to the State Administrative Procedure Act, the emergency rule is effective for 90 days and will expire on July 22, 2012. Therefore, emergency action is needed at the July Regents meeting to ensure that the emergency rule adopted at the April 2012 Regents meeting remains continuously in effect until it can be adopted as a permanent rule.

Subject: Procedures for hearings on charges against tenured school employees.

Purpose: To implement the provisions of the new law relating to the appointment of hearing officers and reimbursement of hearing expenses.

Text of emergency rule: 1. Subdivision (b) of section 82-1.3 of the Regulations of the Commissioner of Education is amended, effective July 22, 2012, to read as follows:

(b) A copy of a written statement specifying in detail each charge as to which the board finds probable cause exists[, and a copy of the vote of the board on each charge,] shall be *immediately* forwarded [at once] to the employee by certified or registered mail, return receipt requested, or by personal delivery *to the employee* and to the commissioner by first class mail. Such statement shall state the maximum penalty which will be imposed by the board if the employee does not request a hearing or that will be sought by the board if the employee is found guilty of the charge after a hearing and shall outline the employee's rights under section 3020-a, including the right to request a hearing and the right to choose either a single hearing officer or a three member panel when the charges involve pedagogical incompetence or issues involving pedagogical judgment.

2. Section 82-1.4 of the Regulations of the Commissioner of Education shall be amended, effective July 22, 2012, to read as follows:

Section 82-1.4. Request for a hearing

Where the employee desires a hearing, he or she may file a written request for a hearing with the clerk or secretary of the employing board within 10 days of receipt of the charges, and where the charges concern pedagogical incompetence or issues involving pedagogical judgment, the

employee shall choose either a single hearing officer or a three member panel. In the request for a hearing, the employee may designate an attorney who will represent the employee at the hearing *and who shall be authorized to receive correspondence from the commissioner pertaining to the 3020-a proceeding on his or her behalf.*

3. Section 82-1.5 of the Regulations of the Commissioner of Education is amended, effective July 22, 2012, as follows:

Section 82-1.5. Notice of need for hearing

(a) The notification [to the commissioner] of the need for a hearing shall be sent to the commissioner within three working days of the request for a hearing with a copy to the employee, or the employee's designated attorney, and shall contain the following information:

- (1) an affidavit of service of the charges upon the employee;
- (2) a copy of the employee's request for hearing;
- (3) a place within the district or the county seat of a county in which the board is located which will be made available by the board at school district expense for the holding of the prehearing conference and hearing;
- (4) the name and [address of] *contact information* for the attorney, if any, who will represent the board at the hearing;
- (5) whether an expedited hearing is sought, and whether the employee is suspended either with, or without pay;
- (6) an estimate of the number of days needed for the hearing;
- (7) the name of the panel member selected by the board, if applicable;

and
(8) where the board has received written notice that the employee will be represented by an attorney at the hearing, the name and [address of] *contact information* for such attorney.

(b) . . .

(c) [At the same time that the notification is sent to the commissioner, the board shall, by certified mail return receipt requested, send to the employee the information provided in paragraphs (a)(3), (4), (5), (6) and (7) of this section.

(d) Separate notification of the need for a hearing shall be given with respect to each employee against whom charges have been filed.

[(e)] (d) Whenever an employee shall be deemed to have waived his/her right to a hearing, the clerk or secretary of the board shall immediately file notice of such waiver with the commissioner.

(e) *Where the matter is resolved prior to the decision of the hearing officer, the board shall notify the commissioner and send a copy of such resolution to the commissioner within ten days of the resolution.*

4. Section 82-1.6 of the Regulations of the Commissioner of Education is amended, effective July 22, 2012, to read as follows:

Section 82-1.6. Appointment of hearing officer and notice of prehearing conference

(a) . . .

(b) [Not later than 10 days from the mailing of the list] *Within 15 days after receiving the list of potential hearing officers, the parties or their agents or representatives shall by agreement select a hearing officer and each party shall notify the commissioner thereof.*

(c) If the parties fail to notify the commissioner of [an agreed upon hearing officer within the time] *a selection within the 15 day time period prescribed by subdivision (b) of this section, the commissioner shall [request the association to select a hearing officer from said list] appoint a hearing officer from the list. The provisions of this subdivision shall not apply in cities with a population of one million or more with alternative procedures specified in section 3020 of the Education Law.*

(d) . . .

(e) . . .

5. Subdivisions (a) and (b) of section 82-1.7 of the Regulations of the Commissioner of Education shall be amended, effective July 22, 2012, to read as follows:

(a) The commissioner shall maintain a list of persons eligible to serve as panel members pursuant to Education Law, section 3020-a(3)(b)(iv), which list shall be updated [at least annually] *as necessary.*

(b) Copies of such list of panel members appointed by the commissioner [shall be filed in the office of the school district clerk or secretary of the board of each district and] shall be available for public inspection *upon request to the commissioner.*

6. Section 82-1.10 of the Regulations of the Commissioner of Education is amended, effective July 22, 2012, to read as follows:

Section 82-1.10. Conduct of hearings

(a) . . .

(b) . . .

(c) . . .

(d) If the hearing officer determines that the absence of a hearing panel member is likely to delay unduly the prosecution of the hearing, he or she shall order the replacement of such panel member. If the party who selected such panel member fails to select a replacement within two business days, the commissioner shall select such replacement. If the hearing officer needs to be replaced and [if the commissioner determines that] the

parties [cannot agree on a replacement] *fail to notify the commissioner of their mutually agreed upon replacement within two business days, the commissioner shall [request the association to select a replacement from the list of hearing officers] select the replacement.* In no event shall a panel hearing proceed except in the presence of two panel members and the hearing officer.

(e) . . .

(f) *All evidence shall be submitted by all parties within one hundred twenty five days of the filing of charges and no additional evidence shall be accepted after such time, absent extraordinary circumstances beyond the control of the parties.*

(g) *The hearing officer shall have the power to regulate the course of the hearing, set the time and place for continued hearings, and direct the parties to appear, so that no party is unduly prejudiced by the prohibition on the submission of evidence after one hundred twenty five days.*

(h) At the conclusion of the testimony, the hearing officer may adjourn the hearing to a specified date after conclusion of the testimony, to permit preparation of the [transcript] *record*, submission by the parties of memoranda of law, and deliberation; provided that such specified date may not be more than 60 days after the prehearing conference unless the hearing officer determines that extraordinary circumstances warrant a later date. [The] *Upon request, the hearing officer shall arrange for the preparation and delivery of one copy of the [transcript] record of the hearing to each panel member, to the employee and the board.*

[(g)] (i) The hearing officer or hearing panel shall render a written decision within 30 days of the last day of the final hearing, or within 10 days of the last day of an expedited hearing and shall forthwith forward a copy to the commissioner, *in a manner prescribed by the commissioner, who shall send copies to [the employee and the clerk or secretary of the employing board] the parties and/or their designated attorneys.* Such written decision shall include the hearing officer's findings of fact on each charge, his or her conclusions with regard to each charge based on such findings and shall state the penalty or other action, if any, which shall be taken by the board, provided that such findings, conclusions and penalty determination shall be based solely upon the record in the proceedings before the hearing officer or panel, and shall set forth the reasons and the factual basis for the determination.

7. A new section 82-1.11 of the Regulations of the Commissioner of Education shall be added, effective July 22, 2012, to read as follows:

Section 82-1.11 *Monitoring and Enforcement of Timelines*

The Department will monitor and investigate a hearing officer's compliance with the timelines prescribed in Education Law section 3020-a. A record of continued failure to commence and complete hearings within the time periods prescribed in this section shall be considered grounds for the commissioner to exclude such individual from the list of potential hearing officers for these hearings.

8. The existing section 82-1.11 of the Regulations of the Commissioner of Education shall be renumbered as section 82-1.12 of the Regulations of the Commissioner of Education and is amended, effective July 22, 2012, to read as follows:

[Section 82-1.11] Section 82-1.12. Reimbursable hearing expenses

(a) [The] *Except as otherwise provided in this section, the commissioner shall compensate the hearing officer with the customary fee paid for service as an arbitrator for each day of actual service rendered by the hearing officer. For [this purpose] hearings commenced by the filing of charges prior to April 1, 2012, a day of actual service shall be five hours. In the event a hearing officer renders more or less than five hours of service on a given calendar day, the per diem fee shall be prorated accordingly. For hearings commenced by the filing of charges on or after April 1, 2012, a day of actual service shall be defined in guidelines prescribed by the commissioner.* Any late cancellation fee charged by the hearing officer shall be paid by the party or parties responsible for the cancellation.

(b) In addition to the statutory fees payable to the hearing officer and panel members for each day of actual service, the commissioner shall reimburse hearing officers and panel members for their necessary travel and other related reasonable expenses [incurred at rates not to exceed the rates] *in accordance with the rules and limits on travel applicable to state employees.*

(c) The commissioner shall arrange for the preparation of [a hearing transcript by a competent stenographer and shall compensate the stenographer for the cost of preparing the transcript and copies thereof for the hearing officer, each panel member, the department, the employee and the board] *an accurate record of the proceedings. Upon request, a copy of the record shall be provided by the commissioner to the hearing officer, panel members and/or the parties at the department's expense.* Upon request of one or more parties, the commissioner may arrange to have a daily copy of the [transcript] *record* prepared and distributed to each party making such request and to the hearing officer, in addition to [the] *any* final copies [to be] provided by the commissioner after conclusion of the hearing. Any

incremental cost incurred for preparing a daily copy for a party and the hearing officer that is in addition to the base amount payable by the commissioner for preparation of the final [transcript] record shall be paid by the party requesting daily copy, or shall be shared equally by the parties where both parties request daily copy.

(d) . . .

(e) *Limitations on fees for hearing officers. For hearings commenced by the filing of charges on or after April 1, 2012, a hearing officer shall be not be reimbursed beyond the maximum rates of compensation of hearings officers, as set forth in a schedule prescribed by the commissioner, based on customary and reasonable fees for service as an arbitrator and shall not be reimbursed for more than a certain amount of study hours, as prescribed by the commissioner.*

(f) *Limitation on claims. No payments shall be made by the department on or after April 1, 2012 for the following if they are on a claim submitted later than one year after the final disposition of the hearing by any means, including settlement, or within 90 days after April 1, 2012 whichever is later; provided that no payment shall be barred or reduced where such payment is required as a result of a court order or judgment or a final audit:*

(1) *compensation of a hearing officer or hearing panel member;*

(2) *reimbursement of such hearing officers or panel members for necessary travel or other expenses incurred by them, or*

(3) *for other hearing expenses.*

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-19-12-00004-EP, Issue of May 9, 2012. The emergency rule will expire September 14, 2012.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

Education Law section 207 grants general rule-making authority to the Regents to carry into effect State educational laws and policies.

Education Law section 215 authorizes the Commissioner to require reports from schools under State educational supervision.

Education Law section 305(1) authorizes the Commissioner to enforce laws relating to the State educational system and execute Regents educational policies.

Section 305(2) provides the Commissioner with general supervision over schools and authority to advise and guide school district officers in their duties and the general management of their schools.

Education Law section 3020-a, as amended by Part B of Chapter 57 of the Laws of 2012, establishes requirements for hearings on charges of tenured school employees.

2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above authority vested in the Regents and Commissioner to carry into effect State educational laws and policies, and is necessary to implement Education Law section 3020-a, as amended by Part B of the Chapter 57 of the Laws of 2012, by prescribing criteria for hearings on charges of tenured school employees.

3. NEEDS AND BENEFITS:

As part of its 2011 legislative agenda, the Board of Regents sought a number of modifications to the tenured teacher hearing process set forth in Education Law § 3020-a to address spiraling costs and the extraordinary length of time to conduct hearings. This legislation was introduced in the Assembly and Senate. The Governor's proposed 2012-13 State Budget included some of these reforms and the State Budget as adopted by the Legislature included a number of important programmatic and fiscal reforms.

Below is a summary of the major Education Law § 3020-a revisions and a description of where changes were made to existing regulations to conform to the new statutory requirements.

Prohibition on Introduction of Evidence After 125 days

A significant change is the prohibition on the introduction of evidence more than 125 days after the filing of charges unless there are extraordinary circumstances beyond the control of the parties. Proceedings under § 3020-a have traditionally taken far too long to resolve and this provision is designed to ensure timely resolution by prohibiting the introduction of evidence beyond a certain point in the proceeding. This means that once the charges are filed, all parties should work expeditiously and cooperatively to complete the case in a timely manner. After 125 days, no additional evidence shall be accepted unless there are extraordinary circumstances beyond control of the parties. The "extraordinary circumstances" rule is meant to provide for that rare occasion when evidence truly can not be introduced within the prescribed time limit.

Department Selects Arbitrator When Parties Can Not Agree

The new amendments also modify the manner in which an arbitrator is selected if the parties fail to agree on an arbitrator selection within 15 days of receipt of the list. Education Law § 3020-a(3)(b)(iii) states that "[i]f the employing board and the employee fail to agree on an arbitrator to serve as a hearing officer from the list of potential hearing officers, or fail to notify the Commissioner of a selection within such fifteen day time period, the commissioner shall appoint a hearing officer from the list." This provision authorizes the Commissioner to select the arbitrator if the parties fail to agree by the 15th day. It does not apply to NYC where there is an alternative procedure.

Department Can Establish Maximum Arbitrator Rates and Study Hours

An amendment to Education Law § 3020-a(3)(b)(i)(B) requires the Commissioner to establish a schedule for "maximum rates of compensation of hearing officers based on customary and reasonable fees for service as an arbitrator and provide for limitations on the number of study hours that may be claimed" (emphasis added). The purpose of this amendment is to give the Commissioner the authority to control costs.

Department Can Exclude Arbitrators For Untimeliness

Pursuant to Education Law § 3020-a(3)(c)(i)(B) the Department is authorized to monitor and investigate a hearing officer's compliance with the timelines set forth in the statute. The Commissioner may exclude any hearing officer who has a record of continued failure to commence and conclude hearings within the timelines prescribed in the statute.

New Technology for Recording Hearings is Allowed

Education Law § 3020-a(3)(c)(i)(D) continues the requirement that an accurate "record" of the proceedings be kept at the expense of the Department and furnished upon request to the employee and the board of education. The statutory changes, however, permit the Department to take advantage of any new technology to transcribe or record the hearings in an accurate, reliable, efficient and cost effective manner. The Department will explore other cost-effective alternatives to recording and producing transcripts for these proceedings, however, there will be no immediate change to the manner in which these hearings are recorded.

One-Year Limitation on Claims

Education Law § 3020-a(3)(d) imposes a one-year limitation, following the final disposition of the hearing, for the submission of claims for reimbursement for services rendered. The purpose of this amendment was to encourage timely submission of claims so that accurate budget assumptions can be made and claims can be paid for in a reasonable time.

Other Changes

A few other technical changes were made to clarify existing regulations, including, but not limited to, the following changes: (1) elimination of the requirement to include a copy of the vote of the board for each charge with the written statement of charges; (2) clarification that the notice of a need for hearing shall be sent to the Commissioner within three working days of the request for a hearing, with a copy to the employee or the employee's attorney; and (3) a provision to authorize the Commissioner to select a replacement hearing officer if the parties fail to notify the Commissioner within two business days of their mutually-agreed-upon replacement. The amendment also provides the hearing officer with the power to regulate the course of the hearing, including scheduling the hearing dates and directing parties to appear, so that no party is unduly prejudiced by the prohibition on the submission of evidence after 125 days and clarifies that that the Commissioner shall reimburse hearing officers and panel members for their necessary travel and other related reasonable expenses in accordance with the rules and limits on travel for State employees.

5. LOCAL GOVERNMENT MANDATES:

The compliance requirements set forth above apply to school districts and BOCES that initiate hearings to terminate tenured school employees.

6. PAPERWORK:

The proposed amendment does not contain any additional paperwork requirements, beyond those imposed by statute.

7. DUPLICATION:

The rule is necessary to implement Education Law section 3020-a and does not duplicate existing State or Federal requirements.

8. ALTERNATIVES:

No alternatives were provided because these changes were necessary to implement the statute.

9. FEDERAL STANDARDS:

The rule is necessary to implement Education Law section 3020-a. There are no applicable Federal standards concerning hearings for tenured school employees.

10. COMPLIANCE SCHEDULE:

Section 3020-a of the Education Law, as amended by Part B of Chapter 57 of the Laws of 2012, became effective on April 1, 2012. If adopted at the April Regents meeting, the proposed amendment will become effective on April 1, 2012.

Regulatory Flexibility Analysis

(a) Small businesses:

The purpose of the proposed rule is to implement Education Law sec-

tion 3020-a, as added by Part B of Chapter 57 of the Laws of 2012, by establishing standards and criteria for hearings on charges of tenured school employees. The proposed rule does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small business. Because it is evident from the nature of the amendment that it does not affect small businesses, no further steps were needed to ascertain that fact and one were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. EFFECT OF RULE:

The rule applies to all school districts and boards of cooperative educational services ("BOCES") in the State, except where otherwise indicated.

2. COMPLIANCE REQUIREMENTS:

As part of its 2011 legislative agenda, the Board of Regents sought a number of modifications to the tenured teacher hearing process set forth in Education Law § 3020-a to address spiraling costs and the extraordinary length of time to conduct hearings. This legislation was introduced in the Assembly and Senate. The Governor's proposed 2012-13 State Budget included some of these reforms and the State Budget as adopted by the Legislature included a number of important programmatic and fiscal reforms.

Below is a summary of the major Education Law § 3020-a revisions and a description of where changes were made to existing regulations to conform to the new statutory requirements.

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A significant change is the prohibition on the introduction of evidence more than 125 days after the filing of charges unless there are extraordinary circumstances beyond the control of the parties. Proceedings under § 3020-a have traditionally taken far too long to resolve and this provision is designed to ensure timely resolution by prohibiting the introduction of evidence beyond a certain point in the proceeding. This means that once the charges are filed, all parties should work expeditiously and cooperatively to complete the case in a timely manner. After 125 days, no additional evidence shall be accepted unless there are extraordinary circumstances beyond control of the parties. The "extraordinary circumstances" rule is meant to provide for that rare occasion when evidence truly can not be introduced within the prescribed time limit.

Department Selects Arbitrator When Parties Can Not Agree

The new amendments also modify the manner in which an arbitrator is selected if the parties fail to agree on an arbitrator selection within 15 days of receipt of the list. Education Law § 3020-a(3)(b)(iii) states that "[i]f the employing board and the employee fail to agree on an arbitrator to serve as a hearing officer from the list of potential hearing officers, or fail to notify the Commissioner of a selection within such fifteen day time period, the commissioner shall appoint a hearing officer from the list." This provision authorizes the Commissioner to select the arbitrator if the parties fail to agree by the 15th day. It does not apply to NYC where there is an alternative procedure.

Department Can Establish Maximum Arbitrator Rates and Study Hours

An amendment to Education Law § 3020-a(3)(b)(i)(B) requires the Commissioner to establish a schedule for "maximum rates of compensation of hearing officers based on customary and reasonable fees for service as an arbitrator and provide for limitations on the number of study hours that may be claimed" (emphasis added). The purpose of this amendment is to give the Commissioner the authority to control costs.

Department Can Exclude Arbitrators For Untimeliness

Pursuant to Education Law § 3020-a(3)(c)(i)(B) the Department is authorized to monitor and investigate a hearing officer's compliance with the timelines set forth in the statute. The Commissioner may exclude any hearing officer who has a record of continued failure to commence and conclude hearings within the timelines prescribed in the statute.

New Technology for Recording Hearings is Allowed

Education Law § 3020-a(3)(c)(i)(D) continues the requirement that an accurate "record" of the proceedings be kept at the expense of the Department and furnished upon request to the employee and the board of education. The statutory changes, however, permit the Department to take advantage of any new technology to transcribe or record the hearings in an accurate, reliable, efficient and cost effective manner. The Department will explore other cost-effective alternatives to recording and producing transcripts for these proceedings, however, there will be no immediate change to the manner in which these hearings are recorded.

One-Year Limitation on Claims

Education Law § 3020-a(3)(d) imposes a one-year limitation, following the final disposition of the hearing, for the submission of claims for reimbursement for services rendered. The purpose of this amendment was to encourage timely submission of claims so that accurate budget assumptions can be made and claims can be paid for in a reasonable time.

Other Changes

A few other technical changes were made to clarify existing regulations, including, but not limited to, the following changes: (1) elimination of the requirement to include a copy of the vote of the board for each charge with the written statement of charges; (2) clarification that the notice of a need for hearing shall be sent to the Commissioner within three working days of the request for a hearing, with a copy to the employee or the employee's attorney; and (3) a provision to authorize the Commissioner to select a replacement hearing officer if the parties fail to notify the Commissioner within two business days of their mutually-agreed-upon replacement. The amendment also provides the hearing officer with the power to regulate the course of the hearing, including scheduling the hearing dates and directing parties to appear, so that no party is unduly prejudiced by the prohibition on the submission of evidence after 125 days and clarifies that the Commissioner shall reimburse hearing officers and panel members for their necessary travel and other related reasonable expenses in accordance with the rules and limits on travel for State employees.

3. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services requirements on school districts or BOCES.

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on local governments beyond those imposed by statute.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on school districts or BOCES.

6. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement Education Law section 3020-a, as added by Part B of Chapter 57 of the Laws of 2012. The rule is necessary to implement the provisions of the new law. Therefore, no alternatives were considered.

7. LOCAL GOVERNMENT PARTICIPATION:

Comments on the development of the proposed amendment have been solicited from district superintendents across the State and the Big 5 city school districts.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment applies to all school districts and boards of cooperative educational services (BOCES) in the State, including those located in 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:

As part of its 2011 legislative agenda, the Board of Regents sought a number of modifications to the tenured teacher hearing process set forth in Education Law § 3020-a to address spiraling costs and the extraordinary length of time to conduct hearings. This legislation was introduced in the Assembly and Senate. The Governor's proposed 2012-13 State Budget included some of these reforms and the State Budget as adopted by the Legislature included a number of important programmatic and fiscal reforms.

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3. COSTS:

There are no additional costs imposed beyond those imposed by statute.

4. MINIMIZING ADVERSE IMPACT:

The rule is necessary to implement Education Law section 3020-a, as amended by Part B of Chapter 57 of the Laws of 2012. Since the statute applies to all school districts and BOCES throughout the State, it was not possible to establish different compliance and reporting requirements for regulated parties in rural areas, or to exempt them from the rule’s provisions.

5. RURAL AREA PARTICIPATION:

Comments on the development of the proposed amendment have been solicited from district superintendents across the State, the Big 5 City School districts and the Department’s Rural Advisory Committee, all of which have representatives who live and work in rural areas.

Job Impact Statement

The purpose of the proposed rule is to implement Education Law section 3020-a, as added by Part B of Chapter 57 of the Laws of 2012, relating to hearings on charges of tenured school employees. The proposed amendment prescribes criteria and standards for the conduct of hearings, selection of hearing officers and reimbursable hearing expenses. Because it is evident from the nature of the proposed rule that it will have no impact on the number of jobs or employment opportunities in New York State, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on May 9, 2012 the State Education Department received the following comment on the proposed amendments.

COMMENT: The proposed amendment to the regulation strives to shorten the length of time to conduct a 3020-a disciplinary process. We fully appreciate both that focus and the effort. However, a careful analysis by our Chief School Officers and consultation with our supporting labor

relations attorneys leave us with the sense that the regulation is still full of exceptions to the time line that will not result in a shorter process. We strongly recommend that the amendment limit the period of time that an employee who is charged under the provisions of 3020-a be compensated. If the goal is to limit the process to 125 days from charge to resolution, then limit employee compensate to 180 days. This will be a motivator to significantly reduce use of the exceptions and both sides will demand quick resolution to the charge(s).

RESPONSE: The proposed amendment implements the provisions of Chapter 57 of the Laws of 2012. We would need a statutory amendment to further limit employee compensation to 180 days.

EMERGENCY RULE MAKING

Approval of International Medical Schools for Long-Term Clinical Clerkship Placements

I.D. No. EDU-19-12-00005-E

Filing No. 727

Filing Date: 2012-07-17

Effective Date: 2012-07-22

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

Action taken: Addition of section 60.10 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6501(not subdivided), 6504(not subdivided), 6506(1), 6507(2)(a) and 6508(1)

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

Specific reasons underlying the finding of necessity: The proposed amendments to the Regulations of the Commissioner of Education are necessary to establish a process and standards for the approval of international medical schools to place students in long-term clinical clerkships in New York.

Emergency action is necessary for the preservation of the public health and general welfare in order to enable the Advisory Committee on Long-Term Clinical Clerkships to evaluate pending applications by international medical schools to place students in long-term clinical clerkships in New York State in a timely manner. Such applications have been on hold pending a review of the process and standards used to approve such applications, and it is now necessary to formally approve the new process and standards, which are designed both to protect the health and safety of patients in the facilities in which the clinical clerkships will be conducted and to assure that the students in the international medical schools placing students in such clerkships are receiving an appropriate medical education before and during their participation in such clerkships.

The proposed amendment was adopted as an emergency measure at the April Regents meeting and became effective April 24, 2012. Pursuant to the State Administrative Procedure Act, the emergency rule is effective for 90 days and will expire on July 22, 2012. Therefore, emergency action is needed at the July Regents meeting to ensure that the emergency rule adopted at the April 2012 Regents meeting remains continuously in effect until it can be take effect as a permanent rule.

Subject: Approval of international medical schools for long-term clinical clerkship placements.

Purpose: Establish the approval standards and procedures for international medical schools to place students in long term clerkships in NY.

Substance of emergency rule: The Commissioner of Education proposes to add a new section, 60.10, related to the standards and process for the approval of international medical schools to place students in long-term clinical clerkships in New York State. The following is a summary of the substance of the regulations:

(a) General requirements. To meet the requirements for approval to place students in long-term clinical clerkships in New York State, an international medical school shall meet the requirements in this section.

(b) Duration of approval. Initial and subsequent approvals of a school shall be for a term of 7 years unless otherwise limited to a lesser period for good cause, and such approvals may be subject to certain limitations and restrictions as determined by the Board of Regents. The term of approval may be extended by the Board of Regents on one or more occasions for a period not to exceed 12 months on each occasion for good cause.

(c) Approval standards. In addition to any applicable requirements in section 60.2 of this Part, in order to be approved to place students in long-term clinical clerkships in New York State, the institution shall meet the following requirements:

(1) Recognition by appropriate authorities of country. The international

medical school shall be recognized by the appropriate civil authorities of the country in which the school is located as an acceptable educational program for physicians, and graduates of the program shall be eligible to pursue licensure or other authorization to practice medicine in such country.

(2) Institutional mission and objective.

(i) The medical school shall be organized and have in place a planning process that sets forth the responsibilities of all sectors of the school community and that sets the direction for its program and results in measurable outcomes.

(ii) The medical school shall have in place a system with central oversight to define the objectives of its program in outcome-based terms that facilitate assessment of student progress in developing essential physician competencies.

(3) Faculty. The medical school shall have a sufficient number of appropriately qualified faculty members to meet the needs and missions of the program.

(4) Curriculum.

(i) The medical education program shall provide at least 130 weeks of instruction, and the curriculum of the medical school shall provide a general professional education and prepare medical students for entry into graduate medical education in any discipline.

(ii) The curriculum of the medical school shall incorporate the fundamental principles of medicine and its underlying scientific concepts; promote the development of skills of critical judgment based on evidence and experience; and develop medical students' abilities to use such principles and skills in solving problems of health and disease.

(iii) The medical school curriculum shall include didactic and clinical instruction necessary for students to become competent practitioners of contemporary medicine, including communication skills as they relate to physician responsibilities.

(iv) The medical school curriculum shall include clinical experience in a broad cross-section of areas, including, but not limited to, primary care.

(v) The medical school shall provide instruction in medical ethics and human values, including, but not limited to, ethical principles in caring for patients and in relating to patients' families and to others involved in patient care.

(vi) The medical school shall demonstrate that there is integrated institutional responsibility for the overall design, management, and evaluation of a coherent and coordinated curriculum.

(vii) The medical school shall demonstrate that it provides comparable educational experiences and equivalent methods of assessment across all instructional sites within a given discipline.

(5) Assessment of student performance. The medical school shall have a system in place for the effective assessment of medical student performance throughout the program.

(6) Administration.

(i) Responsibilities.

(a) The chief academic officer of the medical school shall be responsible for the conduct and quality of the educational program and for ensuring the adequacy of resources, including faculty, at all instructional sites, and shall be given explicit authority to facilitate change in the medical program and to otherwise carry out his or her responsibilities for management and evaluation of the curriculum.

(b) The medical school shall collect and use a variety of outcome data, including accepted norms of accomplishment, to demonstrate the extent to which its educational objectives are being met, and shall engage in an ongoing systematic process to assess student achievement, program effectiveness, and opportunities for improvement.

(c) At least every other year, the medical school shall publish, either in print or online, information on policies and procedures on academic standards, grading, attendance, tuition and fees, refund policy, student promotion, retention, graduation, academic freedom, students' rights and responsibilities.

(d) The medical school shall provide clinical clerkships in accordance with affiliation agreements that define the responsibilities of each party related to the educational program for medical students and section 60.2(d) of this Part. Such clerkships shall be conducted at health care settings in which there is appropriate oversight and supervision. The medical school shall inform the Department of the clinical facilities with which it has affiliation agreements and of anticipated changes in its affiliation agreements or the affiliation status of the clinical facilities.

(ii) The chief official of the medical school and the other members of the school administration shall be qualified by education and experience to provide leadership in medical education, scholarly activity, and patient care and shall have a sufficient number of appropriately qualified administrators.

(7) The medical school shall develop criteria, policies, and procedures for the selection of medical students that are readily available to potential and current applicants and their collegiate advisors.

(8) The medical school shall have an effective system of academic advising and personal and career counseling for medical students that integrates the efforts of faculty members, course directors, and student affairs officers with its counseling and tutorial services.

(9) (i) The medical school shall establish, and make available to all sectors of the school community, policies regarding the standards of conduct for the faculty-student relationship, the standards and procedures for the assessment, advancement, and graduation of its medical students, and the standards and procedures for disciplinary action.

(ii) Medical student educational records shall be confidential and shall be maintained in a manner that will ensure confidentiality as well as the accuracy of such records. A medical student enrolled in the medical school shall be allowed to review the content and challenge information contained in his or her records if he or she considers the information contained therein to be inaccurate, misleading, or inappropriate.

(10) Resources. The medical school shall have sufficient resources to achieve its educational and other goals.

(d) Procedures for approval.

(1) Application.

(i) In order to obtain approval by the Board of Regents to place students in long-term clinical clerkships in New York State, an international medical school shall submit an application, on a form prescribed by the Department. Applications shall remain in active status for three years from the date of receipt of such application.

(ii) Self-study. A school shall be required to conduct and submit with its application for approval a self-study, substantiating compliance with the standards for approval set forth in this section and plans for improvements pertinent to such standards.

(2) Site visit.

(i) When the Advisory Committee has made a preliminary determination that the application has adequately addressed the standards for approval set forth in this section, a site visit will be scheduled, and the Advisory Committee will designate a site visit team of no less than three members, selected from a list of qualified medical education program evaluators developed and maintained by the Department.

(ii) During the site visit, the medical school and its program will be reviewed to verify, clarify and update the representations contained within the application and any supporting documents. The medical school will bear the burden of demonstrating satisfactory compliance with the approval standards set forth in this section.

(3) Site visit report and recommendation. The site visit team shall prepare a site visit report and recommendation and provide a copy to the medical school prior to review by the Advisory Committee. The school shall be provided with an opportunity to respond to such report and recommendation.

(4) Advisory Committee.

(i) The Advisory Committee shall review the site review team's report and recommendation and any written submission by the school and the record upon which the site review team made its recommendation, including, but not limited to, the institution's self-study, the institution's application for approval, and any additional documentation submitted by the institution in support of the application. The Advisory Committee shall base its determination only upon the record before it.

(ii) Upon completion of its review, the Advisory Committee shall forward a report and recommendation to the Board of Regents. The report shall include a recommendation to approve or deny the authority of the school to place students in long-term clinical clerkships in New York State and provide the rationale for the recommendation, reflecting majority and minority opinions.

(6) Board of Regents.

(i) The Board of Regents may review:

(a) the report and recommendation of the Advisory Committee;

(b) the record upon which the Advisory Committee made its recommendation, including, but not limited to, the site visit report and recommendation, the self study, the school's application for approval, and any additional documentation submitted by the institution in support of the application;

(c) any response submitted by the school to the report and recommendation of the Advisory Committee, provided that such submission shall be limited to a discussion of the documentary material already submitted and shall not contain new documentary material.

(ii) Based on the record described in subparagraph (i) of this paragraph, the Board of Regents will make a final determination on the application.

(e) Annual Report. No later than September 30 of each year, an international medical school that has been approved to place its students in long-term clinical clerkships in New York shall submit an annual report in a form prescribed by the Department.

(f) Revocation of approval or placement in probationary status. Upon a finding of substantial non-compliance with the approval standards set forth in this section, the Department or Advisory Committee may at any

time during the approval period recommend to the Board of Regents that the approval be revoked or that the school be placed in probationary status in accordance with the following procedure:

(1) The Department or the Advisory Committee shall provide written notice to the school of its recommendation to revoke the school's approval or place the school in probationary status and the reasons therefore.

(2) The school may reply to such notification within 30 days.

(3) If a reply is received, such reply and the Department's or Advisory Committee's recommendation shall be forwarded to the Board of Regents for action thereon. Based on such recommendation and/or reply, the Board of Regents may:

(i) revoke the school's approval, subject to any conditions set by the Board of Regents;

(ii) continue its approval;

(iii) modify the time period for approval; and/or

(iv) place the school in probationary status.

(4) For purposes of this section, placement in probationary status shall mean the continued approval of the school by the Board of Regents for a specified period of time and subject to certain limitations, restrictions and/or remediation action as prescribed by the Board of Regents.

(g) Reporting requirements.

(1) The institution and/or school shall submit any reports requested by the Department, the Advisory Committee and/or the Board of Regents.

(2) The institution and/or school shall notify the Department of any denial, withdrawal, suspension, revocation, or termination of recognition, approval, accreditation or any other adverse action by any other body against the institution and/or school within 72 hours after receiving official notification of that action by providing to the Department a copy of such action.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt the provisions of this emergency rule as a permanent rule, having previously submitted to the Department of State a notice of proposed rule making, I.D. No. EDU-19-12-00005-EP, Issue of May 9, 2012. The emergency rule will expire September 14, 2012.

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Regulatory Impact Statement

1. STATUTORY AUTHORITY:

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

Section 6501 of the Education Law provides that, to qualify for admission to a profession, an applicant must meet requirements prescribed in the article of the Education Law that pertains to the particular profession.

Section 6504 of the Education Law authorizes the Board of Regents to supervise the admission to and regulation of the practice of the professions.

Subdivision (1) of section 6506 of the Education Law authorizes the Board of Regents to promulgate rules relating to the professions.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations relating to the professions.

Subdivision (1) of section 6508 of the Education Law authorizes the state boards for the professions to assist the Regents and the Department in matters of professional licensure and practice.

2. LEGISLATIVE OBJECTIVES:

The proposed amendment establishes the standards for the approval of international medical schools to place students in long-term clinical clerkships in New York. The standards require that the school be recognized by the appropriate civil authorities in the country in which it is located as an acceptable education program for physicians in that country. In addition, the school must have in place institutional policies and leadership to prepare students effectively for the practice of medicine and must have sufficient resources to achieve its goals. The school must provide at least 130 weeks of instruction, and the curriculum must incorporate the fundamental principles of medicine, promote the development of skills of critical judgment, and develop the ability of students to use such principles and skills effectively. The proposed regulation requires schools to provide clinical, as well as didactic instruction, and the clinical experiences must provide for students to undertake appropriate and progressive responsibilities. To be approved, a school must also provide instruction in ethics and human values and must have in place systems for the effective assessment of student achievement. The school must also have a sufficient number of qualified faculty members and provide appropriate assessment and development opportunities for them. With regard to clinical clerkships, the school must have affiliation agreements with the facilities providing such clerkships, and the clerkships must be provided at facilities where there is appropriate oversight and supervision. The medical school

is required to inform the Department of the facilities with which it has affiliation agreements and of anticipated changes in its agreements.

The proposed amendment also establishes the application and approval process for these schools. Schools seeking approval would be required to submit to the Department an application, on a form prescribed by the Commissioner, which shall include a self-study. Once a determination is made that the application adequately addresses the approval standards, a site visit would be conducted. The school would be provided with a copy of the site visit report and have an opportunity to respond. The Advisory Committee would then make findings with respect to compliance with the approval standards and submit a report and recommendation to the Board of Regents. The report shall include a recommendation to approve or deny the application and provide the rationale for the recommendation, reflecting majority and minority opinions. The Board of Regents would then make a final determination on the application. Any approvals may be subject to certain limitations and restrictions imposed by the Board of Regents.

Schools would be required to submit an annual report. Upon receipt of the annual report, if the Advisory Committee determines that there has been a substantial change in the approved medical program that is not in compliance with the approval standards set forth in this section, the Advisory Committee may recommend corrective action which may include a site visit, additional reporting requirements, submission of a new application and/or self-study, or revocation by the Board of Regents or placement in probationary status.

The proposed amendment would also authorize the Advisory Committee or the Department to recommend to the Board of Regents at any time the revocation of a medical school's approval to place students in New York clinical clerkships and/or placement of the medical school in probationary status and establishes procedures for such actions.

3. NEEDS AND BENEFITS:

Between November 2010 and January 2011, the Professional Practice Committee of the Board of Regents engaged in discussions with Department staff and the Chair of the New York State Board for Medicine regarding the oversight of dual-campus international medical schools that seek authorization to place students in long-term clinical clerkships in NYS hospitals. The discussions with the PPC incorporated input from the Study Group on International Medical Schools which included representation from a broad spectrum of the medical education and hospital services communities, including representatives from the affected schools. After consideration of certain changes that had taken place in the provision of medical education, the Board of Regents concluded that it was time to review the applicable regulations and policies governing the standards for placement of international medical students in long term clerkships in New York State. Accordingly, the Board of Regents established an Advisory Committee to provide advice on matters related to the evaluation and approval of dual-campus international medical schools seeking authorization to place students in long-term clinical clerkships in New York State. The plan approved by the PPC at its meeting in February 2011 specifically provided for the Advisory Committee to examine the standards and processes for such evaluations and approvals. The proposed addition of section 60.10 reflects the approval standards and procedures recommended by the Committee.

4. COSTS:

(a) Costs to State government: There are no additional costs to the government. Any costs related to the conduct of site visits will be borne by the medical school seeking authorization to place students in long-term clinical clerkships.

(b) Cost to local government: The proposed amendment establishes the standards and process for approval of international medical schools that seek authorization to place students in long-term clinical clerkships. Local governments play no role in the process of evaluating international medical schools. As such, there will be no cost to local government.

(c) Cost to private regulated parties: The proposed regulation will not impose any new costs on applicants for approval to place students in long-term clinical clerkships. Such applicants will continue to pay for the costs of site visits, as they have under previous regulations.

(d) Cost to the regulatory agency: See Cost to State Government above.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendments to the Rules and the Regulations are applicable to international medical schools only and do not impose any program, service, duty or responsibility upon local governments.

6. PAPERWORK:

The school will be required to submit an application, a self-study and will be required to notify the Department of any denial, withdrawal, suspension, revocation, or termination of recognition, approval, accreditation or any other adverse action by any other body against the institution and/or school within 72 hours after receiving official notification of that action by providing to the Department a copy of such action. The school will also be required to submit such other reports as may be requested by

the State Education Department, the Advisory Committee, and/or the Board of Regents.

7. DUPLICATION:

The proposed amendments to the Rules and the Regulations do not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

The proposed amendments to the Rules and the Regulations are necessary to update the standards and process for the approval of international medical schools to place students in long-term clinical clerkships in New York State. Because changes in foreign medical education and the availability of limited resources make continuation of the existing process problematic, there are no viable alternatives to the proposed amendments.

9. FEDERAL STANDARDS:

There are no Federal standards applicable to approval of international medical schools to place students in long-term clinical clerkships.

10. COMPLIANCE SCHEDULE:

Compliance with the standards and processes included in the amendment will be required immediately upon adoption.

Regulatory Flexibility Analysis

The purpose of the proposed amendment is to establish the standards and process for approval of international medical schools that seek approval to place students in long-term clinical clerkships in New York State hospitals.

The amendments are applicable to international medical schools only. Small businesses and local governments will not be impacted by the proposed amendment. Accordingly, no further steps were needed to ascertain the impact on small businesses and local governments.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The purpose of the proposed amendment is to establish the standards and the procedures for the evaluation of international medical schools that seek authorization to place students in long-term clinical clerkships in New York State.

These amendments will not be applicable to any New York State medical schools, including any that provide services in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The school will be required to submit an application and a self-study and to notify the Department of any denial, withdrawal, suspension, revocation, or termination of recognition, approval, accreditation or any other adverse action by any other body against the institution and/or school within 72 hours after receiving official notification of that action by providing to the Department a copy of such action. The school will also be required to submit such other reports as may be requested by the State Education Department, the Advisory Committee, and/or the Board of Regents.

3. COSTS:

The proposed amendment does not impose any costs on individuals or entities located in rural areas.

4. MINIMIZING ADVERSE IMPACT:

The proposed amendments are intended to ensure competent medical education for international medical students undertaking clinical training in New York State and thereby protect the health of the public. Due to the nature of the proposed amendment, there would be no reason to establish different requirements for institutions located in rural areas in New York, if there were any.

5. RURAL AREA PARTICIPATION:

Comments on the development of the proposed amendment were solicited from the State Board for Medicine and from statewide professional associations, hospital organizations and medical schools, who collectively represent or include individuals and entities located in rural areas.

Job Impact Statement

The purpose of the proposed amendment is to establish the standards and procedures for the evaluation of international medical schools that seek authorization to place students in long-term clinical clerkships in New York State.

Because it is evident from the nature of the proposed amendment that there will be 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

The agency received no public comment since publication of the last assessment of public comment.

**NOTICE OF EMERGENCY
ADOPTION
AND REVISED RULE MAKING
NO HEARING(S) SCHEDULED**

Policy and Guidelines Prohibiting Discrimination and Harassment of Students

I.D. No. EDU-07-12-00011-ERP

Filing No. 724

Filing Date: 2012-07-17

Effective Date: 2012-07-17

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

Action Taken: Addition of section 100.2(jj) to Title 8 NYCRR.

Statutory authority: Education Law, sections 11(1-7), 12(1) and (2), 13(1-3), 14(1-3), 101(not subdivided), 207(not subdivided), 305(1) and (2) and 2854(1)(b); and L. 2010, ch. 482

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

Specific reasons underlying the finding of necessity: The proposed rule is necessary to implement provisions of the Dignity Act. The statute added a new Article 2 to the Education Law and new section 13 of Article 2 to require school districts, boards of cooperative educational services (BOCES) and charter schools to create:

(i) policies to create a school environment free from discrimination and harassment;

(ii) guidelines to be used in school training programs to discourage the development of discrimination or harassment and that are designed to raise awareness and sensitivity of school employees to potential discrimination or harassment and enable employees to prevent and respond to discrimination or harassment; and

(iii) guidelines relating to the development of nondiscriminatory instructional and counseling methods, and requiring that at least one staff member of every school be thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender and sex.

The proposed rule establishes standards and criteria for the issuance of such policies and guidelines.

The proposed rule was discussed by the P-12 Education Committee at the February Regents meeting. A Notice of Proposed Rule Making was published in the State Register on February 15, 2012. The proposed rule was subsequently revised in response to public comment and discussed at the April Regents meeting. A Notice of Revised Rule Making was published in the State Register on April 25, 2012. The proposed rule was subsequently revised and adopted as an emergency rule at the May Regents meeting, effective May 22, 2012. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on June 6, 2012.

Additional revisions have now been made to the proposed revised rule in response to public comment. Because the Board of Regents meets at fixed intervals, the earliest the proposed revised rule could be presented for regular adoption, after publication in the State Register and expiration of the 30-day public comment period provided for revised rule makings pursuant to the State Administrative Procedure Act (SAPA) section 202(4-a), is the September 10-11, 2012 Regents meeting. Furthermore, pursuant to SAPA, the earliest effective date of the proposed amendment, if adopted at the September meeting, would be September 26, 2012, the date a Notice of Adoption would be published in the State Register. However, the Dignity Act took effect on July 1, 2012, and the May emergency rule, which implements the provisions of Education Law § 13, will expire on August 19, 2012. A lapse in the effective date of the rule may disrupt the provision of training, policies and guidelines under the Dignity Act to prevent harassment and discrimination.

Emergency action is therefore necessary for the preservation of the general welfare to immediately adopt the revisions to the proposed rule so that they may be timely implemented during the 2012-2013 school year, and to otherwise ensure that the emergency rule adopted at the May Regents meeting, as revised and readopted at the July Regents meeting, remains continuously in effect until the effective date of its permanent adoption at a subsequent Regents meeting.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at its September 10-11, 2012 meeting, which is the first scheduled meeting after expiration of the 30-day public comment period for revised rule makings mandated by the State Administrative Procedure Act.

Subject: Policy and guidelines prohibiting discrimination and harassment of students.

Purpose: To establish criteria for issuance of policy and guidelines relating to the Dignity for All Students Act (ch. 482, L. 2010).

Text of emergency/revised rule: 1. The addition of subdivision (jj) of section 100.2 of the Regulations of the Commissioner of Education, which was adopted by the Board of Regents as an emergency action on May 22, 2012 and for which a Notice of Emergency Adoption and Revised Rule Making was published in the State Register on June 6, 2012 (EDU-07-12-00011-ERP), is repealed, effective July 17, 2012.

2. Subdivision (jj) of section 100.2 of the Regulations of the Commissioner of Education is added, effective July 17, 2012, as follows:

(jj) *Dignity For All Students School Employee Training Program.*

(1) *Definitions. As used in this subdivision:*

(i) "School property" means in or within any building, structure, athletic playing field, playground, parking lot or land contained within the real property boundary line of a public elementary or secondary school, including a charter school; or in or on a school bus, as defined in Vehicle and Traffic Law section 142.

(ii) "School function" means a school-sponsored extracurricular event or activity.

(iii) "Disability" means disability as defined in Executive Law section 292(21).

(iv) "Employee" means employee as defined in Education Law section 1125(3), including an employee of a charter school.

(v) "Sexual orientation" means actual or perceived heterosexuality, homosexuality or bisexuality.

(vi) "Gender" means actual or perceived sex and shall include a person's gender identity or expression.

(vii) "Discrimination" means discrimination against any student by a student or students and/or an employee or employees on school property or at a school function including, but not limited to, discrimination based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.

(viii) "Harassment" means the creation of a hostile environment by conduct or by verbal threats, intimidation or abuse that has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being; or conduct, verbal threats, intimidation or abuse that reasonably causes or would reasonably be expected to cause a student to fear for his or her physical safety; such conduct, verbal threats, intimidation or abuse includes but is not limited to conduct, verbal threats, intimidation or abuse based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex.

(2) On or before July 1, 2012, each school district and each charter school shall establish guidelines for its school or schools to implement, commencing with the 2012-2013 school year and continuing in each school year thereafter, Dignity for All Students school employee training programs to promote a positive school environment that is free from discrimination and harassment; and to discourage and respond to incidents of discrimination and/or harassment on school property or at a school function. Such guidelines shall be approved by the board of education, trustees or sole trustee of the school district (or by the chancellor of the city school district, in the case of the City School District of the City of New York) or by the board of trustees of the charter school.

(3) The guidelines shall include, but not be limited to, providing employees, including school and district administrators and instructional and non-instructional staff, with:

(i) training to:

(a) raise awareness and sensitivity to potential acts of discrimination and/or harassment directed at students that are committed by students and/or school employees on school property or at a school function; including, but not limited to, discrimination and/or harassment based on a person's actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender or sex; and

(b) training to enable employees to prevent and respond to incidents of discrimination and/or harassment;

(c) such training may be implemented and conducted in conjunction with existing professional development training pursuant to subparagraph 100.2(dd)(2)(ii) of this Title and/or with any other training for school employees; and

(ii) guidelines relating to the development of nondiscriminatory instructional and counseling methods.

(4) At least one employee in every school shall be designated as a Dignity Act Coordinator and instructed in the provisions of this subdivision and thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex.

(i) The designation of each Dignity Act Coordinator shall be ap-

proved by the board of education, trustees or sole trustee of the school district (or in the case of the City School District of the City of New York, by the principal of the school in which the designated employee is employed) or, in the case of a charter school, by the board of trustees.

(ii) The name(s) and contact information for the Dignity Act Coordinator(s) shall be shared with all school personnel, students, and persons in parental relation, which shall include, but is not limited to, providing the name, designated school and contact information of each Dignity Act Coordinator by:

(a) listing such information in the code of conduct and updates posted on the Internet web site, if available, of the school or school district, or of the board of cooperative educational services, pursuant to subclause 100.2(l)(2)(iii)(b)(1) of this Part;

(b) including such information in the plain language summary of the code of conduct provided to all persons in parental relation to students before the beginning of each school year, pursuant to subclause 100.2(l)(2)(iii)(b)(3);

(c) providing such information to parents and persons in parental relation in at least one per school year district or school mailing or other method of distribution including, but not limited to, sending such information home with each student and, if such information changes, in at least one subsequent district or school mailing or other such method of distribution as soon as practicable thereafter;

(d) posting such information in highly-visible areas of school buildings; and

(e) making such information available at the district and school-level administrative offices.

(iii) In the event a Dignity Act Coordinator vacates his or her position, another school employee shall be immediately designated for an interim appointment as Coordinator, pending approval of a successor Coordinator by the applicable governing body as set forth in subparagraph (i) of this paragraph within 30 days of the date the position was vacated. In the event a Coordinator is unable to perform the duties of his or her position for an extended period of time, another school employee shall be immediately designated for an interim appointment as Coordinator, pending return of the previous Coordinator to his or her duties as Coordinator.

(5) Nothing in this subdivision shall be construed to prohibit a denial of admission into, or exclusion from, a course of instruction based on a person's gender that would be permissible under Education Law sections 3201-a or 2854(2)(a) and Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681, et seq.), or to prohibit, as discrimination based on disability, actions that would be permissible under section 504 of the Rehabilitation Act of 1973.

This notice is intended to serve as both a notice of emergency adoption and a notice of revised rule making. The notice of proposed rule making was published in the State Register on February 15, 2012, I.D. No. EDU-07-12-00011-P. The emergency rule will expire August 16, 2012.

Revised rule making(s) were previously published in the State Register on April 25, 2012.

Emergency rule compared with proposed rule: Substantial revisions were made in 100.2(jj)(4).

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Ken Slentz, Deputy Commissioner P-12 Education, State Education Department, State Education Building 2M West, 89 Washington Ave., Albany, NY 12234, (518) 474-5520, email: NYSEDP12@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 Emergency Adoption and Revised Rule Making in the June 6, 2012 State Register, the following changes were made to the proposed rule:

- Section 100.2(jj)(4)(ii)(c) was revised to permit school districts and schools, in lieu of a mailing, to provide parents and persons in parental relation with the name and contact information of designated Dignity Act Coordinators by other methods of distribution, such as sending the information home with students.

- A nonsubstantial revision was made to section 100.2(jj)(1)(iv) to clarify the applicability of the definition of "employee" with respect to employees of charter schools, and to otherwise ensure consistency with the definition of "employee" in a separate proposed amendment to section 100.2(kk)(1)(iv), relating to Dignity Act reporting requirements.

The above revisions do not require any changes to the previously published Regulatory Impact Statement.

Revised Regulatory Flexibility Analysis and Rural Area Flexibility Analysis

Since publication of a Notice of Revised Rule Making in the State Register on June 6, 2012, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The above revisions do not require any changes to the previously published Regulatory Flexibility Analysis and Rural Area Flexibility Analysis.

Revised Job Impact Statement

Since publication of a Notice of Revised Rule Making in the State Register on June 6, 2012, the proposed rule was revised as set forth in the Statement Concerning the Regulatory Impact Statement filed herewith.

The proposed rule, as revised, relates to school employee training under the Dignity for All Students Act (L. 2010, Ch. 482). The proposed revised rule will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed revised rule that it will have a positive impact, or no impact, on jobs or employment opportunities, no further steps were needed to ascertain those facts 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 Revised Rule Making in the State Register on April 25, 2012 and a Notice of Emergency Adoption and Revised Rule Making in the State Register on June 6, 2012, the State Education Department received the following comments:

1. COMMENT:

To require all schools to include the name(s), designated school and contact information for each Dignity Act Coordinator (DAC) in the printed code of conduct and in at least one mandated mailing per year to all persons in parental relation, with additional mailings as needed if such information changes, would pose an undue and significant financial burden on school districts and its schools, and therefore this requirement should be deleted from the proposed rule. Persons in parental relation would be better served by other more time sensitive methods of communicating the name of the DAC such as electronic media or via regularly scheduled parent meetings, and publication in already existing school publications that are promulgated on a regular basis.

DEPARTMENT RESPONSE:

A key aspect in the proposed rule is the importance that students, parents, persons in parental relation, and staff be aware of who the Dignity Act Coordinator is in their respective school. Including this information in the Code of Conduct, which must be posted on the Internet and provided as a plain language summary pursuant to 100.2(l)(2)(iii)(b)(3), further emphasizes the critical link between the Dignity Act and the Code of Conduct. The requirement in the proposed rule that the name and contact information for the Dignity Act Coordinator be included in at least one district or school mailing per school year to parents and persons of parental relation and, if such information changes, in at least one subsequent district or school mailing as soon as practicable thereafter reinforces the importance that communication between persons in parental relation, teachers, and the Dignity Act Coordinator and other educational professionals within the school is essential to the overall support and success of students. The Department agrees that mailing materials is costly and further agrees that schools routinely provide materials to persons in parental relation by "backpacking" materials home with students. The proposed rule has been amended to provide an option that materials be mailed or sent home with students.

2. COMMENT:

Having only one employee in every school designated as a DAC is unrealistic and short-sighted.

DEPARTMENT RESPONSE:

The requirement in proposed section 100.2(jj)(4) that at least one employee in every school be designated as a Dignity Act Coordinator is consistent with the Dignity Act statute which requires that "... at least one staff member at every school be thoroughly trained to handle human relations in the areas of race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, and sex (Education Law § 13[3]). The proposed rule does not preclude designation of more than one DAC. Because the proposed rule is applicable across the State, from large city school districts to small rural districts, the Department believes that determination of the appropriate number of DAC to be designated, beyond the required one per school, is best left as a local decision to be made by each school district, BOCES and charter school to best address their individual needs and circumstances.

3. COMMENT:

The proposed rule should be implemented in stages, with stage 1 being staff training about bullying/harassment recognition and intervention, rather than rushing to implement the Dignity Act requirements by July 1. Model and non-model programs should be reviewed and a reporting document should be in place to document incidents.

DEPARTMENT RESPONSE:

The July 1, 2012 effective date is in the text of the statute and cannot be amended through the rule-making process. Model programs were reviewed in researching and developing guidance materials posted on the Department's Dignity Act web site. Individual incident reporting formats are developed at the local level. The Department has proposed a rule (100.2[kk]) to comply with Education Law § 15's requirement that all material incidents of discrimination and/or harassment on school grounds or at a school function must be annually reported to the Department. Proposed rule 100.2(kk) is the subject of a separate revised rule making published in the State Register on July 18, 2012 (EDU-15-12-00011-ERP).

4. COMMENT:

It was reiterated that the proposed rule should be revised to clarify the role and responsibilities of the Dignity Act Coordinator (DAC), so that schools may choose an appropriate candidate and help candidates understand the time commitment associated with the role. The DAC should be responsible for coordination of employee training, implementation of district policy, ensuring inclusive curriculum, and final responsibility for investigations and student discipline. The DAC must have administrative credentials to manage student discipline such as a vice principal or other senior administrator, have interaction with students, authority to implement policy changes based on the Dignity Act, and the ability to further implement without compromising other professional responsibilities.

DEPARTMENT RESPONSE:

The Department continues to believe that since the role of the DAC will vary from school-to-school and from district-to-district, depending on the varying needs and circumstances particular to each school and district across the State, from large city school districts to small rural districts, the determination of the specific role and duties of the DAC is best left as a local decision to be made by each school district, BOCES and charter school to best address their individual needs and circumstances. In addition, the Department may consider issuing guidance regarding recommended best practices with respect to the DAC's duties.

5. COMMENT:

It was reiterated that the proposed rule be revised to provide that the Department either offer training for DACs or authorize designated service providers to perform this training and to clarify how this training will take place, and to include a requirement that the DAC do "turnkey" training with all school staff to share what they have learned.

DEPARTMENT RESPONSE:

The Department again acknowledges that a turnkey approach might lessen the burden imposed on schools by the statute's unfunded mandate, but nevertheless continues to believe that providing turnkey training to trainers in large cities, BOCES, and/or Joint Management Team areas would impose substantial costs. Therefore, the Department is considering developing a "static," non-interactive webinar to provide basic DAC training to the field. This is the most economical route and will ensure a consistent message is shared across schools.

6. COMMENT:

It was reiterated that the proposed rule should be revised to encourage regular evaluations of training programs for school districts to assess their effectiveness, and include evaluations of select school districts and charter schools by the Department on at least an annual basis. The Department is also encouraged to evaluate non-district based professional development services which offer training for either Dignity Act Coordinators or general employee training under the Dignity Act.

DEPARTMENT RESPONSE:

Although the Department agrees that evaluations can be beneficial, there is no requirement in the Dignity Act to provide them and they would be a fiscal burden to impose on school districts and the Department at this time, given that no funding for such evaluations by either school districts or the Department has been provided in the Dignity Act or any other legislation.

7. COMMENT:

Schools should be permitted to designate a position (as opposed to a specific, named individual) that will serve as the DAC for each school, and the board of trustees should only be required to approve that position designation (not a specific individual). As an example of the proposed rule's impracticality, a promotion or personnel change affecting this role would require the school to re-designate, obtain board approval within 30 days (which is not always possible, depending on timing of board meetings), and re-issue all documentation to parents with the updated name-a time-consuming and expensive proposition that could be alleviated by simply designating a position rather than an individual name.

DEPARTMENT RESPONSE:

Boards of Education and Boards of Trustees are legally responsible for ensuring that the Dignity Act statute and rules are implemented to ensure safe and supportive environments. Since the Dignity Act applies to student-to-student behaviors, employee-to-student behaviors and student and employee to student behaviors, approving the specific individuals

designated as the Dignity Act Coordinator in each school is a critical element to ensuring that the Dignity Act's integration into the overall school environment will be timely and objective. The Department believes that this provision is necessary to ensure that one or more specifically designated individuals act as DAC at all times, and that the board of education, BOCES or governing body of the charter school are directly involved in the delegation of individual(s) as DAC, in order to elevate the standing of the position and to make it clear that this is an important and necessary position.

8. COMMENT:

Schools should not be required to list specific, individual names or contact information in a code of conduct, any summary of a code of conduct, or any equivalent document. Schools should not be required to post this information throughout the school building. Mailing is not an effective manner of disseminating this type of information, as the mailed notice is a one-time notice that will likely be quickly discarded and forgotten. Instead, schools should be permitted to disseminate the information in a widely distributed bullying policy, with the name and contact information of the position (rather than a specific, named individual) explicitly and clearly listed. Provision of information on websites should be optional, or required only to the extent that detailed personnel and HR matters are included on the website.

Furthermore, schools should not be required to disseminate DAC information prior to the start of the school year; instead, the information should be disseminated at or around the start of the school year.

DEPARTMENT RESPONSE:

The Department believes that communication between students, parents, persons in parental relation, teachers, administrators, other educational professionals/school employees, and the Dignity Act Coordinator (DAC) is essential. Posting the name and contact information of the DAC by various means as set forth in section 100.2(jj)(4)(ii) will promote the importance of the Dignity Act on a daily basis, remind students and the rest of the school community who the DAC is, and encourage communication and interaction related to the Dignity Act between all school building occupants and the school community. It will also ensure greater school community awareness of this vital information than mere inclusion of DAC name(s) and contact information in a bullying policy, which would only serve to reference the existence of the DAC rather than proactively promoting the DAC's availability in the school. Requiring a wide and varying means of disseminating this contact information elevates the importance of the DAC and the requirements of the Dignity Act. Finally, since the official start of the school year is July 1st and the official end of the school year is June 30th, requiring Dignity Act Coordinators to be designated in each school by September is not unreasonable.

NOTICE OF ADOPTION

Procedures for Hearings on Charges Against Tenured School Employees

I.D. No. EDU-19-12-00004-A

Filing No. 726

Filing Date: 2012-07-17

Effective Date: 2012-08-01

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

Action taken: Amendment of Subpart 82-1 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 305(1) and (2), and 3020-a, as amd. by L. 2012, ch. 57, part B

Subject: Procedures for hearings on charges against tenured school employees.

Purpose: To implement the provisions of the new law relating to the appointment of hearing officers and reimbursement of hearing expenses.

Text or summary was published in the May 9, 2012 issue of the Register, I.D. No. EDU-19-12-00004-EP.

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

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, New York State Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Assessment of Public Comment

Since publication of a Notice of Proposed Rule Making in the State Register on May 9, 2012 the State Education Department received the following comment on the proposed amendments.

COMMENT: The proposed amendment to the regulation strives to

shorten the length of time to conduct a 3020-a disciplinary process. We fully appreciate both that focus and the effort. However, a careful analysis by our Chief School Officers and consultation with our supporting labor relations attorneys leave us with the sense that the regulation is still full of exceptions to the time line that will not result in a shorter process. We strongly recommend that the amendment limit the period of time that an employee who is charged under the provisions of 3020-a be compensated. If the goal is to limit the process to 125 days from charge to resolution, then limit employee compensation to 180 days. This will be a motivator to significantly reduce use of the exceptions and both sides will demand quick resolution to the charge(s).

RESPONSE: The proposed amendment implements the provisions of Chapter 57 of the Laws of 2012. We would need a statutory amendment to further limit employee compensation to 180 days.

NOTICE OF ADOPTION

Approval of International Medical Schools for Long-Term Clinical Clerkship Placements

I.D. No. EDU-19-12-00005-A

Filing No. 728

Filing Date: 2012-07-17

Effective Date: 2012-08-01

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

Action taken: Addition of section 60.10 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 6501(not subdivided), 6504(not subdivided), 6506(1), 6507(2)(a) and 6508(1)

Subject: Approval of international medical schools for long-term clinical clerkship placements.

Purpose: Establish the approval standards and procedures for international medical schools to place students in long term clerkships in NY.

Text or summary was published in the May 9, 2012 issue of the Register, I.D. No. EDU-19-12-00005-EP.

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

Text of rule and any required statements and analyses may be obtained from: Mary Gammon, NYS Education Department, 89 Washington Avenue, Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Assessment of Public Comment

The agency received no public comment.

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

Transitional B and C Certificates and Program Registration Standards Leading to Such Standards

I.D. No. EDU-31-12-00005-P

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

Proposed Action: Amendment of section 52.21 and Part 80 of Title 8 NYCRR.

Statutory authority: Education Law, sections 207, 305(1), 3001(2), 3006(1)(b) and 3009

Subject: Transitional B and C certificates and Program Registration Standards Leading to Such Standards.

Purpose: To allow certified teachers to enter a Transitional B or C certificate program to become certified in a different area.

Text of proposed rule: 1. Paragraph 43 of subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education is amended, effective October 31, 2012, to read as follows:

(43) Transitional B certificate means *a* [the first] teaching certificate obtained by a candidate enrolled in an alternative teacher certification program, as prescribed in section 52.21 of this Title, that qualifies that individual in the public schools of New York State, subject to the requirements and limitations of this Part[, and excluding the provisional certificate, initial certificate, temporary license, transitional A certificate, and transitional C certificate].

2. Paragraph 44 of subdivision (b) of section 80-1.1 of the Regulations of the Commissioner of Education is amended, effective October 31, 2012, to read as follows:

(44) Transitional C certificate means *a* [the first] teaching certificate obtained by a candidate holding an appropriate academic or graduate professional degree and enrolled in an intensive program leading to a professional certificate that qualifies that individual to teach in the public schools of New York State, subject to the requirements and limitations of this Part [, and excluding the provisional certificate, initial certificate, temporary license, transitional A certificate, and transitional C certificate].

3. Subparagraph (xvi) of paragraph (1) of subdivision (b) of section 52.21 of the Regulations of the Commissioner of Education is amended, effective October 31, 2012, to read as follows:

(xvi) Transitional B certificate means *a* [the first] teaching certificate obtained by a candidate enrolled in an alternative teacher certification program or a Model-B teacher preparation track of a clinically rich graduate level teacher preparation pilot program, as prescribed in this section, that qualifies that individual to teach in the public schools of New York State, subject to the requirements and limitations of Part 80 of this Title[, and excluding the provisional certificate, initial certificate, temporary license, transitional A certificate, and transitional C certificate].

4. Subparagraph (xvii) of paragraph (1) of subdivision (b) of section 52.21 of the Regulations of the Commissioner of Education is amended, effective October 31, 2012 to read as follows:

(xvii) Transitional C certificate means *a* [the first] teaching certificate obtained by a candidate holding an appropriate academic or graduate professional degree and enrolled in an intensive program leading to a professional certificate that qualifies that individual to teach in the public schools of New York State, subject to the requirements and limitations of Part 80 of this Title [, and excluding the provisional certificate, initial certificate, temporary license, transitional A certificate, and transitional C certificate].

5. Subparagraph (xvi) of paragraph (3) of subdivision (b) section 52.21 of the Regulations of the Commissioner of Education is amended, effective October 31, 2012, to read as follows:

(xvi) Intensive programs leading to professional certificates for individuals, including career changers and others, holding a transitional C certificate and an appropriate graduate academic or graduate professional degree.

(a). . .

(b). . .

(c)(1) *Prior to admission into a program, the institution shall provide written notification to candidates of the variety of teacher certification pathways available in New York, including, but not limited to individual transcript evaluation, interstate reciprocity and traditional preparation pathways. Such notification shall also make candidates aware that other pathways may be less costly and/or time intensive and that they should review all their alternatives before entering the program.*

(2) The program shall require the candidate to present evidence that the candidate meets the requirements for a transitional C certificate for admission to the program. The candidate shall present evidence of holding such transitional C certificate prior to the commencement of mentored teaching, based in part on the holding of an appropriate graduate academic or graduate professional degree.

6. A new subclause (5) is added to clause (a) of subparagraph (xvii) of paragraph (3) of subdivision (b) section 52.21 of the Regulations of the Commissioner of Education is amended, effective October 31, 2012, to read as follows:

(5) *Prior to admission into a program, the institution shall provide written notification to candidates of the variety of teacher certification pathways available in New York, including, but not limited to individual transcript evaluation, interstate reciprocity and traditional preparation pathways. Such notification shall also make candidates aware that other pathways may be less costly and/or time intensive and that they should review all their alternatives before entering the program.*

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, New York State Education Department, 89 Washington Avenue, Room 138, Albany, New York 12234, (518) 473-2183, email: mgammon@mail.nysed.gov

Data, views or arguments may be submitted to: Peg Rivers, New York State Education Department, 89 Washington Avenue, Room 979, Albany, New York 12234, (518) 418-1189, email: privers@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:

Education Law section 207 grants general rule-making authority to the Regents to carry into effect State educational laws and policies.

Subdivision (1) of section 305 of the Education Law empowers the Commissioner of Education to be the chief executive officer of the state system of education and authorizes the Commissioner to execute educational policies determined by the Regents.

Subdivision (2) of section 3001 of the Education Law establishes certification by the State Education Department as a qualification to teach in the State's public schools.

Paragraph (b) of subdivision (1) of section 3006 of the Education Law provides that the Commissioner of Education may issue such teacher certificates as the Regents Rules prescribe.

Subdivision (1) of section 3009 of the Education Law provides that no part of the school moneys apportioned to a district shall be applied to the payment of the salary of an unqualified teacher, nor shall his salary or part thereof, be collected by a district tax except as provided in the Education Law.

2. LEGISLATIVE OBJECTIVES:

The amendment carries out the legislative objectives of the above-referenced statutes by authorizing a certified teacher to enter a Transitional B or C program to obtain certification in another area.

3. NEEDS AND BENEFITS:

New York State is currently facing a shortage of qualified teachers in many certificate areas, particularly in math, science and foreign languages, as well as a shortage of qualified teachers in many geographic locations.

Currently, New York State teachers holding a certificate in one area are precluded from entering a Transitional B or C program to obtain a certificate in another area. For example, a teacher with 30 science credits who holds a valid New York State certificate in Early Childhood Education may not enter into a Transitional B program to obtain certification as a middle school science teacher. To address the current shortages that exist in many certificate areas, the proposed amendment allows certified teachers in one certification area to enter a Transitional B or C program in a different certification area, which will help put qualified teachers in our State's classrooms where shortages exist.

Acknowledging that there are several pathways to obtain certification, the proposed amendment requires all registered programs to provide candidates with written notice prior to admission into a Transitional B or C program that there are several other pathways leading to certification in New York which may be less costly and or time intensive, including, but not limited to, individual transcript evaluation, interstate reciprocity, and traditional preparation pathways. This notice could be provided to candidates by simply providing candidates with a link to our website which lists the certification pathways in New York. Providing this notice to candidates will allow them to make informed decisions as to whether to enter the program, while at the same time allowing qualified candidates to obtain jobs in areas where there is a demand for teachers.

4. COSTS:

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

(b) Costs to local governments: The amendment will not impose any additional costs on Local governments.

5. LOCAL GOVERNMENT MANDATES:

The proposed amendment does not impose any mandatory program, service, duty, or responsibility upon local government, including school districts or BOCES.

6. PAPERWORK:

There are no additional paperwork requirements beyond those currently imposed.

7. DUPLICATION:

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

8. ALTERNATIVES:

No alternatives were considered.

9. FEDERAL STANDARDS:

There are no Federal standards that establish requirements for the certification of teachers for service in the State's public schools.

10. COMPLIANCE SCHEDULE:

It is anticipated that the proposed amendment will be adopted at the October Regents meeting and will become effective on October 31, 2012.

Regulatory Flexibility Analysis

(a) Small businesses:

The purpose of the proposed rule is to allow already certified individuals to be issued a Transitional B or C certificate in an area other than the certificate(s) already issued. The proposed rule does not impose any reporting, recordkeeping or other compliance requirements, and will not have an adverse economic impact, on small business. Because it is evident from the nature of the amendment that it does not affect small businesses, no further steps were needed to ascertain that fact and one were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

(b) Local governments:

1. EFFECT OF RULE:

The rule applies to applicants who seek a teaching certificate in another certificate area through the Transitional B or C alternative pathway.

2. COMPLIANCE REQUIREMENTS:

This change will allow a person that already holds a teaching certificate in New York to enter into a Transitional B or C program in a different certificate area and be issued a Transitional B or C certificate in a different certificate area.

3. PROFESSIONAL SERVICES:

The proposed amendment does not impose any additional professional services or requirements on school districts or BOCES.

4. COMPLIANCE COSTS:

The proposed amendment does not impose any additional costs on local governments beyond those imposed by statute.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule does not impose any additional technological requirements on school districts or BOCES.

6. MINIMIZING ADVERSE IMPACT:

The rule is necessary to allow already certified individuals to be issued a Transitional B or C certificate in an area other than the certificate(s) already issued.

7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed rule have been provided to the Chief School Administrators of the Big 5 City School Districts and to district superintendents with the request that they distribute them to school districts within their supervisory districts for review and comment.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed amendment will affect certified teachers that apply for a Transitional B or C certificate in another certificate area in all parts of the State, including those located in 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:

This change will allow a person that already holds a teaching certificate in New York to enter into a Transitional B or C program in a different certificate area and be issued a Transitional B or C certificate in a different certificate area. There are no additional reporting, recordkeeping or compliance requirements.

3. COSTS:

There are no additional costs imposed beyond those imposed by statute.

4. MINIMIZING ADVERSE IMPACT:

The State Education Department does not believe that making this change for candidates who live or work in rural areas is warranted.

5. RURAL AREA PARTICIPATION:

The State Education Department has sent the proposed amendment to the Rural Advisory Committee, which has members who live or work in rural areas across the State.

Job Impact Statement

The purpose of the proposed amendment is to provide already certified teachers the option of entering a Transitional B or C program and be issued a Transitional B or C certificate in a different certification area. Because it is evident from the nature of the proposed rule 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.

PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

Polysomnographic Technologists

I.D. No. EDU-31-12-00006-P

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

Proposed Action: Addition of sections 52.42 and 79-4.8 through 79-4.17 to Title 8 NYCRR.

Statutory authority: Education Law, sections 207(not subdivided), 212(3), 6504(not subdivided), 6506(1), (2), (5), (6), (8), (9) and (10), 6507(2)(a), 6508(1), (2), (3) and (7), and 8505(5); and L. 2011, ch. 262

Subject: Polysomnographic technologists.

Purpose: To establish standards for the provision of polysomnographic technology services.

Text of proposed rule: 1. Section 52.42 of the Regulations of the Commissioner of Education is added, effective October 31, 2012, to read as follows:

§ 52.42 *Polysomnographic technology.*

(a) *Definitions. As used in this section:*

(1) *Professional polysomnographic technology coursework shall mean didactic coursework and supervised clinical experiences. Such coursework and clinical experiences shall include, but shall not be limited to, the following curricular areas:*

(i) *polysomnographic procedures and protocols;*

(ii) *cardiopulmonary and neurological sciences, diagnostics, interpretation, and monitoring related to sleep disorders.*

(iii) *ethics of polysomnographic care;*

(iv) *infection control; and*

(v) *polysomnographic patient care and patient education related to sleep disorders;*

(2) *Equivalent shall mean substantially the same, as determined by the department.*

(b) *Program requirements. In addition to meeting all applicable provisions of this Part, to be registered as a program recognized as leading to the authorization in polysomnographic technology which meets the requirements in section 79-4.2(a) of this chapter, it shall be a program in polysomnographic technology leading to an associate degree or higher degree and shall meet the following requirements.*

(1) *An associate degree program in polysomnographic technology shall contain at least 60 semester hours, or the equivalent, including a minimum of 30 semester hours in professional polysomnographic technology coursework, or the equivalent, and additional semester hours in appropriate related basic sciences and clinical sciences related to polysomnographic technology.*

(2) A baccalaureate degree program in polysomnographic technology shall contain a minimum of 40 semester hours of professional polysomnographic technology coursework, or the equivalent, and additional semester hours in appropriate related basic sciences and clinical sciences related to polysomnographic technology.

(3) The required semester hours in professional polysomnographic technology content areas shall include supervised clinical experience.

(4) Clinical facilities. A written contract or agreement shall be executed between the educational institution conducting the polysomnographic technology program and the clinical facility or agency which is designated to cooperate in providing the clinical experience. Such contract or agreement shall set forth the responsibilities of each party and shall be signed by the responsible officer of each party.

2. The title of Subpart 79-4 of the Regulations of the Commissioner of Education is amended, effective October 31, 2012, as follows:

Respiratory Therapy, [and] Respiratory Therapy Technician, and Polysomnographic Technologist.

3. Sections 79-4.8 through 79-4.17 of the Regulations of the Commissioner of Education are added, effective October 31, 2012, as follows:

§ 79-4.8 Definitions of the practice of polysomnographic technology and use of the title.

(a) Only a person authorized under this Subpart shall participate in the practice of polysomnographic technology as an authorized polysomnographic technologist, and only a person authorized under this Subpart shall use the title "authorized polysomnographic technologist."

(b) The term "practice of polysomnographic technology" shall mean the process of collecting, analyzing, scoring, monitoring and recording physiologic data during sleep and wakefulness to assist the supervising physician in the clinical assessment and diagnosis of sleep/wake disorders and other disorders, syndromes and dysfunctions that either are sleep related, manifest during sleep or disrupt normal sleep/wake cycles and activities. The practice of polysomnographic technology shall include the non-invasive monitoring, diagnostic testing, and initiation and delivery of treatments to determine therapeutic levels of inspiratory and expiratory pressures for individuals suffering from any sleep disorder, as listed in an authoritative classification of sleep disorders acceptable to the department, under the direction and supervision of a licensed physician who is available for consultation at all times during the provision of polysomnographic technology services in any setting. Such services shall not include the use of mechanical ventilators. Such services shall include, but shall not be limited to:

(1) application of electrodes and apparatus necessary to monitor and evaluate sleep disturbances, including application of devices that allow a physician to diagnose and treat sleep disorders, which disorders shall include, but shall not be limited to, insomnia, sleep breathing disorders, movement disorders, disorders of excessive somnolence, and parasomnias, provided, however, that such services shall include the use of oral appliances, but shall not include the use of any artificial airway or the drawing of arterial blood gasses;

(2) implementation of any type of physiologic non-invasive monitoring applicable to polysomnography, including monitoring the therapeutic and diagnostic use on non-ventilated patients of oxygen, continuous positive airway pressure (CPAP) and bi-level positive airway pressure;

(3) implementation of cardiopulmonary resuscitation, maintenance of patient's airway (which does not include endotracheal intubation), and transcription and implementation of physician orders pertaining to the practice of polysomnographic technology;

(4) implementation of non-invasive treatment changes and testing techniques, as described in paragraphs (1) and (2) of this subdivision, and as required for the application of polysomnographic protocols under the direction and supervision of a licensed physician; and

(5) education of patients, family and the public concerning the procedures and treatments used during polysomnographic technology or concerning any equipment or procedure used for the treatment of any sleep disorder.

§ 79-4.9 Requirements and procedures for professional authorization.

To qualify for authorization as a polysomnographic technologist, an applicant shall be at least 18 years of age, file an application together with the applicable fees with the department, and meet the education, experience, examination and moral character requirements set forth in sections 79-4.10, 79-4.11, 79-4.12, and 79-4.13 of this Subpart, respectively.

§ 79-4.10 Professional study of polysomnographic technology.

To meet the professional education requirement for authorization as a polysomnographic technologist in this State, the applicant shall present evidence of:

(a) completion of an associate or higher degree in polysomnographic technology:

(1) in a program registered by the department; or

(2) in a program determined by the department to be substantially equivalent to a registered program; or

(b) completion of a course of study which is substantially equivalent to a program determined to be acceptable pursuant to subdivision (a) of this paragraph and which is satisfactory to the department.

§ 79-4.11 Experience requirements for polysomnographic technologist authorization.

To meet the professional experience requirement for authorization as a polysomnographic technologist in this State, the applicant shall complete such experience as is required in section 52.42 of this Title.

§ 79-4.12 Examination for authorization as a polysomnographic technologist.

(a) Each candidate for authorization as a polysomnographic technologist shall pass an examination that is determined by the department to measure the applicant's knowledge, judgment and skills concerning the practice of polysomnographic technology and such other matters of law and/or ethics as may be deemed appropriate by the department.

(b) Grade retention. The grade retention limitations of section 59.5(f) of this Title shall not be applicable to the examination for authorization to practice polysomnographic technology.

(c) Passing standard. The passing standard for the examination shall be determined by the State Board for Respiratory Therapy.

§ 79-4.13 Moral character for polysomnographic technologist authorization.

Applicants shall be of good moral character, as determined by the department.

§ 79-4.14 Student authorization. The practice of polysomnographic technology as an integral part of a program of study by students enrolled in a polysomnographic technology education program approved by the department shall not be prohibited. All such student practice shall be under the direction and supervision of a licensed physician and under the direct and immediate supervision of an authorized polysomnographic technologists or another health care provider licensed under Title VIII of the Education Law, provided that all tasks or responsibilities supervised by the health care provider are within the scope of his or her practice.

§ 79-4.15 Limited permit authorization. Authorizations limited as to eligibility, practice and duration shall be issued by the department to eligible applicants as follows:

(a) Eligibility. A person who fulfills all requirements for authorization as a polysomnographic technologist except that related to the examination shall be eligible for a limited permit.

(b) Limit of practice. All practice under a limited permit shall be under the direction and supervision of a licensed physician and under the direct and immediate supervision of a health care provider licensed under Title VIII of the Education Law, provided that all tasks or responsibilities supervised by the health care provider are within the scope of his or her practice.

(c) Duration. A limited permit shall be valid for one year and may be renewed for one additional year.

(d) An application for a limited permit in polysomnographic technology shall be submitted on a form provided by the Department and shall be accompanied by a fee of \$70.

§ 79-4.16 Special provisions for authorization for polysomnographic technologists.

Except as otherwise provided in subdivision (d) of this section, an individual who is at least 18 years of age shall be authorized to practice polysomnographic technology without satisfying the education, experience, and examination requirements set forth in sections 79-4.10, 79-4.11 and 79-4.12 of this Subpart; provided that no later than February 3, 2014, such individual shall meet the requirements of subdivisions (a), (b), and (c) of this section. In order to be authorized to practice polysomnographic technology pursuant to this section, the applicant shall:

(a) file an application and pay the appropriate fees to the department; and

(b) be of good moral character, as determined by the department; and

(c)(1) be certified by a national certifying or accrediting board for polysomnographic technology acceptable to the department, and have practiced polysomnographic technology under the direction and supervision of a licensed physician at least 21 clinical hours per week for not less than 18 months in the three years immediately preceding the receipt of his or her application; or

(2) have practiced polysomnographic technology under the direction and supervision of a licensed physician at least 21 clinical hours per week for not less than three years within the five years immediately preceding the receipt of his or her application.

(d) If at least four licensure qualifying programs in polysomnographic technology have not been registered by the department by February 3, 2014, the applicant shall meet the requirements of subdivisions (a), (b), and (c)(1) of this section prior to the date that a total of four such programs have been registered by the department.

§ 79-4.17 Disciplinary authority for polysomnographic technologists. Authorized polysomnographic technologists shall be subject to the full

disciplinary and regulatory authority of the Board of Regents and the department, as if such authorization were a professional license. Authorized polysomnographic technologists shall be subject to all applicable provisions of the Education Law and of this Title relating to professional misconduct. For purposes of professional misconduct procedures relating to authorized polysomnographic technologists, the State Board for Respiratory Therapy shall serve as the state board responsible for all such procedures.

Text of proposed rule and any required statements and analyses may be obtained from: Mary Gammon, State Education Department, Office of Counsel, State Education Building, Room 148, 89 Washington Ave., Albany, NY 12234, (518) 474-6400, email: legal@mail.nysed.gov

Data, views or arguments may be submitted to: Office of the Professions, Office of the Deputy Commissioner, State Education Department, 89 Washington Avenue, 2M, Albany, NY 12234, (518) 474-1941, email: opdepcom@mail.nysed.gov

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

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.

Section 212 of the Education Law authorizes the department to charge fees for certifications or permits for which fees are not otherwise provided.

Section 6504 of the Education Law provides that admission to the professions shall be supervised by the Board of Regents, and administered by the Education Department, assisted by a state board for each profession.

Section 6506 of the Education Law provides that the Board of Regents shall supervise the admission to and the practice of the professions.

Paragraph (a) of subdivision (2) of section 6507 of the Education Law authorizes the Commissioner of Education to promulgate regulations in administering the admission to and practice of the professions.

Section 6508 of the Education Law authorizes the Board of Regents to appoint a board for each profession for the purpose of assisting the board of regents and the department on matters of professional licensing, practice, and conduct.

Subdivision (5) of section 8505 of the Education Law, as added by Chapter 262 of the Laws of 2011, establishes an exemption from the Respiratory Therapy Practice Act for polysomnographic technologists and authorizes the Commissioner to define polysomnographic technology services and to establish standards for authorization to practice as a polysomnographic technologist.

2. LEGISLATIVE OBJECTIVES:

The proposed new section 52.42 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by outlining the coursework and clinical experience required for registration as a licensure-qualifying polysomnographic technology program.

The proposed amendment of the title of Subpart 79-4 of the Regulations of the Commissioner of Education carries out the intent of the aforementioned statutes by adding the new profession of Polysomnographic Technologist.

Proposed section 79-4.8 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by defining the practice of polysomnographic technology.

Proposed section 79-4.9 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by setting forth the general requirements and procedures for professional authorization.

Proposed sections 79-4.10, 79-4.11, and 79-4.12 of the Regulations of the Commissioner establish the educational, experience, and examination requirements, respectively.

Proposed section 79-4.13 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by mandating that applicants shall be of good moral character, as determined by the Department.

Proposed section 79-4.14 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by creating a student authorization to allow supervised students in an approved program to obtain clinical experience.

Proposed section 79-4.15 of the Regulations carries out the intent of the aforementioned statutes by creating a limited permit to allow a person who fulfills all requirements for authorization, except exam, to practice under supervision for one year. A limited permit could be renewed for one additional year.

Proposed section 79-4.16 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by setting forth grandparenting provisions to enable those who began practicing in the field prior to the new law and regulations, to receive authorization to continue to practice if they meet specified requirements, including experience requirements. Individuals applying under these special provisions must

meet the grandparenting requirements by February 3, 2014 or by such time as four licensure-qualifying programs in polysomnographic technology have been registered by the Department, whichever is later.

Finally, proposed section 79-4.17 of the Regulations of the Commissioner carries out the intent of the aforementioned statutes by implementing the statutory provision that polysomnographic technologists be subject to the full disciplinary and regulatory authority of the Board of Regents and the Department by designating the State Board for Respiratory Therapy as the responsible state board.

3. NEEDS AND BENEFITS:

The proposed rule is necessary to implement the provisions of Chapter 262 of the Laws of 2011, which creates an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorizes the Department to define, in regulation, the practice of polysomnographic technology and set forth the standards to be met for authorization.

4. COSTS:

(a) Cost to State: None.

(b) Cost to local government: None.

(c) Cost to private regulated parties: In accordance with the requirement that the Commissioner prescribe educational requirements for authorization as a polysomnographic technologist, applicants for authorization, after the expiration of the grandparenting period, will incur the cost of an associate's degree-level education. Chapter 262 of the Laws of 2011 requires an application fee of \$300 and a triennial registration fee of \$300. The proposed rule also imposes a limited permit fee of \$70 to allow a person who fulfills all requirements for authorization, except exam, to practice under supervision for one year.

(d) Costs to the regulatory agency: It is anticipated that the costs to the State Education Department in implementing the requirements of Chapter 262 of the Laws of 2011 will be offset by the application fees, limited permit fees and registration fees discussed above under Costs to Private Regulated Parties.

5. LOCAL GOVERNMENT MANDATES:

The proposed rule does not impose any program, service, duty, or responsibility upon local governments.

6. PAPERWORK:

The proposed rule requires the submission of an application and supporting documentation.

7. DUPLICATION:

The proposed rule is necessary to implement Chapter 262 of the Laws of 2011 and does not duplicate other existing State or Federal requirements.

8. ALTERNATIVES:

Alternatives were considered to various aspects of these regulations, particularly as to the eligibility qualifications for the grandparenting provisions and the duration of the grandparenting period. After discussion with stakeholders, the proposed regulations were modified to ensure a level of experience and qualification necessary for public protection, while not adversely impacting the pipeline of eligible polysomnographic technologists.

9. FEDERAL STANDARDS:

There are no Federal standards regarding the matters addressed by the proposed rule.

10. COMPLIANCE SCHEDULE:

The proposed rule takes effect on August 3, 2012, the effective date of Chapter 262 of the Laws of 2011 and must be complied with on the stated effective date. No additional period of time is necessary to enable regulated parties to comply.

Regulatory Flexibility Analysis

1. EFFECT OF RULE:

The purpose of the proposed rule is to implement Chapter 262 of the Laws of 2011, which created an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorized the Department to define in regulation the practice of polysomnographic technology and set forth the standards to be met for authorization.

As of July 2012, the Board of Registered Polysomnographic Technologists website lists 547 registered or certified sleep technologists in New York State who have passed a national certifying examination. The number of uncertified persons currently providing polysomnographic technology services is unknown. Reliable data on the number of individuals providing polysomnographic technology services and employed by a small business or by a local government is not available for New York State, although it is estimated that there are approximately 400 private sleep centers in New York State, most with fewer than 100 employees. Of these, it is estimated that there may be approximately 1,000 individuals providing polysomnographic technology services.

2. COMPLIANCE REQUIREMENTS:

The proposed rule implements Chapter 262 of the Laws of 2011, which created an exemption to the Respiratory Therapy Practice Act for the pro-

vision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorized the Department to define, in regulation, the practice of polysomnographic technology and set forth the standards to be met for authorization. Those wishing to be authorized to practice polysomnographic technology will be required to file an application and to meet the professional study, experience, and examination requirements specified in the proposed regulation. Those wishing to work after completing all requirements for authorization except the examination requirements will be required to file a limited permit application.

3. PROFESSIONAL SERVICES:

The proposed rule will require small businesses and local governments to use only authorized professionals to perform polysomnographic technology, but is not expected to impact the number of individuals employed to provide such services. It is not anticipated that small businesses or local governments will be required to obtain professional services to comply with the proposed rule.

4. COMPLIANCE COSTS:

The proposed rule does not impose any direct costs on small business or local governments. The proposed rule will require small businesses and local governments to use only authorized professionals to perform polysomnographic technology. In accordance with the requirement that the Commissioner prescribe educational requirements for authorization as a polysomnographic technologist, applicants for authorization, after the expiration of the grandparenting period, will incur the cost of an associate's degree-level education. Chapter 262 of the Laws of 2011 requires an application fee of \$300 and a triennial registration fee of \$300. The proposed rule also imposes a limited permit fee of \$70 to allow a person who fulfills all requirements for authorization, except exam, to practice under supervision for one year.

5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The proposed rule will not impose any technological requirements on regulated parties, including those that are classified as small businesses, and the proposed rule is economically feasible. See above "Compliance Costs" for the economic impact of the regulation.

6. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement the provisions of Chapter 262 of the Laws of 2011, which creates an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorizes the Department to define, in regulation, the practice of polysomnographic technology and set forth the standards to be met for authorization. The proposed fee structure was determined by the legislature to be the minimum needed to support additional costs. It is on a par with fee structures in other professions. It was determined that the authorization of polysomnographic technologists who meet minimum requirements established in the proposed regulations best ensures the protection of the health and safety of the public.

7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION:

The New York State Society of Sleep Medicine and the New York State Society for Respiratory Care, which represent physicians specializing in sleep medicine, polysomnographic technologists, respiratory therapists and respiratory therapy technicians, and include members who have experience in a small business environment, were consulted and provided input into the development of the proposed rule. The State Education Department also solicited comments on the proposed rule from the American Academy of Sleep Medicine and the American Association of Sleep Technologists and the comments that were received were considered in the development of the rule.

Rural Area Flexibility Analysis

1. TYPES AND ESTIMATED NUMBER OF RURAL AREAS:

The proposed rule applies to all polysomnographic technologists and physicians who supervise these professionals who live in the State, including those in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The proposed rule implements Chapter 262 of the Laws of 2011, which created an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorized the Department to define, in regulation, the practice of polysomnographic technology and set forth the standards to be met for authorization. Those wishing to be authorized to practice polysomnographic technology will be required to file an application and to meet the professional study, experience, and examination requirements specified in the proposed regulation. Those wishing to work after completing all requirements for authorization except the examination requirements will be required to file a limited permit application. It is not anticipated that professional services will be required to comply with the proposed regulation.

3. COSTS:

The proposed rule does not impose any direct costs on small business or local governments. The proposed rule will require small businesses and local governments to use only authorized professionals to perform polysomnographic technology. In accordance with the requirement that the Commissioner prescribe educational requirements for authorization as a polysomnographic technologist, applicants for authorization, after the expiration of the grandparenting period, will incur the cost of an associate's degree-level education. Chapter 262 of the Laws of 2011 requires an application fee of \$300 and a triennial registration fee of \$300. The proposed rule also imposes a limited permit fee of \$70 to allow a person who fulfills all requirements for authorization, except exam, to practice under supervision for one year.

4. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement the provisions of Chapter 262 of the Laws of 2011, which creates an exemption to the Respiratory Therapy Practice Act for the provision of polysomnographic technology services by persons authorized by the Department. Chapter 262 authorizes the Department to define, in regulation, the practice of polysomnographic technology and set forth the standards to be met for authorization. The proposed fee structure was determined by the legislature to be the minimum needed to support additional costs. It is on a par with fee structures in other professions. It was determined that authorization of polysomnographic technologists who meet minimum requirements established in the proposed rule will best ensure the protection of the health and safety of the public. Because these minimum requirements must uniformly apply to authorized polysomnographic technologists across the State in order to ensure public health and safety, it was not possible to prescribe lesser standards for individuals in rural areas, or to exempt them from the provisions of the proposed rule.

5. RURAL AREA PARTICIPATION:

The State Education Department solicited comments on the proposed rule from the New York State Society for Respiratory Care, the New York State Society of Sleep Medicine, the American Academy of Sleep Medicine, and the American Association of Sleep Technologists, and the comments that were received were considered in the development of the rule.

Job Impact Statement

The proposed rule is required to implement Chapter 262 of the Laws of 2011, authorizing the practice of polysomnographic technology. The proposed rule defines the practice of polysomnographic technology and establish the qualifications for the issuance by the Department of an authorization to provide polysomnographic technology services. It is not anticipated that the proposed proposed rule will increase or decrease the number of jobs to be filled. The proposed rule includes special provisions which will enable most current practitioners to become authorized polysomnographic technologists. Because it is apparent from the nature of the proposed rule that it will not adversely impact the number of jobs, a job impact statement is not required and one has not been prepared.

Department of Environmental Conservation

EMERGENCY RULE MAKING

Open Fires

I.D. No. ENV-31-12-00003-E

Filing No. 696

Filing Date: 2012-07-13

Effective Date: 2012-07-13

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

Action taken: Amendment of Part 215 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305 and 19-0312

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

Specific reasons underlying the finding of necessity: As adopted, Part 215 prohibits certain types of open fires throughout the state. An excep-

tion to the open fires prohibition allows the on-site burning in any town with a total population less than 20,000 of downed limbs and branches (including branches with attached leaves or needles) less than six inches in diameter and eight feet in length between May 15th and the following March 15th. Section 215.3(a). The current rule, therefore, prohibits certain "brush burning" in smaller communities from March 16th through May 14th. This burn ban period has historically been the state's high fire-risk period. Several factors enable wildfires to start easily and spread quickly at this time, including the lack of green vegetation, abundance of available fuels such as dry grass and leaves, warm temperatures and wind.

Data indicates that New York State is currently experiencing a High Fire danger risk due to dryer than normal conditions. The National Wildfire Coordinating Group (NWCG) describes this High Fire status as follows: All fine dead fuels ignite readily and fires start easily from most causes. Unattended fires are likely to escape. Fires spread rapidly and short-distance spotting is common. High-intensity burning may develop on slopes or in concentrations of fine fuels. Fires may become serious and their control difficult unless they are attacked successfully while small. All indications are that the hot, dry weather will continue throughout most of the summer. As of July 13, 2012 there are five active fires in the New York municipalities of Richmondville, North Elba, Indian Lake, Caroga, and Chester; comprising a total of 18.8 acres. In order to ensure public safety the Department by this emergency rule making is expanding the high fire-risk burn ban period until October 10th.

Subject: Open Fires.

Purpose: To expand the high fire-risk burn ban period until October 10th.

Text of emergency rule: 6 NYCRR Part 215, Open Fires

Section 215.3 (a) is amended as follows:

Section 215.3 Exceptions and restricted burning.

Burning in an open fire, provided it is not contrary to other law or regulation, will be allowed as follows:

(a) On-site burning in any town with a total population less than 20,000 of downed limbs and branches (including branches with attached leaves or needles) less than six inches in diameter and eight feet in length between [May 15th] *October 11th* and the following March 15th.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires October 10, 2012.

Text of rule and any required statements and analyses may be obtained from: Robert Stanton, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: airregs@gw.dec.state.ny.us

Regulatory Impact Statement

STATUTORY AUTHORITY

The promulgation of amendments to Part 215 is authorized by the following sections of the Environmental Conservation Law (ECL) which, taken together, clearly empower the Department to implement the rule and amend it:

Section 1-0101. This Section declares it to be the policy of New York State to conserve, improve and protect its natural resources and environment and control air pollution in order to enhance the health, safety and welfare of the people of New York State and their overall economic and social well being. Section 1-0101 further expresses, among other things, that it is the policy of New York State to coordinate the State's environmental plans, functions, powers and programs with those of the federal government and other regions and manage air resources to the end that the State may fulfill its responsibility as trustee of the environment for present and future generations. This Section also provides that it is the policy of New York State to foster, promote, create and maintain conditions by which man and nature can thrive in harmony by providing that care is taken for air resources that are shared with other states.

Section 3-0301. This Section empowers the Department to promulgate regulations to carry out the environmental policy of New York State set forth in Section 1-0101 and specifically empowers the Department to cooperate with officials and representatives of the federal government, other states and interstate agencies regarding problems affecting the environment of New York State. Section 3-0301 specifically empowers the Department to provide for the prevention and abatement of air pollution.

Section 9-0105. This Section generally empowers the Department to manage forests, including the prevention of fire.

Section 9-1103. This Section specifically empowers the Department to prevent and control fires.

Section 19-0103. This Section declares that it is the policy of New York State to maintain the purity of air resources and to require the use of all available practical and reasonable methods to prevent and control air pollution in the State.

Section 19-0105. This Section declares that it is the purpose of Article 19 of the ECL to safeguard the air resources of New York State under a program which is consistent with the policy expressed in Section 19-0103 and in accordance with other provisions of Article 19.

Section 19-0301. This section declares that the Department has the power to promulgate regulations for preventing, controlling or prohibiting air pollution.

Section 19-0303. This Section provides that the terms of any air pollution control regulation promulgated by the Department may differentiate between particular types and conditions of air pollution and air contamination sources.

Section 19-0305. This Section authorizes the Department to enforce the codes, rules and regulations established in accordance with Article 19.

Section 70-0707. This Section empowers the Department to promulgate procedural rules and regulations.

Sections 71-2103 and 71-2105. These sections include provisions for the civil and criminal enforcement of Article 19 of the ECL.

LEGISLATIVE OBJECTIVES

It is the declared policy of the state of New York, as pronounced by the Legislature in the Environmental Conservation Law, to maintain a reasonable degree of purity of the air resources of the state consistent with the public health and welfare and the public enjoyment and the protection of physical property and other resources. That policy requires the use of all available practical and reasonable methods to prevent and control air pollution in the state of New York. The department has the power, as provided for in the Environmental Conservation Law, to formulate, adopt and promulgate, amend and repeal codes and rules and regulations for preventing, controlling or prohibiting air pollution in a manner consistent with that policy. In furtherance of that policy and the Legislature's objectives, the proposed rule amendments will expand the high fire risk burn ban period to further ensure public safety.

NEEDS AND BENEFITS

As adopted, Part 215 prohibits certain types of open fires throughout the state. An exception to the open fires prohibition allows the on-site burning in any town with a total population less than 20,000 of downed limbs and branches (including branches with attached leaves or needles) less than six inches in diameter and eight feet in length between May 15th and the following March 15th. Section 215.3 (a). The current rule, therefore, prohibits certain "brush burning" in smaller communities from March 16th through May 14th. This burn ban period has historically been the state's high fire-risk period. Several factors enable wildfires to start easily and spread quickly at this time, including the lack of green vegetation, abundance of available fuels such as dry grass and leaves, warm temperatures and wind.

Data indicates that New York State is currently experiencing a High Fire danger risk due to drier than normal conditions. The National Wildfire Coordinating Group (NWCG) describes this High Fire status as follows: All fine dead fuels ignite readily and fires start easily from most causes. Unattended fires are likely to escape. Fires spread rapidly and short-distance spotting is common. High-intensity burning may develop on slopes or in concentrations of fine fuels. Fires may become serious and their control difficult unless they are attacked successfully while small. All indications are that the hot, dry weather will continue throughout most of the summer. As of July 13, 2012 there are five active fires in the New York municipalities of Richmondville, North Elba, Indian Lake, Caroga, and Chester; comprising a total of 18.8 acres. In order to ensure public safety the Department by this emergency rule making is expanding the high fire-risk burn ban period until October 10th.

COSTS

This emergency rule making will not impose additional costs on local governments or municipalities. While the exemption for residential brush burning in smaller communities will be postponed for an additional 90 days to ensure public safety, no additional costs are anticipated for individuals in these communities to comply with the emergency rule.

PAPERWORK

There will be no additional paperwork.

LOCAL GOVERNMENT MANDATES

No additional record keeping, reporting or other requirements would be placed upon local governments if the amendment to Part 215 is promulgated.

DUPLICATION

This emergency rule making will not be duplicative with any other law or regulation.

ALTERNATIVES

The Department evaluated the no action alternative in addition to the emergency rule. If this emergency rule is not adopted, the potential fire-risk would be greater. Failure to implement the emergency rule may unnecessarily increase the risk to public safety in this State.

FEDERAL STANDARDS

There are no applicable federal regulations pertaining to open burning.

COMPLIANCE SCHEDULE

Compliance with this emergency regulation will be required immediately in order to ensure public safety.

Regulatory Flexibility Analysis

EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS

The proposed amendments to Part 215 apply statewide and do not have an effect on small business and local governments.

COMPLIANCE REQUIREMENTS

The revisions to Part 215 take effect immediately upon filing with NYS Department of State.

PROFESSIONAL SERVICES

No additional professional services would be required in order to comply with the provisions of this emergency rule.

COMPLIANCE COSTS

This emergency rule does not impose additional costs on small businesses or local governments.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY

There are no technological or economic impediments applicable to the revisions to Part 215.

MINIMIZING ADVERSE IMPACT

No adverse impacts.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

This emergency rule making ensures public safety statewide. The Department and Governor's Office issued a statewide press release warning residents of the heightened danger of wildfires.

Rural Area Flexibility Analysis

TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED

The proposed amendments to Part 215 apply statewide and may have a greater impact in rural areas.

COMPLIANCE REQUIREMENTS

The revisions to Part 215 take effect immediately upon filing with NYS Department of State.

COSTS

This emergency rule making should not impose additional costs. While the exemption for residential brush burning in smaller communities will be postponed until October 11th to ensure public safety, no additional costs are anticipated for individuals in these communities to comply with the emergency rule.

MINIMIZING ADVERSE IMPACTS

No adverse impacts.

RURAL AREA PARTICIPATION

This emergency rule making ensures public safety statewide, including rural areas of the State. In addition, the Department and Governor's Office issued a statewide press release warning residents of the heightened danger of wildfires.

Job Impact Statement

NATURE OF IMPACT

The impact of this emergency rule making will be statewide.

CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED

While there may be a temporary opportunity for jobs handling brush, it is difficult to determine the exact number of jobs or employment opportunities affected.

REGIONS OF ADVERSE IMPACT

None.

MINIMIZING ADVERSE IMPACT

No adverse impacts.

SELF-EMPLOYMENT OPPORTUNITIES

There may be a temporary self-employment opportunity involved with handling brush; it is difficult to determine the exact number of jobs.

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

Mandatory V-Notching Rules for Legal Size Female Egg-Bearing American Lobster

I.D. No. ENV-31-12-00001-EP

Filing No. 688

Filing Date: 2012-07-11

Effective Date: 2012-07-11

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

Proposed Action: Addition of section 44.1(r); and amendment of section 44.7 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 3-0301, 13-0105 and 13-0329

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

Specific reasons underlying the finding of necessity: These regulations are necessary for New York to come into compliance with the Fishery Management Plan (FMP) for American lobster as adopted by the Atlantic States Marine Fisheries Commission (ASMFC), to avoid potential federal sanctions for lack of compliance with such plan, and to begin rebuilding the southern New England lobster stock. 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 State's fisheries. 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 federal sanctions on the particular fishery in that state. A closure of the New York's lobster fishery could result in significant adverse impacts to the State's economy. During 2010, New York's 360 resident commercial lobster license holders harvested almost 800,000 pounds of lobsters for a value of approximately \$3.4 million. In addition, there were 1,095 non-commercial lobster license holders who utilized the State's lobster resource. New York State must adopt regulations that are in compliance with the FMP which are intended to start rebuilding the depleted southern New England lobster stock.

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 to meet the new V-notch implementation date. The V-notch rule for Lobster Conservation Management Area (LMA) 4, which includes New York State waters, was scheduled to be implemented in 2013. The implementation date was moved up to July 1, 2012 due to concerns about the ability of the lobster industry to V-notch enough legal size egg-bearing

females to remain in compliance with the FMP if the program started in 2013. Due to the short timeframe available, the Bureau of Marine Resources (BMR) seeks to adopt by an emergency rule making the regulations needed to become in compliance with the Atlantic States Marine Fisheries Commission (ASMFC) American Lobster Fishery Management Plan (FMP) as soon as possible. If New York is found out of compliance by ASMFC, it may result in federal sanctions and a moratorium on lobster harvest in New York. It is in the best interests of New York State's lobster fishing industry to remain in compliance with ASMFC lobster requirements by not promulgating the proposed regulation through the normal rule making process.

Subject: Mandatory V-notching rules for legal size female egg-bearing American lobster.

Purpose: To implement ASMFC American Lobster Fishery Management Plan Addendum XVII and remain in compliance with ASMFC.

Text of emergency/proposed rule: Section 44.1 of 6 NYCRR is amended read as follows:

Existing subdivisions 44.1(a) through 40.1(q) remain the same.

New subdivision 44.1(r) of 6 NYCRR is adopted to read as follows:

(r) *“V-notched lobster” is defined as any female lobster that bears a notch or indentation in the base of the flipper that is at least as deep as 1/8 inch, with or without setal hairs. V-notched lobster also means any female lobster which is mutilated in a manner which could hide, obscure, or obliterate such a mark.*

Existing sections 44.2 through 44.6 remain unchanged.

Existing section 44.7 of 6 NYCRR is repealed.

New section 44.7 is adopted to read as follows:

44.7 Mandatory V-Notching

(a) *All legal size egg-bearing female lobsters captured in LMA 4 must be V-notched and immediately released back in the water. V-notches must be to the right of the center flipper as viewed from the rear of the female lobster when the underside of the lobster is down. The V-notch should be made by means of a sharp bladed instrument, at least one quarter inch in depth and not greater than one half inch in depth and tapering to a sharp point.*

(b) *Permittees who designate more than one LMA in their lobster permit application shall abide by the V-notching rules of the most restrictive of the designated LMAs, regardless of where they are fishing. Any person who possesses more than one commercial lobster permit shall abide by the V-notching rules of the most restrictive of the LMAs designated on all of their permits, regardless of where they are fishing. Any permittee who fails to designate an LMA on their application shall abide by the most restrictive of the LMAs 1, 2, 3, 4, 5, 6, and Outer Cape Cod (OCC) V-notching rules. The department shall provide license holders written notice of the current V-notching rules of LMAs 1, 2, 3, 4, 5, 6 and OCC annually.*

(c) *The landing or possession of any V-notched female lobster is prohibited. This prohibition applies to all persons other than a final purchaser or consumer.*

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 October 8, 2012.

Text of rule and any required statements and analyses may be obtained from: Kim McKown, New York State Department of Environmental Conservation, 205 North Belle Mead Road, Suite 1, East Setauket, NY 11733, (631) 444-0454, email: kamckown@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 3-0301, 13-0105 and 13-0329 authorize the Department of Environmental Conservation (the department) to establish by regulation V-notch regulations for Lobster Conservation Management Areas 1, 2, 3, 4, 5, and Outer Cape Cod (OCC) for American lobsters.

2. Legislative objectives:

It is the objective of the above-cited legislation that the department 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:

The objective of Addendum XVII to ASMFC American Lobster Fishery Management Plan (FMP) is to reduce harvest of lobster in Southern New England (SNE) by 10 percent to initiate stock rebuilding. Lobster Conservation Management Teams (LCMT) met and determined implementation measures. These measures include that all legal size egg-bearing female lobsters captured in LMA 2, 4 and 5 must be V-notched and immediately released back in the water. New York permit holders harvest lobsters in all three areas, but LMA 4 is the only one which contains New York waters. The Addendum's implementation date is 2013, but due to concerns about not meeting the reduction by the 2014 compliance date, the V-notch implementation date was moved forward to 2012. New York must implement the new V-notch rules by July 10, 2012 to become in compliance with the ASMFC lobster FMP as soon as possible, which necessitates an emergency adoption of the rule. Failure by New York to adopt this measure could result in a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York.

Pursuant to section 13-0371 of the ECL, New York State is a party to the Atlantic States Marine Fisheries Compact which established the Atlantic States Marine Fisheries Commission (ASMFC). ASMFC facilitates the cooperative management of marine, shell and anadromous fish species among the fifteen member states. The principal mechanism for implementation of cooperative management of migratory fish is ASMFC's Interstate Fishery Management Plans for individual species or groups of fish. The Fisheries Management Plans (FMPs) are designed to promote the long-term health of these species, preserve resources, and protect the interests of both commercial and recreational fishers.

Under the provisions of the Atlantic Coastal Fisheries Cooperative Management Act (ACFCMA), ASMFC determines if states have implemented provisions of FMPs with which they are required to comply. If ASMFC determines that a state is non-compliant with an FMP, it so notifies the U.S. Secretary of Commerce. If the Secretary concurs in the non-compliance determination, the Secretary promulgates and enforces a complete prohibition on all fishing for the subject species in the waters of the non-compliant state until the state comes into compliance with the FMP.

Environmental Conservation Law section 13-0329(16), authorizes the department to adopt regulations for the management of lobster in LMAs 1, 2, 3, 4, 5 and Outer Cape Cod (OCC), provided that such regulations must be consistent with the fishery management plans for lobster adopted by ASMFC.

Addendum XVII to the Fishery Management Plan (FMP) for American Lobster requires New York to implement mandatory V-notch program for LMAs 2, 4 and 5.

Failure by New York to adopt these amendments could result in a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York. The promulgation of this regulation on an emergency basis is necessary in order for the department to meet compliance deadlines and avoid closure of the lobster fishery and the economic hardship that would be associated with such closure. During 2010, New York's 360 resident commercial lobster license holders harvested almost 800,000 pounds of lobsters for a value of approximately \$3.4 million. In addition, there were 1,095 non-commercial lobster license holders.

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:

The proposed rule will impose costs to commercial lobster permit holders who indicate on their permit that they fish in LMA 2, 4 or 5. The objective of Addendum XVII is to decrease harvest by 10 percent. We estimate the rule would cost New York's lobster industry as a whole approximately \$45,000 annually using 2010 lobster harvest data.

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

The department will incur limited costs associated with both the implementation and administration of these rules, including the costs relating to notifying permit holders of the new rules and enforcement.

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:

(a) Alternative management measures.

Addendum XVII to the Atlantic States Marine Fisheries Commission (ASMFC) American lobster Fishery Management Plan adopted a 10 percent reduction in harvest to help rebuild the depleted Southern New England lobster stock. The Addendum recommended size limits and seasonal and area closures as management measures. Lobster Conservation Management Teams (LCMT) 2, 4, and 5 proposed conservation equivalency V-notch programs which were approved by the ASMFC Lobster Board. Alternative measures would need to be proposed by the Area LCMT and approved by the ASMFC Lobster Management Board.

(b) No Action.

The ASMFC American Lobster FMP requires a 10 percent reduction in harvest, which will be implemented all or in part by mandatory V-notching for LMAs 2, 4 and 5. Implementation measures were determined by the LCMTs, which are composed of lobster industry representatives. If the department does not adopt these rules, delayed implementation measures may be imposed or the state could be judged out of compliance with the ASMFC American Lobster FMP. In either event the commercial and recreational lobster fisheries would be closed for some duration of time. This would cause significant hardship on resource users. The estimated dollar value of New York's commercial lobster harvest was approximately \$3.4 million in 2011, the most recent year with an estimate of the value of the lobster fishery.

9. Federal standards:

The amendments to Part 44 are in compliance with the ASMFC fishery management plan for American lobster.

10. Compliance schedule:

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

Regulatory Flexibility Analysis

1. Effect of rule:

The amendment of 6 NYCRR Part 44 implements a mandatory V-notch program for lobster harvesters in Lobster Conservation Management Areas (LMA) in which they are required by the Atlantic States Marine Fisheries Commission (ASMFC). It is currently required in LMA 2, 4, and 5. These rules will affect both commercial and non-commercial lobster license holders. These regulations do not apply directly to local governments, and will not have any direct effects on local governments.

The objective of Addendum XVII to ASMFC American Lobster Fishery Management Plan (FMP) is to reduce harvest of lobster in Southern New England (SNE) by 10 percent to initiate stock rebuilding. Lobster Conservation Management Teams (LCMT) met

and determined implementation measures. These measures include that all legal size egg-bearing female lobsters captured in LMA 2, 4 and 5 must be V-notched and immediately released back in the water. New York permit holders harvest lobsters in all three areas, but LMA 4 is the only one which contains New York waters. The Addendum's implementation date is 2013, but due to concerns about not meeting the reduction by the 2014 compliance date, the V-notch implementation date was moved forward to 2012. New York must implement the V-notch program by July 10, 2012 to become in compliance with the ASMFC lobster FMP as soon as possible, which necessitates the emergency adoption of the rule. Failure by New York to adopt this measure could result in a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York.

In 2010, there were 360 licensed resident commercial lobster fishers in New York; most are self-employed. The objective of Addendum XVII is to decrease harvest by 10 percent. We estimate the rule would cost New York's LMA 2, 4, and 5 lobster harvesters \$45,000 annually using 2010 lobster harvest data. The regulatory changes also apply to non-commercial harvesters. There were 1,095 non-commercial lobster permit holders in 2010. In 2010, approximately 30 percent of the non-commercial permit holders fished in areas that would be impacted by the rule.

In the long term, the maintenance of sustainable fisheries will have a positive effect on small businesses in the fisheries in question. Any short-term losses in participation, harvest and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. Protection of the lobster resource is essential to the survival of the commercial and non-commercial fisheries. These regulations are designed to protect stocks while allowing appropriate harvest, to prevent over-harvest, and to continue to rebuild or maintain the stocks for future utilization.

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 expenditures on the part of affected businesses in order to comply with the changes. The changes required by this action have been determined to be economically feasible for the affected parties.

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

6. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for the department to become in compliance with the FMP for lobster as soon as possible. The regulations are intended to protect the lobster resource and avoid the adverse impacts that would be associated with closure of the fishery for non-compliance with the FMP.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, as well as wholesale and retail outlets and other support industries. Failure to comply with an FMP and take required actions to protect a marine fishery could hinder the rebuilding of the SNE lobster stock and have an adverse impact on the commercial and recreational fisheries for that species, as well as the supporting industries for those fisheries. These regulations are being adopted in order to initiate stock rebuilding while allowing for some harvest.

7. Small business and local government participation:

ASMFC had public hearings on Addendum XVII where all resident commercial lobster license holders were invited. In addition, the LMA 4 Lobster Conservation Management Team met to decide on implementation measures for this Addendum.

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

8. Cure period or other opportunity for ameliorative action:

Pursuant to SAPA 202-b (1-a)(b), no such cure period is included in the rule because of the potential adverse impact on the resource. Cure periods for the illegal taking of fish or wildlife are neither desirable nor recommended. Immediate compliance is required to ensure the general welfare of the public and the resource is protected.

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 lobster 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 44, a Rural Area Flexibility Analysis is not required.

Job Impact Statement

1. Nature of impact:

The amendment of 6 NYCRR Part 44 will implement the V-notch management measures of Addendum XVII to the Atlantic States Marine Fisheries Commission (ASMFC) American Lobster Fishery Management Plan (FMP). The objective of this Addendum is to reduce the harvest of lobster in Southern New England (SNE) by 10 percent to initiate stock rebuilding. This rule specifically addresses mandatory V-notch programs for lobster harvesters in Lobster Conservation Management Areas (LMA) in which they are required by the Atlantic States Marine Fisheries Commission (ASMFC). It is currently required in LMA 2, 4, and 5. New York permit holders harvest lobsters in all three areas, but LMA 4 is the only one which contains New York waters. The mandatory V-notch program requires lobster permit holders to cut a notch in the tail fin of any legal size female egg-bearing lobster and return it to the water. V-notching lobsters protects them from harvest for approximately two years. Failure by New York to adopt this measure could result in a determination of non-compliance by ASMFC and the Secretary of Commerce and the imposition of a lobster fishery closure - a complete ban on fishing for lobster in New York. These rules will affect both commercial and non-commercial permit holders.

2. Categories and numbers affected:

In 2010, there were 360 licensed resident commercial lobster fishers in New York, most are self-employed. The objective of Addendum XVII is to decrease harvest by 10 percent. We estimate the rule would cost New York's LMA 2, 4, and 5 lobster harvesters \$45,000 annually using 2010 lobster harvest data. The regulatory changes also apply to non-commercial harvesters. There were 1,095 non-commercial lobster permit holders in 2010. In 2010, approximately 30 percent of the non-commercial permit holders fished in areas that would be impacted by the rule.

3. Regions of adverse impact:

This rulemaking will impact lobster permit holders fishing in the Marine District of New York in LMAs 2, 4 and 5 which are located in the near shore Atlantic Ocean from Cape Cod through Cape Hatteras.

4. Minimizing adverse impact:

This rule making will decrease the potential for closure of the lobster fishery in New York. If the fishery were to close, it would reduce harvest by 100 percent rather than the 10 percent reduction of the Addendum. During 2010, New York's 360 resident commercial lobster license holders harvested almost 800,000 pounds of lobsters for a value of approximately \$3.4 million. In addition, there were 1,095 non-commercial lobster license holders.

Thus, the restrictions are in fact an effort to minimize the potential for job loss due to a closure of the fishery. In the long-term, the maintenance of sustainable fisheries will have a positive effect on lobster fishers. Any short-term losses in participation, harvest and sales will be offset by rebuilding of fishery stocks. Protection of the lobster resource is important to the survival of the lobster fishers and the businesses that support in these fisheries.

NOTICE OF ADOPTION

Sportfish Activities and Associated Activities

I.D. No. ENV-07-12-00005-A

Filing No. 690

Filing Date: 2012-07-12

Effective Date: 2012-10-01

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

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

Statutory authority: Environmental Conservation Law, sections 3-0301, 11-0303, 11-0305, 11-0317, 11-1301, 11-1303, 11-1316 and 11-1319

Subject: Sportfish activities and associated activities.

Purpose: To revise sportfishing regulations and associated activities including snakeheads caught by angling and commercial bait collection.

Substance of final rule: The purpose of this rule making is to amend the Department of Environmental Conservation's (department) general regulations governing sportfishing (6 NYCRR Part 10) and associated (6 NYCRR Part 35) regulations governing Commercial Inland Fisheries. Following biennial review of the department's fishing regulations, department staff have determined that the proposed amendments are necessary to maintain or improve the quality of the State's fisheries resources. Changes to sportfishing regulations are intended to promote optimum opportunity for public use consistent with resource conservation.

The following is a summary of the amendments that the department is proposing:

- Prohibit fishing in the following stream sections from March 16 until the first Saturday in May (opening day for walleye) to protect spawning walleye: Lake Pleasant outlet to the mouth of the Kunjamuk River, Hamilton County; and Little Sandy Creek, Oswego County, from the intersection of the channelized area located adjacent to Koster Drive downstream of the State Rt. 3 bridge to the lower boundary of the public fishing rights section located upstream of the State Rt. 3 bridge.
- Remove special walleye regulations (18 inch minimum size and daily limit of 3/day) and apply the statewide regulation (15 inch minimum size and 5/day) for Lime Lake, Cattaraugus County; and Bear and Findley lakes, Chautauqua County because these populations no longer require the added protection.
- Change the walleye daily limit for Lake Erie and the Upper Niagara River to 6 per day to harmonize limits with bordering jurisdictions.
- Eliminate the special black bass closed season for Oneida Lake and implement statewide regulations to create additional fishing opportunity and expand statewide consistency.
- Apply statewide black bass regulations for Allen Lake, Allegany County, and Cassadaga lakes, Chautauqua County as recent surveys have shown stable bass populations in these waters.
- Extend the catch and release only regulation for brook trout into tidal streams in Suffolk County to provide additional protection to salter brook trout populations.
- Eliminate Suffolk County tidal trout regulations and apply freshwater stream trout regulations to these sections because the anticipated sea run brown trout fishery did not develop.
- Change minimum length for salmonids in the Upper Niagara River to "any size" because it is not necessary that this section be in sync with the current 12 inch minimum length requirement for Lake Erie, plus this change provides for the allowable harvest of salmonids (any size) below the first impassable barrier of the River. By this elimination, the regulations are simplified and the harvest of newly stocked trout that are part of an urban put and take fishery (located below the first impassable barrier) is allowed for.
- Change the trout regulations for the Titicus Outlet, Westchester County, and Esopus Creek, Shandaken tunnel outlet to Ashokan Reservoir, Ulster County, to a daily limit of 5 fish with no more than 2 trout longer than 12 inches to increase catch rates of trout.
- Delete the 12 inch size and daily limit of 3 fish/day for kokanee in Glass Lake, Rensselaer County because DEC no longer stocks this species.

- Open Lake Kushaqua and Rollins Pond, Franklin County, to ice fishing for lake trout as these stocked populations are considered stable enough to support this activity.

- Restore all year trout fishing in Saranac River from the Lake Flower Dam in the Village of Saranac Lake to the Pine Street bridge, as this regulation was mistakenly omitted in 2010.

- Open Blue Mountain Lake, Eagle Lake, Forked Lake, Gilman Lake, South Pond and Utowana Lake, Hamilton County, to ice fishing for landlocked salmon and reduce the daily limit for lake trout in these waters from 3/day to 2/day. Combined with an existing regulation, this change will create a suite of nine lakes in Hamilton County that will have the same ice fishing regulations for lake trout and landlocked salmon.

- Delete the catch and release trout regulation for Jordan River from Carry Falls Reservoir upstream to Franklin County line, St. Lawrence County, because this regulation is considered inappropriate for this remote stream section.

- Implement a 12 inch minimum size for brown trout in Otisco Lake to provide additional opportunity for angler harvest.

- Reduce the creel limit of rainbow trout from 5 to 1 in the western Finger Lakes and from 3 to 1 in the tributaries to provide further protection for this species. Western Finger Lakes include Seneca, Keuka, Canandaigua, Canadice, and Hemlock Lakes.

- Remove the restriction of no more than 3 lake trout per day as part of the 5 trout creel limit in the western Finger Lakes to reduce competition with other trout species and impacts on the forage base.

- Eliminate the current trout catch and release section for Ischua Creek, Cattaraugus County, to enhance angling opportunities by allowing beginner and young anglers to use the section of stream located in the Village of Franklinville, including to keep caught trout.

- Change the minimum size limit for rainbow trout in Skaneateles and Owasco lakes from 9 inches to 15 inches, creating consistency with the other Finger Lakes.

- Include the tributaries to the current fishing closure of Beaverdam Brook, from their mouths to the upstream boundary of the Salmon River Hatchery property, or within 100 yards of any department fish collection device. This would make oversight and enforcement of this area more effective.

- Institute a catch and release only regulation for chain pickerel in Deep Pond, Suffolk County to allow the pickerel population to recover from over exploitation and increase needed predator control over panfish.

- Implement a 40 inch size limit for muskellunge and tiger muskellunge in the Chenango, Tioughnioga, Tioga, and Susquehanna rivers, and a 36 inch minimum size limit at Otisco Lake, to increase the trophy potential of these species in these waters.

- Delete special ice fishing regulation for Square Pond in Franklin County because this water will no longer be managed for trout.

- Eliminate the existing ban on the use of tip-ups in Crumhorn Lake, Otsego County because this is an unnecessary and unwarranted restriction.

- Allow ice fishing on stocked trout lakes in Allegany, Niagara, Wyoming, Chautauqua, Erie, and Cattaraugus counties unless otherwise stated. These lakes are managed for put and take trout fishing and they contain warm water fish species that should be available to anglers during the winter months, through the ice.

- Provide for ice fishing in select group of waters in the counties of Herkimer (Forestport Reservoir, Hinkley Reservoir, Kayuta Lake, Moshier Reservoir and North Lake); Jefferson (Millsite Lake); Lewis (Beaver Lake, Francis Lake, Soft Maple Reservoir, and Whetstone Marsh); Oneida (Delta Reservoir) and St. Lawrence (Sterling Pond).

- Provide for ice fishing at a privately managed water in Hamilton County (Salmon Pond).

- Include Cayuta Lake as a designated water from which baitfish may be collected.

- More clearly specify that attempting to take fish by snagging is prohibited.

- Permit the use of multiple hooks with multiple points on Lake Erie tributaries to provide additional angling opportunities.

- For the Salmon River, Oswego County, allow a bead chain to be attached to floating lures. The distance between a floating lure and hook point may not exceed 3 ½ inches when a bead chain configuration is used. This was determined to be an effective angling method and was not considered an attractive snagging device.

- For the Salmon River, Oswego County, implement a “no weight” restriction (i.e., only floating line and unweighted leaders and flies allowed) from May 1 - 15 for the Lower Fly Area and from May 1 - August 31 for the Upper Fly Area to provide further protection to vulnerable fish.

- Remove the allowance for taking 5 additional brook trout at Spafford Creek as this was intended to be included as part of the statewide deletion of this Regulation in 2010.

- Delete special regulation for Deer Pond in Franklin County as a special regulation no longer exists since the deletions of the 5+5 brook trout regulation in 2010.

- Delete the special trout regulation for Palmer Lake in Saratoga County to match the statewide regulation (minor adjustment as extends the season 15 days).

- Prohibit the release of any snakehead caught by angling in New York City waters (i.e. clarify that they should not be released as part of the catch and release requirements).

- In addition (to the above) clarify that snakeheads should not be released if caught while angling, statewide.

- Eliminate a redundant section of the regulations pertaining to the use of gaff hooks on Finger Lake tributaries through the ice as such is largely prohibited in another section of the regulations.

- Provide clarity and language clean-up in sections of Part 10 as warranted. These instances do not result in any substantive regulation changes (e.g. removing an incorrect time period that is inconsistent with the time period governing the Lake Champlain Tributary section of the regulations; clarifying the name of the lake being referenced in Crotona Park (as being Indian Lake) in the special regulation sections for Bronx County; provide consistency when describing “first impassable barriers” in tributaries; and correct a description for a section of Fall Creek in Tompkins County.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 10.3(b) and (e).

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

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

Revised Regulatory Impact Statement

A revised Regulatory Impact Statement is not needed, as the original Regulatory Impact Statement, as published in the Notice of Proposed Rule Making, remains valid. It does not need to be amended.

Revised Regulatory Flexibility Analysis

A revised Regulatory Flexibility Analysis for Small Businesses and Local Governments statement is not needed. The original Regulatory Flexibility Analysis for Small Businesses and Local Governments statement, as published in the Notice of Proposed Rule Making, remains valid and does not need to be amended.

Revised Rural Area Flexibility Analysis

A revised Rural Area Flexibility Analysis is not needed. The original Rural Area Flexibility Analysis Statement, as published in the Notice of Proposed Rule Making, remains valid and does not need to be amended.

Revised Job Impact Statement

A revised Job Impact Statement is not needed. The original Job Impact Statement, as published in the Notice of Proposed Rule Making, remains valid and does not need to be amended.

Assessment of Public Comment

The following is a summary of the comments received on the proposed rule making and the department’s responses to those comments.

Proposal: Catskill Creek Closure (Greene County).

Comments: Comments included objection to closing fishing for

other species, that this proposal is driven as a result of the actions few walleye poachers, and that this regulation change should not be necessary since the walleye are currently protected by the walleye season being closed during the walleye spawning season. It was also suggested this regulation be considered for additional streams. Comment suggested educating fishermen and aggressive enforcement as the preferred alternative.

Response: The department has decided to withdraw this proposal and the current regulations for Catskill Creek (Greene County) will remain in place. DEC law enforcement will closely monitor activity during the spring walleye spawning season.

Proposal: Eliminate the special black bass closed season at Oneida Lake.

Comment: Opening up Oneida Lake for catch-and-release black bass fishing during the critical walleye spawning period will provide opportunities for anglers to poach walleye, and there is inadequate enforcement in place to address this.

Response: Department law enforcement staff do not anticipate any increased difficulty in enforcing the fishing seasons and creel limits if this proposal goes forward. DEC law enforcement is committed to providing adequate enforcement to guard against potential poaching of walleye.

Comment: Extending the catch-and-release season for black bass will provide an opportunity to disturb the walleye during spawning. Walleye and other fish species will be caught when their respective seasons are closed. Some fish, including bass and walleye, will end up being taken illegally; others will die or be injured by the angling process.

Response: The lake is already open to fishing for other species (e.g. panfish). Anglers legally targeting bass during this period will likely be fishing deeper waters where bass tend to winter, and not tributary mouths or other areas where walleye spawn or stage. The requirement of artificial baits for bass anglers during catch-and-release should limit deep hooking, a primary cause of mortality.

Comment: Extending catch-and-release bass fishing at Oneida Lake poses an unacceptable large risk to Oneida Lake's unique fish populations, especially walleyes, and there are already threats to this healthy fishery as a result of other biological changes and other factors such as cormorant predation.

Response: Cornell University has maintained and continues to maintain an intensive monitoring program at Oneida Lake. Any impacts would be detected, but are not expected as a result of extending the bass season. Monitoring of the cormorant populations continues and indicates that summer cormorant numbers have remained low and are not likely having an adverse effect on sportfish populations in Oneida Lake.

Comment: Opening the bass season year round will add additional stress to the soon to spawn black bass.

Response: Biological monitoring by Cornell University indicates that bass production has not been harmed by allowing catch-and-release fishing during the spawn.

Proposal: Salmon River (Oswego County) Gear Modifications and Restrictions.

Comment: Modifications were suggested to the use of bead configurations, as proposed. The proposal for the Salmon River allowing a bead chain to be attached to floating lures will result in the snagging of fish.

Response: A pilot study determined that the proposed configuration is more effective for hooking and landing fish, and less effective as a snagging device as compared with other lure and hook configurations.

Comment: Objection was raised to no use of weighted flies during the summer and May.

Response: The use of un-weighted flies provides added protection at a time when a deeply sunk weighted fly in low water conditions increases foul hooking of fish.

Proposal: Esopus Creek Creel Change (five fish limit with no more than two trout longer than 12 inches).

Comment: Comment received objected to limiting the number of

large fish that can be creeled, as well as recommending a 10 inch size limit.

Response: Reducing the creel limit for these larger trout will still allow some fish to be creeled, but it will also hopefully allow some of them to remain in the creek later into the season to possibly be caught multiple times before being creeled. A five fish limit is protective enough of the smaller trout in this population, the additional protection of the relatively rare larger trout may provide for a better catch rate for larger trout. This opportunity can be provided as long as fish populations remain strong.

Proposal: Open several Hamilton County Waters to ice fishing for landlocked salmon.

Comment: Objection was raised to allowing ice fishing for landlocked salmon in these waters.

Response: All of the waters listed in this regulation proposal are already open to ice fishing for trout. Only Blue Mountain Lake is currently stocked annually with landlocked salmon; emigrant salmon are generally caught in the winter by local anglers in other waters. The salmon do not remain in these waters year round since they lack significant areas of coldwater habitat in the summer. Harvesting emigrating salmon does not hurt the fishery, and provides for angler needs.

Proposal: Delete catch-and-release regulation for Jordan River (St Lawrence County).

Comment: The catch-and-release proposed regulation for the Jordan River should be retained as remote waters are natal waters and are necessary for future offspring.

Response: The earlier established catch-and-release regulation has not resulted in establishing larger wild brook trout, and this remote fishery will not be impacted by the minimal amount of harvest that would occur without the special regulation.

Proposal: Eliminate trout catch-and-release for Ischua Creek (Cattaraugus County).

Comment: Allowing the harvest of trout in the current catch-and-release section (Ischua) would eliminate the potential for natural reproduction.

Response: Survey data indicates that there was no increase in wild trout after the catch-and-release regulation was established.

Comment: There are many miles of stream in this area that trout can be harvested so there is no need to add this as a harvest section.

Response: The area with the existing catch-and-release regulation on Ischua Creek is very accessible making it desirable for being available to all anglers.

Comment: The catch-and-release regulation for Ischua Creek should be retained as it lets beginner and younger anglers learn how important it is to sustain fisheries through catch-and-release efforts. Removal of trout from the stream does not enhance angling opportunity; more fish in the water increases opportunity for a catch.

Response: Catch-and-release fishing can still be fostered if harvest is allowed at this section of Ischua Creek. A high percentage of anglers are now voluntarily releasing the trout they catch, providing excellent opportunity to catch fish.

Proposal: Drop creel limit restriction for lake trout in Western Finger Lakes.

Comment: The increased creel limit for lake trout in the western Finger Lakes, specifically Hemlock and Canadice, will be detrimental to the lake trout population and that the current creel limit of three should be maintained for at least Canadice Lake.

The creel limit for lake trout in the Finger Lakes should not be increased as the lake trout are in trouble as a result of meager stockings, lack of bait fish to sustain them, and the explosion of lamprey eels.

Response: Data suggests that increasing lake trout populations along with decreased forage abundance in the western Finger Lakes may have negatively impacted lake trout growth characteristics as well as other salmonide populations, such as rainbow trout, and that these impacts may be alleviated by increasing the allowable catch of lake trout.

Proposal: Reduce the creel limit for rainbow trout in the Western Finger Lakes.

Comment: The creel limit for rainbow trout in the western Finger Lakes should only be reduced to from 5 to 3 in the lakes, not from 5 to 1.

The creel limit for rainbow trout should not be reduced from 5 to 1 as rainbow trout fishing is the best seen in a decade or more. More rainbows and landlocked salmon are being caught over the past several years.

Response: DEC data supports a reduction in the creel limit of rainbow trout in the western Finger Lakes and their tributaries. This will protect declining adult rainbow trout populations as well as stress the importance of these unique fisheries and help sustain a quality rainbow trout fishery over the long term.

Proposal: Remove size limit for trout in tidal waters of Suffolk County.

Comment: The size limit should not be removed on brown trout and rainbow trout in the tidal waters of Suffolk County. The size restrictions should be increased, preferably with a slot limit, so that larger trout would need to be released.

Response: Establishing a 12 inch size limit for brown and rainbow trout was part of the DEC's attempt to produce sea run fish, along with stocking large numbers of fall fingerling brown trout into the tidal waters. The department eliminated the fall fingerling stocking in tidewater as the fall fingerlings show little inclination to go out to sea and come back as large sea run fish. Eliminating the 12 inch size limit in tidal waters will simplify the Long Island trout regulations, as well as allow for the harvest of stocked yearling trout.

Proposal: Permit the use of multiple hooks on Lake Erie tributaries.

Comment: The proposal to allow multiple hooks with multiple points on Lake Erie Tributaries will result in increased efforts to illegally snag fish and increase fish injuries, including in no kill sections.

Response: The proposal was made to simplify Lake Erie's tributary regulations, and expand angling opportunities to accommodate additional popular angling techniques. The prevailing single hook restriction only applies through March 31st each year and DEC has not detected increases in snagging activity or difficulties in releasing foul hooked fish among these tributary fisheries. In addition, no other Lake Erie jurisdiction requires a single hook for tributary trout fishing, and these other Lake Erie fisheries management agencies have reported to DEC that tributary snagging remains a minor issue.

Proposal: Increase Size Limit for Tiger Muskellunge at Otisco Lake.

Comment: The size limit for tiger muskies at Otisco Lake should be increased to 40 inches, and not just 36 inches.

The size limit for tiger muskies at Otisco Lake should remain at 30 inches and not be increased to 36 inches, as with the limited public access fishermen would not be able to take advantage of a trophy size fishery if it was established, and secondly a 30 inch tiger muskellunge is in itself a trophy.

The size limit for tiger muskellunge at Otisco Lake should not be raised to 36 inches as this would result in many years without a single legal tiger muskellunge being caught and interest will therefore diminish.

Response: While a "trophy" size fish may be subjective avid musky/tiger musky anglers typically use 40" as the bar for what constitutes a quality fish. The 36 inch size limit is biologically sound with growth rates to support it, and viewed as a good compromise for Otisco. Recent angler reports and DEC diary data indicate that there are already tiger muskellunge over 36".

Proposal: Delete special regulation for kokanee salmon in Glass Lake (Rensselaer County).

Comment: The 12 inch size limit and 3 fish creel limit for kokanee salmon in Glass Lake should be retained if a native opportunity exists for kokanee salmon.

Response: There is little evidence of kokanee salmon in Glass Lake; any presence of kokanee salmon is likely to be very limited.

Proposal: Clarification of snakehead prohibition.

Comment: Comment was received objecting to adding language in regulation ensuring that snakeheads are not returned to the water if caught while angling, citing them as a valuable food source and being comparable to carp.

Response: Snakeheads are highly invasive and have the potential to disrupt recreational and commercial fishing and harm native fish and wildlife, and should not be returned to the water if caught.

NOTICE OF ADOPTION

Recreational Harvest Regulations for Summer Flounder (Fluke), Scup and Black Sea Bass

I.D. No. ENV-18-12-00010-A

Filing No. 689

Filing Date: 2012-07-11

Effective Date: 2012-08-01

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

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

Statutory authority: Environmental Conservation Law, sections 13-0105, 13-0340-b, 13-0340-e and 13-0340-f

Subject: Recreational harvest regulations for summer flounder (fluke), scup and black sea bass.

Purpose: To maximize recreational angler opportunities for popular finfish species while staying in compliance with the ASMFC and MAFMC.

Text of emergency 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 1 - Sept 30	[20.5]19.5" TL	[3]4

Species Yellowtail flounder through Winter flounder remain the same. Species Scup (porgy) licensed party/charter boat anglers through Black sea bass are amended to read as follows:

Species	Open Season	Minimum Length	Possession Limit
Scup (porgy) licensed party/charter boat anglers****	[June 8 - Sept. 6] May 1 - Aug. 31 Sept. [7]1 - Oct. [11]31 Nov. 1 - Dec. 31	11" TL 11" TL 11" TL	[10]20 40 20
Scup (porgy) all other anglers	May [24]1 - [Sept. 26]Dec. 31	10.5" TL	[10]20
Black sea bass	June [13]15 [- Oct. 1 and Nov. 1] - Dec. 31	13" TL	[10]15

Species American shad through Oyster toadfish remain the same.

Existing paragraph 40.1 (h)(3) of 6 NYCRR is amended to read as follows:

Party and charter boat license holders must provide each customer who possess more than [25]20 scup during the period of September 1st through October 31st with a commercially printed, dated original fare receipt, bearing the vessel's name and permit number. The customer of any party/charter boat who lands or possesses more than [25]20 scup during the period of September 1st through October 31st must possess an original receipt from a licensed party or charter boat.

Final rule as compared with last published rule: Nonsubstantive changes were made in section 40.1(h)(3).

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

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

Revised Regulatory Impact Statement

The original Regulatory Impact Statement, as published in the New York State Register on May 2, 2012, remains valid and does not need to be

amended. Non-substantive changes were made to the proposed rule. The possession limit triggers for the bonus season requirements for scup anglers aboard a licensed party and charter boat had to be amended from 25 to 20 scup in 6 NYCRR 40.1(h)(3) for consistency with the proposed rule.

Revised Regulatory Flexibility Analysis

The original Regulatory Flexibility Analysis for Small Businesses and Local Governments Statement, as published in the New York State Register on May 2, 2012, remains valid and does not need to be amended. Non-substantive changes were made to the proposed rule. The possession limit triggers for the bonus season requirements for scup anglers aboard a licensed party and charter boat had to be amended from 25 to 20 scup in 6 NYCRR 40.1(h)(3) for consistency with the proposed rule.

Revised Rural Area Flexibility Analysis

The original Rural Area Flexibility Analysis Statement, as published in the New York State Register on May 2, 2012, remains valid and does not need to be amended. 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, scup 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.

Revised Job Impact Statement

The original Job Impact Statement, as published in the New York State Register on May 2, 2012, remains valid and does not need to be amended. Non-substantive changes were made to the proposed rule. The possession limit triggers for the bonus season requirements for scup anglers aboard a licensed party and charter boat had to be amended from 25 to 20 scup in 6 NYCRR 40.1(h)(3) for consistency with the proposed rule.

Assessment of Public Comment

DEC received one comment concerning the proposed rule.

Comment: The author was content with the relaxation of summer flounder regulations but believes that the regulations regarding scup and black sea bass are not stringent enough.

DEC response: Changes made to the marine recreational regulations for both species included season expansions and increases in the possession or bag limit. The black sea bass and scup regulations were developed as part of a multi-state (Massachusetts, Rhode Island, Connecticut and New York) cooperative effort to make recreational fishing regulations more contiguous among neighboring states. The portion of the recreational fishing industry that is based out of western Nassau County, Brooklyn, and Queens must compete for business with New Jersey's significantly more relaxed regulations and specifically requested a larger black sea bass trip limit. The regulations proposed in the emergency rule are consistent with harvest limits imposed by the Atlantic States Marine Fisheries Commission.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

LEV, ZEV, GHG, Environmental Performance Label, New Aftermarket Catalytic Converter, and Emissions Warranty/Recall Standards

I.D. No. ENV-31-12-00009-P

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

Proposed Action: Amendment of Parts 200 and 218; and repeal of Part 252 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 1-0303, 3-0301, 19-0103, 19-0105, 19-0107, 19-0301, 19-0303, 19-0305, 19-1101, 19-1103, 19-1105, 71-2103 and 71-2105; and Federal Clean Air Act (42 USC 7507), section 177

Subject: LEV, ZEV, GHG, environmental performance label, new aftermarket catalytic converter, and emissions warranty/recall standards.

Purpose: To incorporate California's LEV, ZEV, GHG, environmental performance label, catalytic converter, and warranty standards.

Public hearing(s) will be held at: 2:00 p.m., Sept. 17, 2012 at New York State Department of Environmental Conservation Region 8 Office, Conference Rm. 6274, E. Avon-Lima Rd., (Rtes. 5 and 20), Avon, NY; 2:00 p.m., Sept. 19, 2012 at New York State Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129B, Albany, NY; and 2:00 p.m., Sept. 20, 2012 at New York State Department of Environmental Conservation, Region 2 Office, One Hunters Point Plaza, 47-40 21st St., Rm. 834, Long Island City, NY.

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

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

Substance of proposed rule (Full text is posted at the following State website: www.dec.ny.gov): The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Part 218, 6 NYCRR Part 252 and Section 200.9. Section 200.9 is a list that cites Federal and California codes and regulations that have been referenced by the Department in the course of amending Parts 218 and 252. The purpose of the amendment is to revise the existing low emission vehicle (LEV) program to incorporate modifications California has made to its vehicle emission control program to reduce criteria pollutant and greenhouse gas (GHG) emissions. The Department is amending Sections 218-1.2, Definitions; 218-2.2, Reporting; 218-3.1, Fleet Average; 218-3.2, Fleet average reporting and projection; 218-4.1, ZEV percentages; 218-4.2, Voluntary alternative compliance plan (ACP); 218-5.1, Assembly-line quality audit testing and reporting for 1993, 1994, 1996 and subsequent model-years; 218-7.2, Prohibitions; 218-8.2, Prohibitions; 218-8.3, Fleet average greenhouse gas requirements; and 218-8.5, Greenhouse gas exhaust emissions reporting. New Sections 218-9, Emissions control system warranty requirements; 218-10, Recall requirements; and 218-11, Environmental performance labels are being created. Existing Section 218-9, Severability is being renumbered as Section 218-12. The remaining Sections in Part 218 are unchanged. The existing Part 252 Environmental Performance Labels will be repealed.

Section 218-1.2 is amended to include revisions to definitions that govern the provisions of this Part.

Section 218-2.2 is amended to revise the certification reporting requirements.

Section 218-3.1 is amended to incorporate California's latest LEV standards. These changes will apply to all 2014 and subsequent model year passenger cars (PC), light-duty trucks (LDT), and medium-duty vehicles (MDV) up to 14,000 pounds Gross Vehicle Weight Rating (GVWR).

The LEV proposal will: require fleet average Super Ultra-low Emission Vehicle (SULEV) performance by model year 2022; increase the stringency and restructure the Non-Methane Organic Gas (NMOG) and oxides of nitrogen (NO_x) standards; increase the stringency of the Particulate Matter (PM) standards; increase emission control component durability requirements; increase the stringency and coverage of evaporative emission control requirements; permit manufacturers to pool emissions of criteria pollutants including hydrocarbon (HC), carbon monoxide (CO), and NO_x in California and Section 177 states to demonstrate compliance.

Section 218-3.2 is amended to revise the fleet average reporting requirements. The words "and projection" are being deleted from the title. Section 218-3.2(b) is also being deleted. Manufacturers will no longer be required to submit annual fleet average projection reports to the Department. This change will align the Department's requirements with California and other Section 177 State requirements.

Section 218-4.1 is amended to incorporate California's latest zero emission vehicle (ZEV) standards. The California regulations take effect for all vehicles up to 10,000 pounds GVWR beginning with the 2012 model year. The ZEV proposal will essentially be split into two periods covering the 2012-2017 model years and the 2018-2025 model years.

The amendments for the 2012-2017 timeframe will: create new ZEV types; extend the travel provision; reduce the ZEV requirement for intermediate low volume manufacturers (IVM); remove credit carry forward restrictions; clarify vehicle credit eligibility. An optional Section 177 ZEV compliance path will also be created as an alternative to the base ZEV requirements. The alternative compliance option meets the states' interests in placing BEV and PHEV in Section 177 states earlier than would be required under the base program, while also providing vehicle manufacturers with a smoother ramp-up in the number of vehicles required and a reduced ZEV obligation over the life of the program.

The amendments for the 2018-2025 timeframe will: amend manufacturer size definitions, aggregated ownership criteria, and lead time provisions; eliminate partial zero emission vehicles (PZEV) and advanced

technology PZEV (ATPZEV) as compliance options; increase ZEV compliance requirements; allow IVM to meet entire ZEV requirement with transitional ZEV (TZEV); limit the use of banked PZEV, ATPZEV, and neighborhood electric vehicle (NEV) credits to meet ZEV requirements; eliminate the travel provision for Type I, I.5, II, and III ZEV; allow GHG over-compliance credits to be used to offset a portion of a manufacturer's ZEV requirement.

Section 218-4.2 is being repealed. The voluntary ACP program concluded at the end of the 2009 model year and was not extended.

Section 218-5.1 is being amended to remove existing Section 218-5.1(a).

Section 218-7.2 is being amended to include a new Section 218-7.2(c). Section 218-7.2(c) incorporates California's new aftermarket catalytic converter requirements and prohibition of used catalytic converters.

Sections 218-8.2 and 218-8.3 are being amended to incorporate California's latest GHG standards. These changes will apply to all 2017 and subsequent model year PC, LDT, and MDV up to 10,000 pounds GVWR. The amendments will: establish separate footprint indexed CO₂ grams per mile emission standards for PC and LDT harmonized with proposed federal GHG standards; establish separate emission standards for CH₄ and N₂O to harmonize with federal standards; include mandatory requirements for motor vehicle air conditioning (MVAC) refrigerants; include MVAC fleet average leak rate limits and indirect emission limits; create off-cycle credit provisions similar to federal provisions; create incentives for full-size pickup truck emission reductions; create optional credit provisions for upstream emissions.

Section 218-8.5(a) is being amended to change the reporting date from March 1st to May 1st. This change will align New York's reporting date with California's.

Existing Section 218-9 is renumbered to create Section 218-12. This Section contains severability provisions.

A new Section 218-9 is being created to incorporate California's emissions control system warranty requirements. These requirements will apply to 2016 and subsequent model year PC, LDT, and MDV up to 14,000 pounds GVWR.

A new Section 218-10 is being created to incorporate California's recall requirements. These requirements will apply to 2016 and subsequent model year PC, LDT, and MDV up to 14,000 pounds GVWR. The California emissions warranty and recall regulations are designed to reduce vehicle emissions by identifying, recalling, and repairing noncompliant vehicles to meet applicable emission standards and test procedures.

A new Section 218-11 is being created to incorporate California's environmental performance label standards. These standards were previously incorporated in Part 252. The standards will be updated and moved to Part 218 to consolidate all of the new motor vehicle emission standards in one Part.

Existing Part 252 will be repealed.

Text of proposed rule and any required statements and analyses may be obtained from: Jeff Marshall, P.E., NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3255, (518) 402-8292, email: 218LEV3@gw.dec.state.ny.us

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

Public comment will be received until: September 27, 2012.

Additional matter required by statute: Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration, and a Coastal Assessment Form have been prepared and are on file.

Summary of Regulatory Impact Statement

The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Section 200.9 and 6 NYCRR Part 218. Part 218 is being amended to incorporate revisions to the low emission vehicle (LEV), greenhouse gas (GHG), zero emission vehicle (ZEV), environmental performance label, and new aftermarket and used catalytic converter standards that have been adopted by the California Air Resources Board (CARB) as part of the LEV program. The Department is also incorporating California's emissions warranty and recall provisions. Part 252 is being repealed and its contents are being updated and incorporated into Part 218.

By statutory authority of, and pursuant to, Environmental Conservation Law (ECL), the Commissioner of Environmental Conservation is responsible for protecting the air resources of New York State. The Commissioner is authorized to adopt rules and regulations to enforce the ECL. The legislature bestowed on the Department the power to formulate, adopt, promulgate, amend, and repeal regulations for preventing, controlling, or prohibiting air pollution.

The main purpose of enacting this regulation is to address the adverse health, environmental, and climate change impacts that criteria and GHG pollutants will cause in New York State if left uncontrolled. New York has made significant progress over the years in improving its air quality;

however, it is essential that the Department continue to adopt stringent mobile source emissions standards to protect human health and the environment.

Low emission motor vehicle technology is important to achieving and maintaining the long term air quality of New York. While motor vehicle technology has continued to improve, the number of vehicles and the number of vehicle miles traveled (VMT) has continued to increase. While vehicles emit pollutants at a lower level when new, the increases in VMT, as well as deterioration of vehicle emission control systems over vehicle life, have resulted in the mobile sector being a major contributor to air quality degradation.

Part 218 is being revised to incorporate California's latest amendments to the LEV program. The California LEV III regulations take effect for all vehicles up to 14,000 pounds gross vehicle weight rating (GVWR) beginning with the 2015 model year. The Department is adopting LEV standards and credit mechanisms that are identical to those adopted by CARB. The amendments will: require fleet average super ultra low emission vehicle (SULEV) emissions performance from new vehicles by model year 2022; increase the stringency of the passenger car (PC) and light-duty truck (LDT) standards and restructure them into a combined NMOG+NO_x standard (non-methane organic gas + oxides of nitrogen); increase the stringency and restructure the standards for chassis certified medium-duty vehicles (MDV); increase the stringency of the particulate matter (PM) standards; increase the durability requirements; increase the stringency and coverage of the evaporative emission standards; allow manufacturers to demonstrate compliance with the fleet average NMOG+NO_x standard based on new vehicles produced and delivered for sale in California and Section 177 states, including the District of Columbia; revise the fuel standards to include ethanol fuels.

New York State's criteria pollutant emission reductions for reactive organic gas (ROG), NO_x, and PM_{2.5} will be fully realized in the 2035-2040 timeframe. The Department estimates that by 2035 the standards will reduce ROG emissions by approximately 21 tons per day (TPD), NO_x emissions by approximately 23 TPD, and PM_{2.5} emissions by approximately 1 TPD.

Part 218 is also being revised to incorporate California's amendments to the ZEV program. The California regulations take effect for all vehicles up to 10,000 pounds GVWR beginning with the 2012 model year. The Department is adopting ZEV standards and credit mechanisms that are identical to those adopted by CARB. The amendments for the 2012-2017 timeframe will: create new ZEV types; extend the travel provision for Type I, I.5, II, and III ZEV; increase the credit amount for Type V fuel cell vehicles; reduce the ZEV requirement for intermediate low volume manufacturers (IVM); remove credit carry forward restrictions; decrease the value of transportation system credits; no longer use NMOG fleet average in the calculation of ZEV credits; revise lead time provisions; clarify vehicle credit eligibility.

The amendments for the 2018-2025 timeframe will: amend manufacturer size definitions, aggregated ownership criteria, and lead time provisions; eliminate partial zero emission vehicles (PZEV) and advanced technology PZEV (ATPZEV) as compliance options; increase ZEV compliance requirements; allow IVM to meet entire ZEV requirement with transitional ZEV (TZEV, previously Enhanced ATPZEV); limit the use of banked PZEV, ATPZEV, and NEV credits to meet ZEV requirements; adjust the credit range; simplify the TZEV credit system; eliminate the travel provision for Type I, I.5, II, and III ZEV; allow GHG over-compliance credits to be used to offset a portion of a manufacturer's ZEV requirement; amend the sales volume determination method; amend the credit carry back provision; remove the placed in service requirement.

There are no additional emission benefits associated with ZEV regulations beyond those achieved under the LEV III and GHG standards.

Part 218 is also being revised to incorporate California's amendments to the GHG standards. The California regulations take effect for all vehicles up to 10,000 pounds GVWR beginning with the 2017 model year. The Department is adopting GHG standards and credit mechanisms that are identical to those adopted by CARB. The amendments will: establish separate footprint indexed carbon dioxide (CO₂) grams per mile emission standards for PC and LDT harmonized with proposed federal GHG standards; establish separate emission standards for methane (CH₄) and nitrous oxide (N₂O) to harmonize with federal standards; include mandatory requirements for motor vehicle air conditioning (MVAC) refrigerants; include MVAC fleet average leak rate limits; include MVAC indirect emission limits; create off-cycle credit provisions similar to federal provisions; create incentives for full-size pickup truck emission reductions; create optional credit provisions for upstream emissions.

New York State's GHG emission reductions will be fully realized in the 2035-2040 timeframe. The Department estimates that by 2035 the standards will reduce carbon dioxide equivalent (e) emissions in New York by approximately 19 million metric tons (MMT) per year.

Part 218 is being revised to incorporate regulations for new aftermarket

and used catalytic converters that are identical to those adopted by CARB. This regulation prohibits the sale of used catalytic converters and requires more stringent emissions reduction performance and durability requirements for new aftermarket catalytic converters. The new aftermarket catalytic converters are required to achieve exhaust emissions that comply with the emissions standards to which the vehicles were certified. The durability requirement was extended from 25,000 miles to 50,000 miles and the catalytic converters must be warranted to be free from defect for five years. The new aftermarket catalytic converters also must be compliant with onboard diagnostic (OBDII) systems on 1996 and newer vehicles. New aftermarket catalytic converters are required to display a permanent label or stamp indicating the CARB Executive Order approval number, the part number, date of manufacture, and an arrow indicating the proper installation direction.

The Department estimates that the proposed regulation will reduce emissions of HC + NO_x in New York State by 3.66 tons per day in 2012.

Part 218 is also being revised to incorporate revisions to California's environmental performance label standards. These revisions will apply to all 2013 and subsequent model year PC, LDT, and MDV up to 14,000 GVWR. The standards will harmonize California's label with the recently adopted federal fuel economy and environmental performance label.

The Department is adopting environmental performance label standards that are identical to those adopted by CARB. The Department originally adopted California's environmental performance label standards in 2009 and incorporated them in Part 252. The standards are being updated and moved to Part 218 to consolidate the new motor vehicle regulations in a single Part. Part 252 will be repealed. New York State passed legislation (S4833/A8839) in 2007 requiring that global warming index labels be affixed to new 2010 and subsequent model year vehicles delivered for sale in New York. The labels were required to be consistent with labels adopted by other states, and permitted the adoption of California labeling requirements.

The Department is also revising Part 218 to incorporate California's warranty and recall regulations for California certified vehicles delivered for sale and registered in New York State. These regulations will apply to 2016 and subsequent model year vehicles and will not be retroactive. Adoption of the warranty and recall regulations is important to achieving the State's goal of reduced motor vehicle emissions. The California warranty and recall program has the potential to achieve additional emission reductions by addressing parts failures before they can lead to excessive emissions. The reporting requirements will enable the Department to track failures and corrective action undertaken by manufacturers. Adopting the warranty and recall regulations will also remove existing confusion over what requirements apply to varying states, particularly for new vehicle dealers and consumers.

The cost effectiveness of the LEV III standards for light-duty vehicles is estimated to be \$4 per pound of ROG + NO_x emissions reduced in 2025 and \$3 per pound in 2035. The average incremental price increases in 2025 were estimated to be \$75 for gasoline fueled vehicles and \$54 for diesel. There are no operating cost savings associated with the LEV III standards.

There are no compliance costs attributed to the ZEV program in this rulemaking package. All compliance costs are accounted for in the LEV III and GHG standards.

The operating cost savings resulting from the regulation are attributed solely to the GHG standards. Consumers should experience significant savings resulting from decreased operating costs which would more than offset the increased initial purchase price of new vehicles. The GHG standards are estimated to increase new vehicle prices by approximately \$1,800 dollars in 2025. The Department estimates that the break-even year for model year 2017-2025 passenger cars occurs between one to five years after initial purchase. The average 2025 model year new passenger car is projected to save more than \$3,400 over a 10 year period. For model year 2017-2025 light-duty trucks the break-even year occurs one year after initial purchase. The average 2025 model year new light-duty truck is projected to save more than \$14,000 over a 10 year period.

The cost effectiveness of the proposed warranty and recall regulations is difficult to quantify since it relies upon the quality and durability of future emission control components. However, it is anticipated that some emissions reductions will occur as a result of repairing defective, or noncompliant, in-use emissions control components to meet original certification standards. Staff believes that the emissions benefit of the warranty and recall regulations would be achieved by completing emissions related repairs at no, or reduced, cost to the consumer. DEC anticipates a reduction in the number of repair expenditure based emission inspection waivers. Repair costs for vehicles receiving waivers ranged from \$450 to \$6,200 with an average repair cost of \$838.

The cost of a new aftermarket catalytic converter is expected to increase up to \$200 per unit. The average cost increase is attributable to the increased amounts of precious metals required to comply with the new

regulation. However, this cost increase is partially offset by increased durability and warranty requirements. The Department estimates the cost effectiveness of the proposed regulation in New York to be \$3.60 per pound of HC + NO_x reduced.

New York State consumers will likely experience increased new vehicle prices as a result of the LEV III, GHG and ZEV standards. However, it is expected that they will also experience reduced operating costs which should more than offset the increased purchase prices. The warranty and recall regulations could provide an economic benefit for consumers since they provide enhanced protection for a vast array of emissions parts and systems that may not have been covered under warranty in the past.

The aftermarket catalytic converter regulations are expected to result in additional costs for New York State consumers. The greatest adverse impact is likely to be experienced by consumers accustomed to purchasing used converters, and those vehicle owners faced with the need to replace a converter for vehicles sold in low volume.

The revised environmental performance labels are not expected to result in any additional costs for consumers. Consumers will benefit by having access to information that will enable them to make knowledgeable decisions when purchasing new vehicles, ideally resulting in a cleaner fleet in New York.

Adoption of the warranty and recall regulations in New York will likely result in cost increases for manufacturers. Manufacturers would be required to extend California's more comprehensive warranty coverage to a market where it has not been required to date, thereby incurring costs to repair affected vehicles. Further, the more stringent recall reporting requirements will likely result in minimal cost and workload increases to manufacturers to prepare reports specifically for New York vehicles. The reporting requirements will be identical to those in California and other Section 177 states that have previously adopted the regulation. The regulations could enable the manufacturers to reduce some costs by reducing the number of markets with different warranty and recall provisions. Adopting the warranty and recall regulations would also remove existing confusion over what requirements apply to varying states, particularly for new vehicle dealers and consumers.

The proposed amendments are not expected to cause a noticeable change in New York employment since the State accounts for only a small share of motor vehicle and parts manufacturing employment. The proposed LEV, ZEV, GHG, environmental performance label, and warranty and recall regulations are not expected to have a significant adverse impact on business creation, elimination, or expansion. This determination is based upon previous experience implementing similar revisions to the program over the past 22 years.

The proposed regulations are not expected to result in any additional costs for local and state agencies beyond those that will be experienced by the general public. No additional paperwork or staffing requirements are expected. This is not a mandate on local governments pursuant to Executive Order 17.

The LEV, ZEV, GHG, and environmental performance label regulations should not result in any significant paperwork requirements for New York vehicle suppliers, dealers or government. In fact, the Department is reducing the paperwork burden in some areas by eliminating reporting requirements that are no longer necessary. New York relies on materials submitted to California for certification, while manufacturers must submit to New York annual sales and corporate fleet average reports to show compliance with the fleet average requirements. This has been the case since New York first adopted the California LEV program in 1992. The implementation of the proposed regulations is not expected to be burdensome in terms of paperwork to vehicle owners.

The aftermarket catalytic converter regulation should not result in any significant paperwork requirements for New York vehicle suppliers, dealers or local government. The proposed warranty provisions would require the installer to complete a warranty card in triplicate with the original going to the customer, one copy to the installer, and one copy to the manufacturer of the converter. The implementation of the proposed catalytic converter regulation is not expected to be burdensome in terms of paperwork to owners/operators of vehicles.

The Department will experience an increase in paperwork associated with aftermarket catalytic converter warranty reporting requirements. This increased workload will be covered by existing staff working on the LEV program. Manufacturers of aftermarket catalytic converters will be required to submit semi-annual reports to the Department identical in format and content to those submitted to California. Warranty claims exceeding four percent or 100 claims, whichever is greater, in New York will require the manufacturer to include in the report the type of failure, the probable cause of the failure, and an evaluation of the impact on vehicle emissions.

The warranty and recall regulations are likely to result in increased paperwork requirements for New York vehicle suppliers, dealers, and government. Manufacturers currently provide warranty and recall infor-

mation to California and other Section 177 states, and it is anticipated that manufacturers will provide similar information adjusted for New York vehicles. Implementation of the warranty and recall regulations is expected to be transparent in terms of paperwork to owners and operators of vehicles.

The LEV III regulatory amendments will take effect for 2015 through 2025 model year PC, LDT, and MDV up to 14,000 pounds GVWR. The ZEV amendments will take effect for 2012 through 2025 model year PC and LDT up to 10,000 pounds GVWR. The GHG amendments will take effect for 2017 and subsequent model year PC, LDT, and MDV up to 10,000 pounds GVWR. The environmental performance label amendments will take effect for 2013 and subsequent model year PC, LDT, and MDPV up to 10,000 pounds GVWR. The new aftermarket and used catalytic converter regulations will take effect for all 1993 and subsequent model year California certified on-road motor vehicles, with the exception of 1995 model year vehicles. The warranty and recall regulations will take effect for 2016 and subsequent model year California certified vehicles.

Regulatory Flexibility Analysis

1. Effect of rule:

The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Part 200, and 6 NYCRR Part 218. Part 218 is being amended to incorporate revisions to the low emission vehicle (LEV), greenhouse gas (GHG), zero emission vehicle (ZEV), environmental performance label, and new aftermarket catalytic converter requirements that have been adopted by the California Air Resources Board (CARB) as part of the LEV program. The Department is also incorporating California's emissions warranty and recall provisions. Part 252 is being repealed and its contents are being updated and incorporated into Part 218. These changes apply to vehicles purchased by consumers, businesses, and government agencies in New York and may impact businesses involved in manufacturing, selling, leasing, or purchasing passenger cars or trucks.

State and local governments are also consumers of vehicles that will be regulated under the proposed GHG amendments. Therefore, local governments who own or operate vehicles in New York State are subject to the same requirements as owners of private vehicles in New York State; i.e., they must purchase California certified vehicles. This rulemaking is not a local government mandate pursuant to Executive Order 17.

The changes are an addition to the current LEV standards. The new motor vehicle emissions program has been in effect in New York State since model year 1993 for passenger cars and light-duty trucks, with the exception of the 1995 model year, and the Department is unaware of any significant adverse impact to small businesses or local governments as a result of previous revisions.

2. Compliance requirements:

There are no specific requirements in the regulation which apply exclusively to small businesses or local governments. Reporting, record-keeping and compliance requirements are effective statewide. Automobile dealers (some of which may be small businesses) selling new cars are required to sell or offer for sale only California certified vehicles. These proposed amendments will not result in any additional reporting requirements to dealerships other than the current requirements to maintain records demonstrating that vehicles are California certified. This documentation is the same documentation already required by the New York State Department of Motor Vehicles for vehicle registration. If local governments are buying new fleet vehicles they should make sure that the vehicles are California certified.

The proposed aftermarket catalytic converter requirements are not expected to have an adverse impact on the majority of New York State businesses. The greatest impact will be on businesses which sell, advertise, or install used catalytic converters, as these activities will be prohibited by the proposed regulation. The result will be a transfer of business and associated income from companies selling used catalytic converters to companies selling new aftermarket or OEM catalytic converters. The total sales of catalytic converters will remain unchanged. The Department expects that any increase in development and production costs will be passed along to consumers in the form of higher purchase prices.

3. Professional services:

There are no professional services needed by small business or local government to comply with the proposed rule.

4. Compliance costs:

New York State currently maintains personnel and equipment to administer the LEV program. It is expected that these personnel will be retained to administer the revisions to this program. Therefore, no additional costs will be incurred by the State of New York for the administration of this program.

5. Minimizing adverse impact:

The regulations are not expected to have significant adverse impacts on automobile dealers. Dealerships may experience a reduction in sales revenue if consumers decide to delay, or forego, purchasing new advanced

technology vehicles in response to increased prices. However, these delayed or lost sales could potentially be offset by early adopters and consumers desiring vehicles with reduced operating costs. Dealerships may also incur expenses to train staff to sell and service advanced technology vehicles. Dealerships may experience a reduction in service revenue due to the emissions warranty regulations. This is due to the fact that original equipment manufacturers (OEM) generally reimburse dealerships for warranty repairs at a rate lower than the rate charged to retail customers. Dealerships may experience increased revenue from sales of catalytic converters for vehicle models for which there are no certified aftermarket catalytic converters.

It will be difficult, if not impossible, to minimize the adverse impact of the aftermarket and used catalytic converter standards on businesses which sell, advertise, or install used catalytic converters. The use, sale, or installation of used catalytic converters is expressly prohibited due to the lack of economically feasible screening methods to evaluate the emissions reduction performance of used catalytic converters. Each converter will have to be tested individually to determine if it was acceptable for reuse, which is a costly and time consuming process. Further, the existing methods are unable to determine if the used catalytic converters will meet the performance and durability requirements required by the new aftermarket catalytic converter standards. It is possible that companies supplying used catalytic converters will be able to generate some revenue by recycling the precious metal content of used converters.

There will be no adverse impact on local governments who own or operate vehicles in the state because they are subject to the same requirements as those imposed on owners of private vehicles. In other words, state and local governments will be required to purchase California certified vehicles. This rulemaking is not a local government mandate pursuant to Executive Order 17.

This regulation contains exemptions for emergency vehicles, and military tactical vehicles and equipment.

6. Small business and local government participation:

The Department plans on holding public hearings at various locations throughout New York State after the amendments are proposed. Small businesses and local governments will have the opportunity to attend these public hearings. Additionally, there will be a public comment period in which interested parties can submit written comments.

7. Economic and technological feasibility:

The standards are not expected to have significant adverse impacts on automobile dealers. Dealerships will be required to ensure that the vehicles they sell are California certified. Starting with the 1993 model year, most manufacturers have included provisions in their ordering mechanisms to ensure that only California certified vehicles are shipped to New York dealers. The implementation of the standards is not expected to be burdensome in terms of additional reporting requirements for dealers. As stated previously, there would be no change in the competitive relationship with out-of-state businesses.

The regulations attempt to minimize adverse impacts on automobile manufacturers by phasing-in emissions standards over several model years, offering credit incentives, allowing pooling of vehicle sales to demonstrate compliance, and offering alternative compliance pathways to increase compliance flexibility among other options. The warranty and recall provisions will have the required 2 years of lead time and will not be applied to vehicles retroactively.

As discussed previously, the use, sale, or installation of used catalytic converters is expressly prohibited due to the lack of economically feasible screening methods to evaluate the emissions reduction performance of used catalytic converters. The result will be a transfer of business and associated income from companies supplying used catalytic converters to companies supplying new aftermarket or OEM catalytic converters. The total sales of catalytic converters will remain unchanged. Any increase in new aftermarket catalytic converter development and production costs will most likely be passed along to consumers in the form of higher purchase prices.

8. Cure period:

In accordance with NYS State Administrative Procedures Act (SAPA) Section 202-b, this rulemaking does not include a cure period because the Department is undertaking this rulemaking to comply with changes California has made to its vehicle emissions program in order to maintain identity with section 177 of the Clean Air Act.

Rural Area Flexibility Analysis

1. Types and estimated numbers of rural areas:

The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Section 200.9, and 6 NYCRR Part 218. Part 218 is being amended to incorporate revisions to the low emission vehicle (LEV), greenhouse gas (GHG), zero emission vehicle (ZEV), environmental performance label, and new aftermarket catalytic converter requirements that have been adopted by the California Air Resources Board (CARB) as part of the LEV program. The Depart-

ment is also incorporating California's emissions warranty and recall provisions. Part 252 is being repealed and its contents are being updated and incorporated into Part 218.

There are no requirements in the regulation which apply only to rural areas. These changes apply to vehicles purchased by consumers, businesses, and government agencies in New York. The changes to these regulations may impact businesses involved in manufacturing, selling, purchasing, or repairing passenger cars or trucks.

The changes are additions to the current LEV standards. The new motor vehicle emission program has been in effect in New York State since model year 1993 for passenger cars as well as light-duty trucks, with the exception of model year 1995, and the Department is unaware of any adverse impact to rural areas as a result. The beneficial emission reductions from the program accrue to all areas of the state.

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

There are no specific requirements in the proposed regulations which apply exclusively to rural areas. Reporting, recordkeeping and compliance requirements apply primarily to vehicle manufacturers, and to a lesser degree to automobile dealerships. Manufacturers reporting requirements mirror the California requirements, and are thus not expected to be burdensome. Dealerships do not have reporting requirements, but must maintain records to demonstrate that vehicles are California certified. This documentation is the same as documentation already required by the New York State Department of Motor Vehicles for vehicle registration. There will be some reporting and recordkeeping requirements associated with the warranty and recall provisions, as well as the aftermarket catalytic converter standards, but these are not expected to be burdensome for manufacturers, dealerships, or independent repair facilities.

Professional services are not anticipated to be necessary to comply with the rules.

3. Costs:

The amendments to Part 218 are expected to have an impact on consumers. Consumers will likely experience increased initial purchase prices as a result of the new standards. It is estimated that the LEV III and GHG standards will increase new vehicle prices by approximately \$1,800 in 2025. However, these price increases should be more than offset by reduced operating expenses. It is estimated that the new standards could save consumers approximately \$3,500 over a 10 year period. The aftermarket catalytic converter standards are expected to increase prices by approximately \$200 per unit.

4. Minimizing adverse impact:

The changes will not adversely impact rural areas. The regulations are expected to result in increased initial purchase prices for vehicles, but this increase should be more than offset by reduced operating expenses. Consumers will also benefit from increased emissions warranty coverage on new vehicles and new aftermarket catalytic converters.

5. Rural area participation:

The Department plans on holding public hearings at various locations throughout New York State once the regulation is proposed. Some of these locations will be convenient for persons from rural areas to participate. Additionally, there will be a public comment period in which interested parties can submit written comments.

Job Impact Statement

1. Nature of impact:

The New York State Department of Environmental Conservation (Department) is proposing to amend 6 NYCRR Section 200.9 and 6 NYCRR Part 218. Part 218 is being amended to incorporate revisions to the low emission vehicle (LEV), greenhouse gas (GHG), zero emission vehicle (ZEV), environmental performance label, and new aftermarket catalytic converter requirements that have been adopted by the California Air Resources Board (CARB) as part of the LEV program. The Department is also incorporating California's emissions warranty and recall provisions. Part 252 is being repealed and its contents are being updated and incorporated into Part 218.

The amendments to the regulations may adversely impact jobs and employment opportunities in New York State. New York State has had a LEV program in effect since model year 1993 for passenger cars and light-duty trucks, with the exception of model year 1995, and the Department is unaware of any significant adverse impact to jobs and employment opportunities as a result of previous revisions.

2. Categories and numbers affected:

The changes to this regulation may adversely impact businesses involved in manufacturing, selling, leasing, purchasing, or repairing passenger cars or trucks. The proposed regulation is not expected to impose a competitive disadvantage on affiliated businesses, and there would be no change from the current relationship with out-of-state businesses.

The regulations are not expected to have a significant impact on employment since New York State accounts for only a small portion of automobile manufacturing employment. Automobile manufacturers are

expected to incur costs in order to comply with the regulation. The increased costs are associated with the use of advanced technology emissions control components and the increased cost of providing the more comprehensive California emissions warranty. It is expected that these increased costs will be passed on to the consumer in the form of increased purchase prices.

The regulations are not expected to have a significant adverse impact on dealership employment levels. Dealerships may experience a reduction in sales revenue if consumers decide to delay, or forego, purchasing new advanced technology vehicles in response to increased prices. However, these delayed or lost sales could potentially be offset by early adopters and consumers desiring vehicles with reduced operating costs. Dealerships may also incur expenses to train staff to sell and service advanced technology vehicles. Dealerships may experience a reduction in service revenue due to the emissions warranty regulations. This is due to the fact that original equipment manufacturers (OEM) generally reimburse dealerships for warranty repairs at a rate lower than the rate charged to retail customers. Dealerships may experience increased revenue from sales of catalytic converters for vehicle models for which there are no certified aftermarket catalytic converters.

Independent repair shop employment may be adversely affected by the regulations. Independent repair shops may lose revenue associated with repairs that would be performed at dealerships and covered by the more comprehensive emissions warranty. This loss of revenue may result in reduced employment opportunities at some independent repair shops.

The new aftermarket catalytic converter requirements are not expected to have an adverse impact on the majority of New York State businesses. The greatest impact will be on businesses which sell, advertise, or install used catalytic converters, as these activities will be prohibited by the proposed regulation. The result will be a transfer of business and associated income from companies selling used catalytic converters to companies selling CARB certified new aftermarket catalytic converters or OEM catalytic converters. The total sales of catalytic converters will remain unchanged. The Department expects that any increase in development and production costs will be passed along to consumers in the form of higher purchase prices.

3. Regions of adverse impact:

None.

4. Minimizing adverse impact:

The regulations are not expected to have significant adverse impacts on automobile dealers. Dealerships will be required to ensure that the vehicles they sell are California certified. Starting with the 1993 model year, most manufacturers have included provisions in their ordering mechanisms to ensure that only California certified vehicles are shipped to New York dealers. The implementation of the regulations is not expected to be burdensome in terms of additional reporting requirements for dealers. There would be no change in the competitive relationship with out-of-state businesses.

The regulations attempt to minimize adverse impacts on automobile manufacturers by phasing-in emissions standards over several model years, offering credit incentives, allowing pooling of vehicle sales to demonstrate compliance, and offering alternative compliance pathways to increase compliance flexibility among other options. The warranty and recall provisions will have the required two years of lead time and will not be applied to vehicles retroactively.

It will be difficult, if not impossible, to minimize the adverse impact of the new aftermarket catalytic converter requirements and used catalytic converter prohibition on businesses which sell, advertise, or install used catalytic converters. The use, sale, or installation of used catalytic converters is expressly prohibited due to the lack of economically feasible screening methods to evaluate the emissions reduction performance of used catalytic converters. Each converter will have to be tested individually to determine if it was acceptable for reuse, which is a costly and time consuming process. Further, the existing methods are unable to determine if the used catalytic converters will meet the performance and durability requirements required by the new aftermarket catalytic converter standards. It is possible that companies supplying used catalytic converters will be able to generate some revenue by recycling the precious metal content of used converters.

5. Self-employment opportunities:

None that the Department is aware of at this time.

PROPOSED RULE MAKING HEARING(S) SCHEDULED

Permitting and Registration Requirements for Stationary Emission Sources

I.D. No. ENV-31-12-00010-P

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

Proposed Action: Amendment of Parts 200 and 201 of Title 6 NYCRR.

Statutory authority: Environmental Conservation Law, sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0107, 19-0301, 19-0302, 19-0303, 19-0305, 19-0306, 19-0311, 70-0109, 71-2103 and 71-2105; 40 CFR part 70; United States Code, section 7661(b); Federal Clean Air Act, sections 160-169 and 171-193 (42 USC sections 7470-7479; 7501-7515)

Subject: Permitting and registration requirements for stationary emission sources.

Purpose: To comply with the 1990 Clean Air Act Amendments by establishing a comprehensive statewide air permit program.

Public hearing(s) will be held at: 2:00 p.m., Sept. 17, 2012 at New York State Department of Environmental Conservation, Region 8 Office Conference Rm. 6274, E. Avon-Lima Rd. (Rtes. 5 and 20), Avon, NY; 2:00 p.m., Sept. 19, 2012 at New York State Department of Environmental Conservation, 625 Broadway, Public Assembly Rm. 129B, Albany, NY; 2:00 p.m., Sept. 20, 2012 at New York State Department of Environmental Conservation, Region 2 Office, One Hunters Point Plaza, 47-40 21st St., Rm. 834, Long Island City, NY.

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

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

Text of proposed rule: The New York State Department of Environmental Conservation (Department) is proposing to revise its Operating Permit Program found in Title 6 of Official Compilation of Codes, Rules and Regulation of the State of New York (6 NYCRR) Parts 200, General Provisions; and 201, Permits and Registrations (Part 201).

The Part 200 amendment replaces an outdated reference to the 1994 version of the National Toxicology Program's 'Report on Carcinogens' with the 2011 version of the report. In addition, several existing incorporations by reference will be added.

Section 201-1.4 is revised and reworded to more clearly state its requirements. A new Section 201-1.11 is added in order to establish regulatory requirements for temporary emission sources. General language allowing the Department to suspend, modify, revoke, reopen, or reissue air permits, consistent with 6 NYCRR Part 621, is relocated from other Subparts of Part 201 to a new Section 201-1.12. A new Section 201-1.13 is added to include a provision granting Department staff access to inspect any facility subject to the requirements of Part 201. A new section 201-1.14 is added to require owners and operators of facilities holding outdated certificates to operate to apply for a state facility permit or registration within 90 days of notification by the Department. Finally, a new Section 201-1.15 is added to require facility owners and operators to commence construction of permitted emission sources within 18 months of receiving a permit or registration from the Department.

The definition of major stationary source in Paragraph 201-2.1(b)(21) is revised to remove references to the "severe ozone nonattainment area" and include the specific affected areas. Paragraph 201-2.1(b)(24) is repealed. A new Paragraph 201-2.1(b)(24) is added to define a "portable emission source" as an emission source that can be carried or moved from one location (i.e. any single site at a building, structure, facility, or installation) to another. Paragraph 201-2.1(b)(29) is repealed. A new Paragraph 201-2.1(b)(29) is added to define a "temporary emission source" as an emission source that is transient in nature and will be operated at a facility for less than 90 consecutive days from the date of first operation, or an emission source that will be constructed and operated for less than 30 days per calendar year.

Subpart 201-3, Exemptions and Trivial Activities, is renamed as "Permit Exempt and Trivial Activities". Subdivisions 201-3.1(b) through 201-3.1(e) are repealed and replaced with new language to clarify their requirements. Paragraph 201-3.2(c)(1) is revised to clarify the specific types of combustion equipment that are exempt from permitting requirements. Paragraph 201-3.2(c)(2) is repealed and replaced with an exemption for certain space heaters using waste oil as a fuel. Paragraph 201-3.2(c)(3) is revised to remove references to the "severe ozone nonattainment area" and to allow for stationary or portable internal combustion engines using fuels other than diesel or natural gas to qualify for exemption. Paragraph 201-3.2(c)(4) is repealed and the paragraph number reserved to preserve the numerical order of the Section. Paragraph 201-3.2(c)(6) is revised to exclude stationary internal combustion engines used for demand response and/or peak shaving from the exemption. Paragraph 201-3.2(c)(13) is revised to remove references to the "severe ozone nonattainment area". Paragraph 201-3.2(c)(16) is revised to exempt all gasoline dispensing sites that are registered with the Department pursuant to 6 NYCRR Part 612 from air pollution control permitting. Paragraph 201-

3.2(c)(17) is revised to clarify which surface coating activities are intended to be exempt and to remove references to the "severe ozone nonattainment area". Paragraph 201-3.2(c)(20) is revised to clarify that only landfill gas ventilating systems at landfills with design capacities less than 2.5 million megagrams and 2.5 million cubic meters are exempt. Paragraph 201-3.2(c)(21) is revised to include liquid asphalt storage tanks. Paragraph 201-3.2(c)(27) is revised to exclude raw material, clinker, and finished product silos at Portland cement plants. Paragraphs 201-3.2(c)(28) and 201-3.2(c)(29) are revised to clarify which sand and gravel and stone crushing plants qualify for exemption. Paragraph 201-3.2(c)(30) is repealed and the paragraph number reserved to preserve the numerical order of the Section. New exempt activities are added as Paragraphs 201-3.2(c)(46) through 201-3.2(c)(48). The new activities cover operations including: hydrogen fuel cells, certain dry cleaning equipment, and manure handling and spreading equipment at farms, respectively.

Paragraph 201-3.3(c)(29) is revised to clarify when an air stripper or soil vent qualifies as a trivial activity. New language is added to Paragraph 201-3.3(c)(33) to exclude bypass stacks and vents on incinerators and bypass stacks and vents that operate on a routine or frequent basis from the trivial activity. New language is added to Paragraph 201-3.3(c)(41) to include several additional types of solid waste handling equipment. Paragraph 201-3.3(c)(50) is deleted and its number reserved to preserve the order of the Section. New language is added to Paragraph 201-3.3(c)(53) that includes hand held spray guns with capacity less than three ounces in the trivial activity. Paragraph 201-3.3(c)(81) is revised to clarify the office equipment and products that are considered trivial for permitting purposes. Paragraph 201-3.3(c)(94) is revised to remove carbon dioxide, methane and propane from the list of trivial emissions. In addition, the reference to the seventh edition of the United States Department of Health and Human Services' Annual Report on Carcinogens is updated to the twelfth version of that document. A new Paragraph is added at 201-3.3(c)(95) to include emissions of carbon dioxide and methane that are not specifically regulated by a federal or state law or regulation as a trivial activity. Lastly, a new Paragraph 201-3.3(c)(96) is added that describes solvent cleaning of parts and equipment exclusively by hand wiping as trivial for the purposes of Part 201.

Section 201-4.1 is revised to clarify the applicability of Subpart 201-4. Paragraphs 201-4.1(a)(1) through 201-4.1(a)(4) are repealed. Paragraph 201-4.1(a)(5) is renumbered as Paragraph 201-4.1(a)(1) and revised to correct the reference to the cap-by-rule provisions which will be relocated as part of this rulemaking. A new Paragraph is added as 201-4.1(a)(2) that requires facilities, except for stationary or portable combustion installations, with annual actual emissions of any persistent, bioaccumulative, or toxic (PBT) compound less than the threshold listed in Table 1 of Subpart 201-9 to register with the Department. Subdivision 201-4.1(b) is repealed and replaced with new language allowing the Department to require a facility owner or operator that would otherwise qualify for registration to apply for a state facility permit within six months of notification by the Department. Section 201-4.2 is renamed as "General Requirements". Subdivisions 201-4.2(e) and 201-4.2(f) are repealed. A new Subdivision 201-4.2(e) is added limiting the term of new and modified registrations to ten years from the date of issuance. A new Subdivision 201-4.2(f) is added granting the Department the authority to withdraw or revoke a registration in situations where the registered activity poses the potential for a significant adverse impact to the public health, safety, welfare, or the environment. A new Subdivision 201-4.2(g) is added to require owners and operators of facilities with a registration issued prior to the effective date of the proposed revisions to submit a renewal application within ninety days of notification by the Department. Section 201-4.3 is repealed and subsequent sections are renumbered accordingly. Section 201-4.4 is renumbered as Section 201-4.3 and renamed to "Application Content". Renumbered Subdivision 201-4.3(a) and its subsequent paragraphs are revised to reflect the current information the Department expects on all registration applications. A new Subdivision 201-4.3(b) is also added to provide the acceptable time frame for the submission of registration renewal applications. Section 201-4.5 is renumbered as Section 201-4.4. A new Subdivision 201-4.4(b) is added requiring facility owners and operators to notify the Department of a change in ownership within 30 days. The cap-by-rule provisions previously located in Section 201-7.3 are relocated to a new Section 201-4.5. This Section describes the thresholds, methods, and compliance requirements for facility owners and operators that choose to cap-by-rule in order to avoid major facility permitting.

Section 201-5.1 is revised to clarify when a facility owner or operator is required to apply for a state facility permit. Subdivisions 201-5.1(a) and 201-5.1(b) are revised to clarify the existing applicability criteria. Paragraphs 201-5.1(a)(3) and 201-5.1(a)(4) are repealed and replaced. Paragraph 201-5.1(a)(3) establishes permitting requirements for facilities with annual actual emissions of a PBT compound greater than or equal to the threshold listed in Subpart 201-9. New language is added as Paragraph 201-5.1(a)(4) requiring facilities with emissions in excess of the registra-

tion thresholds to apply for a state facility permit. Subdivision 201-5.1(c) is repealed. Section 201-5.2 is revised to more clearly describe what is required as part of a state facility permit application. Paragraph 201-5.2(b)(3) is repealed. Paragraph 201-5.2(b)(4) is renumbered as 201-5.2(b)(3) and revised to more clearly state which emission sources must be included in the facility description provided by the applicant. Paragraph 201-5.2(b)(5) is repealed. New Paragraphs are added as 201-5.2(b)(4) through 201-5.2(b)(7) to describe additional requirements for state facility permit applications. Paragraph 201-5.2(b)(6) is renumbered as 201-5.2(b)(8). New Paragraphs are added as 201-5.2(b)(9) and 201-5.2(b)(10) to list additional state facility permit application requirements. A new Subdivision 201-5.2(c) is added to describe the procedure and timeframes for submitting a state facility permit renewal application. Subdivision 201-5.3(a) is revised to limit the term of issuance for a new or modified state facility permit to 10 years. A new Subdivision 201-5.3(b) is added to require the owner or operator of an existing facility holding a state facility permit to submit a renewal application to the Department within 90 days of notification. Existing Subdivision 201-5.3(b) is renumbered as 201-5.3(c) and reworded to improve its clarity. Subdivisions 201-5.3(c) and 201-5.3(d) are repealed. Section 201-5.4 is repealed, and a new Section 201-5.4 entitled, "Permit modifications" is added to describe the procedures and requirements for requesting a modification of a state facility permit.

Section 201-6.1 is revised to clarify the applicability of Title V permitting to major facilities. Subdivision 201-6.1(b) is repealed, and subsequent Subdivisions are renumbered accordingly. Subparagraph 201-6.1(b)(2)(i) is renumbered as Paragraph 201-6.1(b)(2). Renumbered Subparagraphs 201-6.1(b)(2)(ii) and 201-6.2(b)(2)(iii) are repealed. New language is added as Subparagraph 201-6.1(b)(3)(ii) relieving facilities that EPA has permanently exempted from the requirement to get a Title V permit, and subsequent Subparagraphs are renumbered accordingly. Section 201-6.2 is repealed and subsequent Sections are renumbered accordingly. Renumbered Subdivision 201-6.2(a) is revised to remove references to the outdated transition plan requirements removed with Section 201-6.2. Accordingly, renumbered Paragraph 201-6.2(a)(1) is repealed and subsequent Paragraphs are renumbered accordingly. Renumbered Paragraphs 201-6.2(a)(1) through 201-6.2(a)(4) are revised to clarify the acceptable time frame for the submittal of Title V permit applications. Paragraphs 201-6.2(a)(5) and 201-6.2(a)(6) are repealed, and subsequent paragraphs are renumbered accordingly. Paragraph 201-6.2(a)(9) is repealed. Paragraph 201-6.2(b)(1) is revised to be consistent with the requirements of 6 NYCRR Part 621. Paragraph 201-6.2(b)(4) is repealed. Subdivision 201-6.2(c) is revised to remove references to the repealed transition plan. Subdivision 201-6.2(d) is revised to more clearly state the purpose of the Subdivision. New language is added as Subparagraphs 201-6.2(d)(3)(x) and 201-6.2(d)(3)(xi) to require a detailed process flow diagram and the physical parameters of each emission point with Title V permit applications, respectively. Paragraph 201-6.2(d)(7) is repealed and subsequent Paragraphs are renumbered accordingly. A new Subdivision 201-6.2(f) is added to describe what information is required on a Title V permit renewal application. A new Subdivision 201-6.2(g) is added to prohibit a facility owner or operator from omitting information from a permit application that is needed to determine the applicability of any requirements. A new Subdivision 201-6.2(h) is added to clearly state that a facility owner or operator may choose to accept an emission cap in order to avoid the requirement to obtain a Title V permit. Renumbered Paragraph 201-6.4(d)(3) is repealed, and subsequent Paragraphs are renumbered accordingly. Subdivision 201-6.4(g) is separated into Paragraphs 201-6.4(g)(1) and 201-6.4(g)(2), and Paragraphs 201-6.4(g)(1) through 201-6.4(g)(4) are renumbered as Subparagraphs 201-6.4(g)(2)(i) through 201-6.4(g)(2)(iv) respectively. Paragraph 201-6.5(a)(1) is renumbered as Subdivision 201-6.5(a). Paragraph 201-6.5(a)(2) is repealed. Subdivisions 201-6.5(d) and 201-6.5(e) are repealed. Subparagraph 201-6.6(c)(1)(v) is revised to be consistent with 6 NYCRR Part 231. Paragraph 201-6.6(c)(9) is revised to allow the Department to process groups of minor permit modifications for a single facility simultaneously. Subparagraphs 201-6.6(c)(9)(i) through 201-6.6(c)(9)(vi) are repealed. Renumbered Section 201-6.7 is renamed to "Appendix A - Area Sources Regulated by National Emission Standards for Hazardous Air Pollutants Permanently Exempted from Title V Permitting". Referenced federal National Emission Standards for Hazardous Air Pollutants 40 CFR 63.541 and 40 CFR 63.1500 are removed. Section 201-6.9 is repealed.

Section 201-7.1 is renamed "Emission capping in facility permits" and the existing language is repealed. New language is added as Subdivisions 201-7.1(a) through 201-7.1(h) that establishes the requirements for emission capping in facility permits. Section 201-7.2 is repealed. Section 201-7.3 is repealed.

Subdivision 201-8.2(b) is revised to be consistent with 6 NYCRR Part 621. Subdivisions 201-8.2(c) and 201-8.2(d) are repealed. Subdivision 201-8.3(d) is repealed. A new Subdivision 201-8.3(d) is added to allow

the Department to request that a facility that would otherwise qualify for a general permit apply for a state facility permit instead.

A new Subpart 201-9 entitled "Tables" is added. Table 1 is added to this Subpart to contain the emission thresholds for 62 Persistent, Bioaccumulative and Toxic compounds.

Text of proposed rule and any required statements and analyses may be obtained from: Mark Lanzafame, NYSDEC, Division of Air Resources, 625 Broadway, Albany, NY 12233-3254, (518) 402-8403, email: 201permit@gw.dec.state.ny.us

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

Public comment will be received until: September 27, 2012.

Additional matter required by statute: Pursuant to Article 8 of the State Environmental Quality Review Act, a Short Environmental Assessment Form, a Negative Declaration and a Coastal Assessment Form have been prepared and are on file.

Summary of Regulatory Impact Statement

The New York State Department of Environmental Conservation (Department) is proposing to update its Operating Permit Program found in Title 6 of Official Compilation of Codes, Rules and Regulation of the State of New York (6 NYCRR) Parts 200, General Provisions; and 201, Permits and Registrations (Part 201). The last substantial overhaul of Part 201 occurred in 1996. At that time, the Department was required to revise Part 201 to incorporate the federal Title V permitting program mandated by the Clean Air Act Amendments of 1990 (Act). Many of the requirements in Part 201 have since become outdated and/or in need of substantial revision. While the Department has over the years made several minor changes to particular definitions and exempt activities, a comprehensive review and revision has not been proposed. This rulemaking will revise several components of the existing Part 201 to further clarify their requirements and simplify their implementation. This proposal applies to any entity that operates one or more stationary air emission sources in the State of New York, and does not create a mandate on local governments. The scope of the existing Part 201 will not be changed as a result of this proposal.

1. STATUTORY AUTHORITY

The statutory authority for these regulations is found in Sections 1-0101, 3-0301, 3-0303, 19-0103, 19-0105, 19-0301, 19-0302, 19-0303, 19-0305, 19-0306, 19-0311, 70-0109, 71-2103, and 71-2105 of the Environmental Conservation Law (ECL), 40 CFR 70, Section 7661[b] of the United States Code (USC), and Sections 160-169 and 171-193 of the Federal Clean Air Act (Act) (42 USC Sections 7470-7479;7501-7515).

2. LEGISLATIVE OBJECTIVES

Title V of the 1990 amendments to the Act established federal standards that states must satisfy with their air permitting programs in order to fulfill the environmental protection goals expressed therein. Such a program is required to address both large and small sources of air pollution, and provide a strong basis for implementing and enforcing various federal and state rules and regulations. The Department completed a rule making in 1996 that modified Part 201, and the Department's existing air permitting program, to be consistent with the new requirements of the Act. The knowledge and experience gained by the Department since that time has highlighted certain areas of the State air permitting program that need to be updated and revised. The changes being proposed through the present rulemaking are intended to increase the effectiveness of the program, streamline the permitting process, and make the program itself more efficient and responsive.

The development of a clear, concise and effective air permitting program will allow the Department to better fulfill its obligations to the citizens of the State while simultaneously meeting its responsibilities under the Act. This goal is consistent with the objectives set forth in both the Act and the ECL. The proposed revisions will also simplify the process for facility owners and operators by making the requirements for permitting or registering a facility more clear, consistent and concise. Finally, the revisions will make the program more efficient by reducing the amount of back and forth correspondence between the applicant, their consultants, and Department staff during the application review process.

3. NEEDS AND BENEFITS

The Department responded to the 1990 amendments to the Act by restructuring its existing air permitting program to be consistent with the newly promulgated federal requirements. Since that time, the program has remained largely unchanged. The subsequent 15 years of experience with the existing program has highlighted several areas in need of update and revision. Accordingly, the Department is proposing to amend Part 201 to comprehensively address these issues and improve the air permitting program by streamlining certain portions of the permitting process, making it easier and more efficient for facility owners and operators to implement. In addition, this rulemaking will also address inconsistencies caused by the promulgation of several federal regulations since Part 201 was last revised. It is necessary to correct these inconsistencies in order to

avoid further confusion and simplify program implementation for facility owners, operators, and the Department.

The proposed Part 200 amendments will update a reference to the National Toxicology Program's 'Report on Carcinogens' that is used in Subpart 201-3. This will update the referenced version from the 1994 version to the 2011 version, ensuring that the most up to date information is used in Part 201.

The 1996 revisions to Part 201 included transition plan requirements to help the Department phase-in the new obligations under the Act. Many of these requirements have since lapsed and no longer apply to any existing or new sources of air pollution in the State. Accordingly, the Department will remove these outdated requirements as part of this proposal.

The provisions for emission sources that operate on a temporary basis will also be revised as part of this rulemaking. In the current version of the rule, temporary operations are only discussed in the portion of Part 201 that applies to major facilities subject to Title V permitting requirements. While temporary operations at Title V facilities are an important part of many industrial operations, they are also frequently used at smaller facilities. As part of this rulemaking, the Department is proposing to clarify the provisions that define how an emission source must be operated to be considered temporary, and extend those same provisions to all facilities, regardless of size.

Prior to 1996, the Department issued individual source permits, permits to construct, and certificates to operate (COs) to all applicable air emission sources at a facility. This practice changed in 1996 when the Department was required to revise its Part 201 to begin phasing-out the individual source permitting program and phasing-in the current program designed to permit an entire facility under a single permit or registration. Existing COs were extended indefinitely to mitigate some of the burden associated with the changes to the permitting program. Many facilities still hold one or more COs today and these permits need to be updated. The Department estimates that approximately 350 COs are still outstanding statewide. Facility owners and operators holding a current permit or registration are not affected by this change. The proposed revisions to Part 201 will require the owners or operators of facilities still holding COs to submit a facility permit or registration application to the Department within 90 days of receiving written notification from the Department.

The cap-by-rule requirements for facilities that choose to maintain annual actual emissions below 50 percent of the major facility thresholds, as defined and set forth in Subpart 201-7.3, will also be revised as part of this proposal. The current language includes a list of fuel usage limits intended to restrict combustion facilities to a level that would maintain their emissions below the capping thresholds. The values listed in this table are now outdated and need to be revised. Accordingly, as part of this rulemaking, the Department is proposing to do away with these values, and allow facility owners or operators to demonstrate compliance through recordkeeping. In addition, the cap-by-rule provisions for other types of facilities will be revised to increase their clarity and ease of implementation. This change will also help to reduce confusion for facility owners and operators by simplifying the language describing the necessary procedures for capping by rule.

The Department is further proposing to revise the list of activities that are exempt from permitting requirements. The proposed revisions will update several of the listed activities in order to make them consistent with federal and state requirements that have been promulgated since the list was first implemented in 1996. In addition, six new activities will be added. These new activities address emission sources and technologies that were not widely used when Part 201 was last revised in 1996.

The Department is proposing as part of this rulemaking to add new items to the required information that must be submitted with air facility registration and permit applications. The proposed changes will require applicants to submit more detailed emissions calculations, as well as the physical parameters of each emission point at the facility. By adding this requirement to the rule, the Department is codifying its long-standing practice of mandating the submittal of this information and supporting documentation during the permit review process. This change is intended to decrease the number of requests for additional information made by the Department during the permit application review process, making the process itself less cumbersome and time consuming, and more efficient.

The Department is proposing a term limit on new and modified registrations and state facility permits. Specifically, the Department is proposing to establish a maximum term limit of 10 years. The 10 year limit was chosen to avoid confusion with the statutory deadlines for Title V permit renewal and mitigate any burden this change may impose on both the regulated community and Department staff. In addition, owners and operators of facilities holding existing registrations or state facility permits will be required to submit renewal applications within 90 days of receiving written notification from the Department.

In addition to the proposed term limits for registrations and state facility permits, the Department is also proposing to limit the amount of time a fa-

cility owner or operator has to commence construction once receiving a permit or registration from the Department. Accordingly, Facility owners and operators will have 18 months from the date of permit or registration issuance to commence construction. Should the facility owner or operator fail to meet this deadline, the Department may revoke or modify their permit or registration as necessary.

The proposed revisions will also add a new subpart to the rule introducing a list of 62 toxic air contaminants that have been found to pose the greatest threat to public health, safety, and the environment. The new list of air pollutants will establish emission thresholds for Persistent, Bioaccumulative and/or Toxic (PBT) air contaminants. PBT air contaminants are chemical substances that are persistent (P) in the environment, accumulate in biological organisms (bioaccumulative (B)), and toxic (T), making them priority pollutants and potential risks to both humans and ecosystems. The list contains 26 compounds determined to be carcinogens by the National Toxicology Program of the US Department of Health and Human Services (NTP)¹, 12 of which are listed as known human carcinogens.² Five families of compounds on the list are targeted for reduction by the Great Lakes Commission due to their long term persistence.³ Finally, the Emergency Planning and Community Right-to-Know Act has identified all but three of the listed PBT contaminants as significant compounds that should be evaluated.⁴ The three extra compounds were included because emissions of those compounds have required action by the Department in the past. By monitoring, controlling and potentially eliminating emissions of these compounds, the Department will be able to better fulfill its obligation to protect the health of the citizens and environment of New York State.

The proposed changes to Part 201 will ensure that PBT air contaminants are appropriately identified in permit and registration applications so that they can be properly monitored and, where possible, controlled by the Department. In addition, by establishing mass emission thresholds for these potentially hazardous compounds, the compliance process for regulating facilities will be simplified. A facility emitting one of these listed PBT air contaminants will be able to avoid conducting potentially costly emissions modeling and analysis since the modeling was already included in the development of the applicable threshold values. Further, the Department will benefit from this increased reporting on permit and registration applications by acquiring new data that can be used in future modeling exercises and/or to meet current and future air program goals.

It is important to note that this proposed change does not apply to facilities that operate only emission sources that are considered to be exempt or trivial pursuant to Subpart 201-3. The Department is confident that the activities listed as exempt and trivial will not result in emissions in excess of the proposed PBT thresholds. Further, the Department has decided to exclude combustion sources (i.e. boilers, stationary engines) from these requirements. Potential HAP and VOC emissions from these facilities are addressed through the federal National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations. The Department has no intention of duplicating that federal effort with this rulemaking.

4. COSTS

Overall cost increases at currently regulated facilities are expected to be minimal if Part 201 is amended as proposed. In most cases, the affected facilities are already required to pay emission fees, monitor their emission sources and complete permit applications. In addition, many of these facilities already employ the necessary staff to complete and file any permit or renewal applications, and monitor their facility for compliance with any applicable environmental regulations.

Costs for complying with the permitting program will vary depending on the size and nature of the facility, and the types and amounts of pollutants it emits. While there are costs associated with compliance incurred by major facilities, the Department does not anticipate any change in those costs as a result of this rulemaking.

Annualized costs associated with obtaining and complying with a state facility permit or registration are estimated to be approximately \$300/yr. These costs represent activities such as recordkeeping and filing annual reports with the Department. In addition, annual permit program fees based on the type, size and number of emission sources operated at the facility must be paid to the Department. Permit program fees are controlled by Section 72-0302 of the ECL, and are currently set at: \$100 for a small combustion or incineration source, \$160 for a small process source, and \$2000 for a large combustion, incineration or process source. The total program fee for any particular facility is calculated by tallying the number of each type of source operated at the facility and adding the respective fees. Facility owners and operators operating air emission sources in New York State are currently required to pay these costs. The Department does not anticipate an increase in compliance costs as a result of this proposal.

In addition to the annual compliance costs and permit fees, there are also costs associated with preparing state facility permit and registration applications. The costs for state facility permit and registration applications in the downstate region ranged from \$1,500 to \$7,200 based on the

number of emission points at the facility. In the upstate region, these costs are estimated at \$1,800 to \$4,000. Some facilities may choose to hire a consulting firm to assist with the permit application process. The Department estimates that the cost of hiring a consulting firm is approximately \$6,000 per application.

The Department is sensitive to the costs of permitting for small businesses. The Small Business Environmental Assistance Program (SBEAP) is a component of EFC that provides free and confidential application preparation services for small businesses that own or operate minor facilities. This service mitigates a large portion of the costs of preparing permit applications, and helps to ensure facility owners and operators are in compliance with all applicable regulations.

5. PAPERWORK

The proposed changes to Part 201 are not expected to create any significant increase in the amount of required paperwork.

Facility owners or operators that are required to update their existing COs may incur some additional paperwork in the form of recordkeeping and/or reporting requirements that they were not previously required to satisfy. Any additional paperwork will be consistent with other similar facilities already holding a permit or registration.

6. LOCAL GOVERNMENT MANDATES

The proposed revisions to Part 201 do not create any local government mandates beyond the need for local governments operating sources of air pollution to apply for and comply with a permit or registration as necessary. This requirement has existed since the inception of the first air permitting program more than 30 years ago. It has always been the policy of the Department to review all sources of air emissions, regardless of ownership. This policy does not represent or create any additional or disproportionate burden for local governments.

7. DUPLICATION

The proposal is not intended to duplicate any state or federal regulations or statutes.

8. ALTERNATIVES

An alternative to these proposed revisions is to take no action. Taking no action will have several negative consequences. First, outdated transition plan requirements and other confusing language will continue to remain in the rule. Second, sources of PBT compound emissions will continue to operate without increased scrutiny from the Department, potentially resulting in excess emissions. Third, facilities operating under existing COs will continue to operate indefinitely under their outdated permits, potentially resulting in excess emissions and non-compliance with newly promulgated state and federal regulations. The Department will not be able to properly address temporary emission sources, resulting in time consuming permit reviews for short-term actions with little environmental impact. Facility owners and operators will be required to respond to requests from the Department for more information, delaying the review of their permit applications and lengthening the overall permit issuance process.

9. FEDERAL STANDARDS

The proposed revisions to Part 201 are consistent with all federal standards.

10. COMPLIANCE SCHEDULE

The proposed revisions do not result in the establishment of any compliance schedules. The regulation will take effect 30 days after publication in the State register, anticipated to be in November 2012. Current permit renewal schedules for regulated industries will remain, and any new requirements will be added during the permit renewal process. Facility owners or operators required to update their existing COs or submit a state facility permit or registration renewal application will be notified by the Department prior to their required filing date.

¹ 12th Report on Carcinogens. US Department of Health and Human Services National Toxicology Program, 2011 <http://ntp.niehs.nih.gov/ntp/roc/twelfth/ListedSubstancesKnown.pdf>

² EPA and the NTP issue guidance documents that rank carcinogens based on five recommended hazard descriptors: carcinogenic to humans, suggestive evidence of carcinogenic potential, inadequate information to assess carcinogenic potential, and not likely to be carcinogenic to humans. See: Guidelines for Carcinogen Risk Assessment. EPA/630/P-03/001F USEPA. March 2005.

³ The Great Lakes Commission is an interstate compact agency that promotes the integrated and comprehensive development of the water and related natural resources of the Great Lakes basin and St. Lawrence River. See: <http://www.glc.org/>

⁴ See: <http://www.epa.gov/ceppo/pubs/title3.pdf>

Regulatory Flexibility Analysis

The New York State Department of Environmental Conservation (Department) is proposing to revise and update 6 NYCRR Parts 200, Gen-

eral Provisions, and 201, Permits and Registrations (Part 201). The last substantial overhaul of Part 201 occurred in 1996. Since that time, many of the requirements in Part 201 have become outdated and in need of revision. The proposed rulemaking will revise several components of the existing Part 201 to further clarify their requirements and simplify its implementation, making it more efficient and cost effective for affected facilities. The scope of the existing Part 201 is not changed as a result of proposed revisions.

The proposed changes to Part 201 include the addition of several exempt and trivial activities, the removal of outdated transition plan requirements and many other minor language corrections. The provisions for emission sources operating on a temporary basis will also be clarified. Permitting thresholds for 62 persistent, bioaccumulative, and/or toxic compounds are also being added in order to more closely monitor and where possible control their emissions. Facility owners and operators still holding outdated certificates to operate will be required to update their current permit by submitting a permit or registration application. Lastly, the Department is proposing to limit the term of issuance for state facility permits and registrations to 10 years, ensuring that the air permits and registrations issued by the Department contain the most up to date information possible.

EFFECTS ON SMALL BUSINESS AND LOCAL GOVERNMENTS

The proposed revisions to Part 201 are not expected to directly affect small businesses and local governments. The owner or operator of an air emission source is required to obtain and comply with a permit or registration for that source. Small businesses and local governments are currently required to comply with this requirement under the existing Part 201. The proposed revisions will make the terms and conditions of Part 201 easier to understand and implement, simplifying the compliance process.

The proposed revisions will also require facility owners and operators that still hold outdated certificates to operate to update those certificates to current permits or registrations. Affected facility owners and operators will be required to complete a permit or registration application and go through the necessary approval process. In addition, the Department is proposing to add a list of permitting thresholds for certain persistent, bioaccumulative and toxic (PBT) compounds. This list may require that a new or existing small business emitting one or more of these compounds obtain either a permit or registration from the Department. Such a determination will be based on the actual emission levels of the compound in question. There may also be recordkeeping requirements associated with facilities that emit PBT compounds. Many of the potentially affected facilities are already required to keep some form of records relative to these compounds, and any additional recordkeeping would amount to only a more detailed accounting of their emissions.

Lastly, the Department is aware of local governments that issue their own air pollution control permits in addition to those required by the Department. This action is conducted solely at the discretion of local agencies and is not mandated by Part 201.

COMPLIANCE REQUIREMENTS

Small businesses and local governments that own or operate a non-exempt stationary emission source are currently required to complete and file an appropriate permit or registration application for the construction and operation of that facility. Once a permit or registration is issued, the facility owner or operator is required to comply with all terms and conditions of that permit or registration, and ensure that it accurately reflects facility operations. This requirement will not change as a result of these proposed revisions.

PROFESSIONAL SERVICES

Small businesses and local governments are able to comply with the requirements of Part 201 without contracting with any professional services. In some cases however, small businesses and local governments may choose to hire a private consulting firm to assist them with meeting their obligations under Part 201. The decision to employ a consulting firm is voluntary, and any associated costs are incurred at the discretion of the affected facility.

COMPLIANCE COSTS

Compliance costs for small businesses and local governments are not expected to increase as a result of the proposed revisions. In fact, the proposed revisions to Part 201 may have a positive impact on costs to small businesses and local governments. The proposed revisions seek to clarify and simplify the permitting process, leading to an increase in effectiveness and efficiency. This increased efficiency may actually decrease compliance costs for affected facilities. A more detailed analysis of the costs associated with this rulemaking is presented in the Regulatory Impact Statement.

Emission sources operated by small businesses and local governments tend to be minor facilities subject to state facility permitting or registration. The Department estimates that the annualized compliance costs for a minor facility are approximately \$300. In addition, there are costs associated with completing and filing permit applications. The Department

estimates that the cost of preparing and filing a permit application ranges from approximately \$1,500 to \$7,200 in the downstate region and \$1,800 to \$4,000 in the upstate region depending on the size and number of emission sources at the facility. Permit application costs will be incurred by affected facilities in ten year intervals as their permit or registration comes up for renewal, allowing facility owners and operators time to anticipate them.

MINIMIZING ADVERSE IMPACTS

The proposed revisions to Part 201 are not expected to have an adverse impact on small businesses and local governments. New and existing facilities are already required to comply with the current version of Part 201, and the scope of the regulation is not changed as a result of the proposed revisions. These proposed changes are intended to simplify the permitting process by making it easier to understand and more efficient.

In order to assist small businesses with environmental compliance, the Department provides free and confidential support through the Small Business Environmental Assistance Program (SBEAP), administered by the New York State Environmental Facilities Corporation. Interested facility owners and operators can contact SBEAP staff for free and confidential assistance filing permit and registration applications, as well as for advice and strategies for maintaining compliance with environmental regulations. This program provides small businesses with a cost saving option while ensuring that they are in compliance with the requirements of Part 201.

SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

Prior to this proposal, the Department solicited the input of potentially affected parties through a series of stakeholder meetings and outreach activities. A fact sheet detailing draft changes being considered for Part 201 was distributed to potentially affected parties via the Business Council, and all feedback received was carefully considered. In addition, interested parties will have the opportunity to review and comment on the Department's proposal as part of the formal rulemaking process.

ECONOMIC AND TECHNOLOGICAL FEASIBILITY

Part 201 does not contain any technological requirements for affected facilities. In addition, the Department does not expect a significant change in the economic feasibility of Part 201 as a result of these revisions. Affected facilities are currently required to obtain permits and registrations from the Department. Several thousand facilities of various sizes are currently operating in compliance with Part 201 throughout the State. This is expected to continue after these proposed revisions are promulgated.

CURE PERIOD

The proposed revisions to Part 201 do not require the imposition of a cure period because there are no changes to any existing violations or penalties, and no new violations or penalties are established.

Rural Area Flexibility Analysis

The New York State Department of Environmental Conservation (Department) is proposing to revise and update 6 NYCRR Parts 200, General Provisions, and 201, Permits and Registrations (Part 201). The last substantial overhaul of Part 201 occurred in 1996. Since that time, many of the requirements in Part 201 have become outdated and in need of revision. The proposed rulemaking will revise several components of the existing Part 201 to further clarify their requirements and simplify its implementation, making it more efficient and cost effective for affected facilities. The scope of the existing Part 201 is not changed as a result of proposed revisions.

The proposed changes to Part 201 include the addition of several exempt and trivial activities, the removal of outdated transition plan requirements and many other minor language corrections. The provisions for emission sources operating on a temporary basis will also be clarified. Permitting thresholds for 62 persistent, bioaccumulative, and/or toxic compounds are also being added in order to more closely monitor and where possible control their emissions. Facility owners and operators still holding outdated certificates to operate will be required to update their current permit by submitting a permit or registration application. Lastly, the Department is proposing to limit the term of issuance for state facility permits and registrations to 10 years, ensuring that the air permits and registrations issued by the Department contain the most up to date information possible.

TYPES AND ESTIMATED NUMBER OF RURAL AREAS AFFECTED

Part 201 applies to the owner or operator of any facility operating one or more stationary emission sources in New York State. Affected facilities range in scale from small industries with a handful of emission sources, to large scale industries with hundreds of emission sources. Affected facilities are located in communities throughout the state, including many rural areas. The owner or operator of such a facility is already required to comply with the permitting and registration provisions of the existing Part 201. This proposal seeks to modify and update those provisions in order to make them easier to understand and implement. These changes are expected to result in increased efficiency at regulated facilities, potentially

decreasing compliance costs. Accordingly, no adverse impacts on rural areas are anticipated due to this rulemaking.

COMPLIANCE REQUIREMENTS

Facility owners and operators that are subject to the requirements of Part 201 are required to obtain a facility permit or registration from the Department based on the potential to emit of their facility. Once issued, the permit or registration contains terms and conditions that the facility owner or operator is required to adhere to in order to demonstrate continuous compliance with state and federal rules and regulations that apply to the operation of that facility. Part 201 applies to all facilities operating stationary emission sources, regardless of their location. The proposed revisions will increase the clarity and efficiency of the rule, making compliance easier and more efficient for facility owners and operators.

COSTS

A detailed analysis of the costs for complying with the requirements of Part 201 can be found in the Regulatory Impact Statement for this rulemaking. The annualized compliance costs and application preparation costs described in that analysis are expected to be comparable to those of affected facilities located in rural areas. The proposed revisions to Part 201 will increase the clarity and efficiency of the air permitting program, potentially leading to cost savings over the current regulation.

MINIMIZING ADVERSE IMPACT

The Department does not anticipate any adverse impacts to rural areas as a result of this proposal. Permitting sources of air pollution regardless of ownership or location is necessary to ensure that they are operated in a way that protects the public health and the environment. In addition, the proposed revisions to Part 201 will make it easier for facility owners and operators to understand and comply with its requirements.

RURAL AREA PARTICIPATION

Prior to this proposal, the Department solicited the input of potentially affected parties through a series of stakeholder meetings and outreach activities. A fact sheet detailing draft changes being considered for Part 201 was distributed to potentially affected parties via the Business Council, and all feedback received was carefully considered. In addition, interested parties will have the opportunity to review and comment on the Department's proposal as part of the formal rulemaking process.

Job Impact Statement

The New York State Department of Environmental Conservation (Department) is proposing to revise and update 6 NYCRR Parts 200, General Provisions, and 201, Permits and Registrations (Part 201). The last substantial overhaul of Part 201 occurred in 1996. Since that time, many of the requirements in Part 201 have become outdated and in need of revision. The proposed rulemaking will revise several components of the existing Part 201 to further clarify their requirements and simplify its implementation, making it more efficient and cost effective for affected facilities. The scope of the existing Part 201 is not changed as a result of proposed revisions.

The proposed changes to Part 201 include the addition of several exempt and trivial activities, the removal of outdated transition plan requirements and many other minor language corrections. The provisions for emission sources operating on a temporary basis will also be clarified. Permitting thresholds for 62 persistent, bioaccumulative, and/or toxic compounds are also being added in order to more closely monitor and where possible control their emissions. Facility owners and operators still holding outdated certificates to operate will be required to update their current permit by submitting a permit or registration application. Lastly, the Department is proposing to limit the term of issuance for state facility permits and registrations to 10 years, ensuring that the air permits and registrations issued by the Department contain the most up to date information possible.

NATURE OF IMPACT

The proposed revisions to Part 201 are not expected to have any measurable impact on jobs or employment opportunities in the state. Affected facilities will continue to comply with their air permitting requirements by utilizing existing staff, or by contracting with outside consulting firms. Due to the nature of the proposed changes, the Department expects resources at affected facilities will be able to be utilized more efficiently.

CATEGORIES AND NUMBERS OF JOBS OR EMPLOYMENT OPPORTUNITIES AFFECTED

Facility owners and operators affected by Part 201 need professional engineering staff in order to accurately complete any required permit applications, and ensure their facility meets its obligations under their permit. Most facilities already employ the necessary staff to meet these needs. Professional engineering consultants may be retained where dedicated staff is unavailable, but that decision will be made by the facility owner or operator. In addition, the proposed changes will increase the clarity and efficiency of the air permitting process, allowing technical staff and consultants to complete the necessary work more quickly and efficiently.

REGIONS OF ADVERSE IMPACT

The proposed revisions to Part 201 are not expected to have any adverse

impact on jobs or employment opportunities in the state. Accordingly, there are no regions of the state where there is expected to be a disproportionate or adverse impact.

MINIMIZING ADVERSE IMPACT

The revisions to Part 201 are not expected to have an adverse impact on jobs or employment opportunities.

Department of Financial Services

EMERGENCY RULE MAKING

Excess Line Placements Governing Standards

I.D. No. DFS-31-12-00002-E

Filing No. 693

Filing Date: 2012-07-13

Effective Date: 2012-07-13

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

Action taken: Amendment of Part 27 (Regulation 41) of Title 11 NYCRR.

Statutory authority: Insurance Law, sections 301, 316, 1213, 2101, 2104, 2105, 2110, 2116, 2117, 2118, 2121, 2122, 2130, 3103, 5907, 5909, 5911 and 9102; and arts. 21 and 59; Financial Services Law, sections 202 and 302; L. 1997, ch. 225; L. 2002, ch. 587; L. 2011, ch. 61

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

Specific reasons underlying the finding of necessity: This regulation governs the placement of excess line insurance. Article 21 of the Insurance Law and Regulation 41 enable consumers who are unable to obtain insurance from authorized insurers to obtain coverage from unauthorized insurers (known as "excess line insurers") if the unauthorized insurers are "eligible," and an excess line broker places the insurance.

On July 21, 2010, President Obama signed into law the Nonadmitted and Reinsurance Reform Act of 2010 ("NRRRA"), which prohibits any state, other than the insured's home state, from requiring a premium tax payment for nonadmitted insurance. The NRRRA also subjects the placement of nonadmitted insurance solely to the statutory and regulatory requirements of the insured's home state, and provides that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate nonadmitted insurance with respect to such insured. On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amended the Insurance Law to implement the provisions of the NRRRA.

The sections of Part I of Chapter 61 that amend the Insurance Law to bring New York into conformance with the NRRRA took effect on July 21, 2011, which is when the NRRRA took effect. The regulation was previously promulgated on an emergency basis on July 22, 2011, October 19, 2011, January 16, 2012 and April 16, 2012.

For the reasons stated above, emergency action is necessary for the general welfare.

Subject: Excess Line Placements Governing Standards.

Purpose: To implement chapter 61 of the Laws of 2011, conforming to the federal Nonadmitted and Reinsurance Reform Act of 2010.

Substance of emergency rule: On July 21, 2010, President Obama signed into law the federal Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), which contains the Nonadmitted and Reinsurance Reform Act of 2010 ("NRRRA"). The NRRRA prohibits any state, other than the home state of an insured, from requiring a premium tax payment for excess (or "surplus") line insurance. The NRRRA also subjects the placement of excess line insurance solely to the statutory and regulatory requirements of the insured's home state, and declares that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate excess line insurance with respect to such insured.

In addition, the NRRRA provides that an excess line broker seeking to procure or place excess line insurance for an exempt commercial purchaser ("ECP") need not satisfy any state requirement to make a due diligence search to determine whether the full amount or type of insurance sought by the ECP may be obtained from admitted insurers if: (1) the broker procuring or placing the excess line insurance has disclosed to the ECP that the insurance may be available from the admitted market, which may provide greater protection with more regulatory oversight; and (2) the ECP has subsequently requested in writing that the broker procure the insurance from or place the insurance with an excess line insurer.

On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amends the Insurance Law to conform to the NRRRA.

Insurance Regulation 41 (11 NYCRR Part 27) consists of 24 sections and one appendix addressing the regulation of excess line insurance placements.

The Department of Financial Services ("Department") amended Section 27.0 to discuss the NRRRA and Chapter 61 of the Laws of 2011.

The Department amended Section 27.1 to delete language in the definition of "eligible" and to add three new defined terms: "exempt commercial purchaser," "insured's home state," and "United States."

Section 27.2 is not amended.

The Department amended Section 27.3 to provide an exception for an ECP consistent with Insurance Law Section 2118(b)(3)(F) and to clarify that the requirements set forth in this section apply when the insured's home state is New York.

The Department amended Section 27.4 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

The Department amended Section 27.5 to: (1) clarify that the requirements set forth in this section apply when the insured's home state is New York; (2) with regard to an ECP, require an excess line broker or the producing broker to affirm in part A or part C of the affidavit that the ECP was specifically advised in writing, prior to placement, that the insurance may or may not be available from the authorized market that may provide greater protection with more regulatory oversight; (3) require an excess line broker to identify the insured's home state in part A of the affidavit; and (4) clarify that the premium tax is to be allocated in accordance with Section 27.9 of Insurance Regulation 41 for insurance contracts that have an effective date prior to July 21, 2011.

The Department amended Section 27.6 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

Section 27.7 is not amended.

The Department amended Section 27.8 to: (1) require a licensed excess line broker to electronically file an annual premium tax statement, unless the Superintendent of Financial Services (the "Superintendent") grants the broker an exemption pursuant to Section 27.23 of Insurance Regulation 41; (2) acknowledge that payment of the premium tax may be made electronically; and (3) change a reference to "Superintendent of Insurance" to "Superintendent of Financial Services."

The Department amended Section 27.9 to clarify how an excess line broker must calculate the taxable portion of the premium for: (1) insurance contracts that have an effective date prior to July 21, 2011; and (2) insurance contracts that have an effective date on or after July 21, 2011 and that cover property or risks located both inside and outside the United States.

The Department amended Sections 27.10, 27.11, and 27.12 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

The Department amended Section 27.13 to clarify that the requirements set forth in this section apply when the insured's home state is New York and to require an excess line broker to obtain, review, and retain certain trust fund information if the excess line insurer seeks an exemption from Insurance Law Section 1213. The Department also amended Section 27.13 to require an excess line insurer to file electronically with the Superintendent a current listing that sets forth certain individual policy details.

The Department amended Section 27.14 to state that in order to be exempt from Insurance Law Section 1213 pursuant to Section 27.16 of Insurance Regulation 41, an excess line insurer must establish and maintain a trust fund, and to permit an actuary who is a fellow of the Casualty Actuarial Society (FCAS) or a fellow in the Society of Actuaries (FSA) to make certain audits and certifications (in addition to a certified public accountant), with regard to the trust fund.

Section 27.15 is not amended.

The Department amended Section 27.16 to state that an excess line insurer will be subject to Insurance Law Section 1213 unless the contract of insurance is effectuated in accordance with Insurance Law Section 2105 and Insurance Regulation 41 and the insurer maintains a trust fund in accordance with Sections 27.14 and 27.15 of Insurance Regulation 41, in addition to other current requirements.

The Department amended Sections 27.17, 27.18, 27.19, 27.20, and 27.21 to clarify that the requirements set forth in this section apply when the insured's home state is New York.

Section 27.22 is not amended.

The Department repealed current Section 27.23 and added a new Section 27.23 titled, "Exemptions from electronic filing and submission requirements."

Section 27.24 is not amended.

The Department amended the excess line premium tax allocation schedule set forth in appendix four to apply to insurance contracts that have an effective date prior to July 21, 2011.

The Department added a new appendix five, which sets forth an excess line premium tax allocation schedule to apply to insurance contracts that have an effective date on or after July 21, 2011 and that cover property and risks located both inside and outside the United States.

This notice is intended to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire October 10, 2012.

Text of rule and any required statements and analyses may be obtained from: David Neustadt, New York State Department of Financial Services, One State Street, New York, NY 10004, (212) 709-1690, email: david.neustadt@dfs.ny.gov

Regulatory Impact Statement

1. Statutory authority: The Superintendent's authority for the promulgation of the Fourteenth Amendment to Insurance Regulation 41 (11 NYCRR Part 27) derives from Sections 301, 316, 1213, 2101, 2104, 2105, 2110, 2116, 2117, 2118, 2121, 2122, 2130, 9102, and Article 21 of the Insurance Law, Sections 202 and 302 of the Financial Services Law, Chapter 225 of the Laws of 1997, Chapter 587 of the Laws of 2002, and Chapter 61 of the Laws of 2011.

The federal Nonadmitted and Reinsurance Reform Act of 2010 (the "NRRRA") significantly changes the paradigm for excess line insurance placements in the United States. Chapter 61 of the Laws of 2011 amends the Insurance Law and the Tax Law to conform to the NRRRA. The NRRRA and Chapter 61 have been impacting excess line placements since their effective date of July 21, 2011.

Section 301 of the Insurance Law and Sections 202 and 302 of the Financial Services Law authorize the Superintendent of Financial Services (the "Superintendent") to prescribe regulations interpreting the provisions of the Insurance Law, and effectuate any power granted to the Superintendent under the Insurance Law. Section 316 authorizes the Superintendent to promulgate regulations to require an insurer or other person or entity making a filing or submission with the Superintendent to submit the filing or submission to the Superintendent by electronic means, provided that the insurer or other person or entity affected thereby may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

Section 1213 provides the manner by which substituted service on an unauthorized insurer may be made in any proceeding against it on an insurance contract issued in New York. Substituted service may be made on the Superintendent in the manner prescribed in Section 1213.

Article 21 sets forth the duties and obligations of insurance brokers and excess line brokers. Section 2101 sets forth relevant definitions. Section 2104 governs the licensing of insurance brokers. Section 2105 sets forth licensing requirements for excess line brokers. Section 2110 provides grounds for the Superintendent to discipline licensees by revoking or suspending licenses or, pursuant to Section 2127, imposing a monetary penalty in lieu of revocation or suspension. Section 2116 permits payment of commissions to brokers and prohibits compensation to unlicensed persons. Section 2117 prohibits the aiding of an unauthorized insurer, with exceptions. Section 2118 sets forth the duties of excess line brokers, with regard to the placement of insurance with eligible foreign and alien excess line insurers, including the responsibility to ascertain and verify the financial condition of an unauthorized insurer before placing business with that insurer. Section 2121 provides that brokers have an agency relationship with insurers for the collection of premiums. Section 2122 imposes limitations on advertising by producers. Section 2130 establishes the Excess Line Association of New York ("ELANY").

Section 9102 establishes rules regarding the allocation of direct premiums taxable in New York, where insurance covers risks located both in and out of New York.

2. Legislative objectives: Generally, unauthorized insurers may not do an insurance business in New York. In permitting a limited exception for licensed excess line brokers to procure insurance policies in New York from excess line insurers, the Legislature established statutory requirements to protect persons seeking insurance in New York. The NRRRA significantly changes the paradigm for excess (or "surplus") line insurance placements in the United States. The NRRRA prohibits any state, other than the home state of an insured, from requiring a premium tax payment for excess line insurance. Further, the NRRRA subjects the placement of excess line insurance solely to the statutory and regulatory requirements of the insured's home state and declares that only an insured's home state may require an excess line broker to be licensed to sell, solicit, or negotiate excess line insurance with respect to such insured. In addition, the NRRRA establishes uniform eligibility standards for excess line insurers. A state may not impose additional eligibility conditions.

Under the new NRRRA paradigm, an excess line broker now must

ascertain an insured's home state before placing any property/casualty excess line business. Thus, if the insured's home state is not New York, even though the insured goes to the broker's office in New York, the excess line broker must be licensed in the insured's home state in order for the broker to procure the excess line coverage for that insured. Conversely, a person who is approached by an insured outside of New York must be licensed as an excess line broker in New York in order to procure excess line coverage for an insured whose home state is New York.

On March 31, 2011, Governor Andrew M. Cuomo signed into law Chapter 61 of the Laws of 2011, Part I of which amends the Insurance Law to conform to the NRRRA. The NRRRA and Chapter 61 took effect on July 21, 2011 and have been impacting excess line placements since that date.

3. Needs and benefits: Insurance Regulation 41 governs the placement of excess line insurance. The purpose of the excess line law is to enable consumers who are unable to obtain insurance from authorized insurers to obtain coverage from eligible excess line insurers. This regulation implements the provisions and purposes of Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the NRRRA. The NRRRA and Chapter 61 took effect on July 21, 2011 and have been impacting excess line placements since that date.

Section 27.14 of Insurance Regulation 41 currently prohibits an excess line broker from placing coverage with an excess line insurer unless the insurer has established and maintained a trust fund. However, the new NRRRA eligibility requirements do not include a trust fund with respect to foreign insurers (alien insurers, however, do have to maintain a trust fund that satisfies the International Insurers Department ("IID") of the National Association of Insurance Commissioners ("NAIC")). As such, New York is no longer requiring a trust fund of foreign insurers for eligibility.

Currently, Insurance Law Section 1213(e) exempts excess line insurers writing excess line insurance in New York from the requirements of Section 1213, such as the requirement that an insurer deposit with the clerk of the court cash or securities or a bond with good and sufficient sureties, in an amount to be fixed by the court sufficient to secure payments of any final judgment that may be rendered by the court, with the clerk of the court before filing any pleading in any proceeding against it, so long as the excess line insurance contract designates the Superintendent for service of process and, in material part, the policy is effectuated in accordance with Section 2105, the section that applies to excess line brokers. In a memorandum to the governor, dated March 30, 1949, recommending favorable executive action on the bill, the Superintendent of Insurance wrote that it was "our understanding that this subsection was inserted as the result of representations made by the representatives of Lloyds of London because the contracts of insurance customarily [written] by the underwriters and placed through licensees of this Department, contain a provision whereby the underwriters consent to be sued in the courts of this state and they maintain a trust fund in New York of a very sizable amount, which is available for the payment of any judgment which may be secured in an action involving one of their contracts of insurance."

When the Superintendent of Insurance first promulgated Insurance Regulation 41, effective October 1, 1962, pursuant to his broad power to make regulations, he codified in the regulation the longstanding practice regarding the trust fund, and established minimum provisions and requirements, thus providing a reasonable alternative for unauthorized insurers that regularly engage in the sale of insurance through the excess line market. While the specific provisions have been amended a number of times over the years, every iteration of Insurance Regulation 41 has called for a trust fund as a means of providing alternative security that the insurer would have resources to pay judgments against the insurer.

Although the NRRRA apparently precludes New York from requiring a foreign insurer to maintain a trust fund to be eligible in New York, or a trust fund for an alien insurer that deviates from the IID requirements, New York policyholders need to be protected when claims arise. As a result, the Department is amending Section 27.16 of Insurance Regulation 41 to provide that an excess line insurer will be subject to Insurance Law Section 1213's requirements unless the contract of insurance is effectuated in accordance with Insurance Law Section 2105, the Superintendent is designated as agent for service of process, and the insurer maintains a trust fund in accordance with Sections 27.14 and 27.15 of Insurance Regulation 41 (in addition to other requirements currently set forth in Section 27.16). Further, the Department is amending Section 27.14 of Insurance Regulation 41 to state that in order to be exempt from Insurance Law Section 1213 pursuant to Section 27.16 of Insurance Regulation 41, an excess line insurer must establish and maintain a trust fund. Insurance Law Section 316 authorizes the Superintendent to promulgate regulations to require an insurer or other person or entity making a filing or submission with the Superintendent to submit the filing or submission to the Superintendent by electronic means, provided that the insurer or other person or entity affected thereby may submit a request to the Superintendent for

an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

The Department amended Section 27.8(a) of Insurance Regulation 41 to require excess line brokers to file annual premium tax statements electronically, and amended Section 27.13 to require excess line brokers to file electronically a listing that sets forth certain individual policy details. In addition, the Department added a new Section 27.13 to Insurance Regulation 41 to allow excess line brokers to apply for a "hardship" exception to the electronic filing or submission requirement.

4. Costs: The rule is not expected to impose costs on excess line brokers, and it merely conforms the requirements regarding placement of coverage with excess line insurers to the requirements in Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the NRRRA. Although the amended regulation will require excess line brokers to file annual premium tax statements and a listing that sets forth certain individual policy details electronically, most brokers already do business electronically. In fact ELANY already requires documents to be filed electronically. Moreover, the regulation also provides a method whereby excess line brokers may apply for an exemption from the electronic filing or submission requirement.

With regard to the trust fund amendment, on the one hand, excess line insurers may incur costs if they choose to establish and maintain a trust fund in order to be exempt from Insurance Law Section 1213. On the other hand, it should be significantly less expensive to establish and maintain a trust fund rather than comply with Insurance Law Section 1213. This is a business decision that each insurer will need to make. The trust fund, if established and maintained, will be for the purpose of protecting all United States policyholders.

Costs to the Department of Financial Services also should be minimal, as existing personnel are available to review any modified filings necessitated by the regulations. In fact, filing forms electronically may produce a cost savings for the Department of Financial Services. These rules impose no compliance costs on any state or local governments.

5. Local government mandates: These rules do not impose any program, service, duty or responsibility upon a city, town, village, school district or fire district.

6. Paperwork: The regulation imposes no new reporting requirements on regulated parties.

7. Duplication: The regulation will not duplicate any existing state or federal rule, but rather implement and conform to the federal requirements.

8. Alternatives: The Department discussed the changes related to trust funds and Insurance Law Section 1213 with counsel at the NAIC and with ELANY.

9. Federal standards: This regulation will implement the provisions and purposes of Chapter 61 of the Laws of 2011, which amends the Insurance Law to conform to the NRRRA.

10. Compliance schedule: Pursuant to Chapter 61 of the Laws of 2011, this regulation will impact excess line insurance placements effective on and after July 21, 2011.

Regulatory Flexibility Analysis

This rule is directed at excess line brokers and excess line insurers.

Excess line brokers are considered to be small businesses as defined in section 102(8) of the State Administrative Procedure Act. The rule is not expected to have an adverse impact on these small businesses because it merely conforms the requirements regarding placement of coverage with excess line insurers to Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the federal Nonadmitted and Reinsurance Reform Act of 2010.

The rule will require excess line brokers to file annual premium tax statements electronically, and to file electronically a listing that sets forth certain individual policy details. However, the excess line broker may submit a request to the Superintendent for an exemption from the electronic filing requirement upon a demonstration of undue hardship, impracticability, or good cause, subject to the approval of the Superintendent.

Further, the Department of Financial Services has monitored Annual Statements of excess line insurers subject to this rule, and believes that none of them fall within the definition of "small business," because there are none that are both independently owned and have fewer than one hundred employees.

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

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

Rural Area Flexibility Analysis

The Department of Financial Services ("Department") finds that this rule does not impose any additional burden on persons located in rural areas,

and the Department finds that it will not have an adverse impact on rural areas. This rule applies uniformly to regulated parties that do business in both rural and non-rural areas of New York State.

Job Impact Statement

The Department of Financial Services finds that this rule should have no impact on jobs and employment opportunities. The rule conforms the requirements regarding placement of coverage with excess line insurers to Chapter 61 of the Laws of 2011, which amended the Insurance Law to conform to the federal Nonadmitted and Reinsurance Reform Act of 2010. The rule also makes an excess line insurer subject to Insurance Law Section 1213, unless it chooses to establish and maintain a trust fund in New York for the benefit of New York policyholders.

Public Service Commission

NOTICE OF ADOPTION

Denying the Petition of Local 101 — Utility Division Transport Workers Union of America, AFL-CIO

I.D. No. PSC-27-11-00004-A

Filing Date: 2012-07-16

Effective Date: 2012-07-16

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

Action taken: On 7/12/12, the PSC adopted an order denying the petition of Local 101 — Utility Division Transport Workers Union of America, AFL-CIO for investigation of National Grid's proposed change to the One Call Damage Prevention Dispatching Process.

Statutory authority: Public Service Law, sections 2(10), (11), 4(1), 5(1), 64, 65(1), 66(1), (2), (5), (8), 119-b(1), (2), (4), (6), (7) and (8); General Business Law, sections 760, 763(1), (2) and (3)

Subject: Denying the petition of Local 101 — Utility Division Transport Workers Union of America, AFL-CIO.

Purpose: To deny the petition of Local 101 — Utility Division Transport Workers Union of America, AFL-CIO.

Substance of final rule: The Commission, on July 12, 2012 adopted an order denying, in its entirety, the petition of Local 101 — Utility Division Transport Workers Union of America, AFL-CIO for investigation of National Grid's proposed change to the One Call Damage Prevention Dispatching Process and for a temporary halt to implementation of the plan.

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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(11-M-0237SA1)

NOTICE OF ADOPTION

Corporate Restructuring, Including Establishment of a Holding Company

I.D. No. PSC-04-12-00005-A

Filing Date: 2012-07-13

Effective Date: 2012-07-13

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

Action taken: The PSC on 7/12/12 adopted an order approving the petition of Warwick Valley Telephone Company for a corporate restructuring, including establishment of a holding company WVT Communications Group.

Statutory authority: Public Service Law, sections 108 and 110

Subject: Corporate restructuring, including establishment of a holding company.

Purpose: To approve a corporate restructuring, including establishment of a holding company.

Substance of proposed rule: The Commission, on July 12, 2012, adopted an order approving the petition of Warwick Valley Telephone Company (Warwick or company) for a corporate restructuring, including establishment of a holding company WVT Communications Group (WVTCG), 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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(12-C-0003SA1)

NOTICE OF ADOPTION

Modify the Ordering Clause 5 of the Commission's Untitled Order in Case 29724 Issued June 9, 1988

I.D. No. PSC-04-12-00006-A

Filing Date: 2012-07-13

Effective Date: 2012-07-13

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

Action taken: The PSC on 7/12/12 adopted an order approving Warwick Valley Telephone Company request to modify the Ordering Clause 5 of the Commission's Untitled Order in Case 29724 issued June 9, 1988.

Statutory authority: Public Service Law, section 107

Subject: Modify the Ordering Clause 5 of the Commission's Untitled Order in Case 29724 issued June 9, 1988.

Purpose: To approve the modification of Ordering Clause 5 of the Commission's Untitled Order in Case 29724 issued June 9, 1988.

Substance of final rule: The Commission, on July 12, 2012, adopted an order approving Warwick Valley Telephone Company request to modify the Ordering Clause 5 of the Commission's Untitled Order in Case 29724 issued June 9, 1988 to state: "That petitioner's share of any revenues received or income earned or tax credits generated from its investment in the Partnership shall be used to offset regulated losses through December 31, 2016 and otherwise considered non-regulated revenues." Such designation and modification are subject to the proviso that the holding company established in its corporate restructuring enter into an agreement with the newly established incumbent local exchange company to provide funds from the Partnership to offset regulated losses, so that such local exchange company operates on at least a free cash flow neutral basis through December 31, 2016, 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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(12-C-0004SA1)

NOTICE OF ADOPTION

Modification of Rate Plan Provisions

I.D. No. PSC-09-12-00011-A

Filing Date: 2012-07-17

Effective Date: 2012-07-17

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

Action taken: On 7/12/12, the PSC adopted an order approving, with modifications Niagara Mohawk Power Corporation d/b/a National Grid's Rate Plan Provisions which are consistent with the 2011 Rate Order.

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

Subject: Modification of Rate Plan Provisions.

Purpose: To approve modification of Rate Plan Provisions.

Substance of final rule: The Commission, on July 12, 2012 adopted an order approving, with modifications Niagara Mohawk Power Corporation d/b/a National Grid's Rate Plan Provisions which are consistent with the 2011 Rate Order and provide clarity as to which merger provisions should continue across rate plans, 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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(10-E-0050SA11)

NOTICE OF ADOPTION

Major Electric Rate Filing

I.D. No. PSC-13-12-00006-A

Filing Date: 2012-07-12

Effective Date: 2012-07-12

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

Action taken: On 7/12/12, the PSC adopted an order approving a Joint Proposal, with exceptions, by The Village of Rockville Centre and Department Staff establishing an electric rate plan.

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

Subject: Major electric rate filing.

Purpose: To approve the Joint Proposal, with exceptions, to establish an electric rate plan.

Substance of final rule: The Commission, on July 12, 2012 adopted an order approving a Joint Proposal, with exceptions, by The Village of Rockville Centre and Department Staff establishing an electric rate plan, 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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(11-E-0590SA1)

NOTICE OF ADOPTION

Regulations Implementing Public Service Law Article 10 Governing Applications to Construct Major Electric Generating Facilities

I.D. No. PSC-15-12-00006-A

Filing No. 729

Filing Date: 2012-07-17

Effective Date: 2012-08-01

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

Action taken: Repeal of Parts 1000-1002 and addition of new Parts 1000-1002 to Title 16 NYCRR.

Statutory authority: Public Service Law, sections 160(8), 161(1), (3),

163(1)(h), (2), (4)(b), 164(1), (2), (3), (4), (6)(b), 165(2), (4)(b), (5) and 167(1)(b) and (4)

Subject: Regulations implementing Public Service Law article 10 governing applications to construct major electric generating facilities.

Purpose: To establish review procedures and the content of applications.

Substance of final rule: The New York State Board on Electric Generation Siting and the Environment has adopted Subchapter A (consisting of Parts 1000-1002) to 16 NYCRR Chapter X in order to implement Article 10 of the Public Service Law (PSL) with respect to the authorization of the construction and operation of major electric generating facilities, and has repealed existing Subchapter A (consisting of Parts 1000-1003) of 16 NYCRR Chapter X, which implemented former Article X. The adopted regulations implement provisions in Article 10 that were not in former Article X but, to the extent the experience gained in proceedings under former Article X remains relevant, the regulations take advantage of such experience by specifying in some detail the applicable procedures and requirements, while still allowing some flexibility in tailoring such requirements to specific cases.

Part 1000 contains sections on applicability, definitions, adoption of Public Service Commission procedures, public involvement, pre-application procedures, procedures regarding the filing, service and notice of applications, water quality and coastal certification procedures, procedures regarding discovery of additional information, documents and evidence, the fund to assist municipal and local parties in participating in Article 10 proceedings, amendment and dismissal of applications, acceptance, amendment, revocation, suspension and transfer of certificates and designation of counsel. Regarding public involvement, experience has demonstrated that active and adequate public involvement can be critical to the success of an Article 10 review process if it engages stakeholders early enough in the process so that stakeholder concerns can be considered in the design phase of the proposal when the applicant has the most flexibility as to its plans. Early and informative engagement of stakeholders also minimizes later delays in the review process. Well-conducted public involvement programs by applicants tend to minimize misunderstandings and conflicts in Article 10 proceedings whereas poorly-conducted public involvement programs by applicants tend to exacerbate differences and conflicts. In that regard, applicant public involvement programs, with DPS (Department of Public Service) Staff input, have been made a mandatory component of the Article 10 process. The regulations create a specific process for DPS Staff to provide input into the adequacy of an intended public involvement program without being overly burdensome as to time or iterations. Regarding pre-application procedures, in establishing deadlines, a balance has been struck between the time realistically needed to perform tasks and a desire to keep the process moving. It is difficult to gauge the need for and amount of time that will be needed to negotiate stipulations, but the regulation threads the most workable path through the various competing provisions of the statute. Applicants are encouraged to seek stipulations wherever possible based on DPS Staff experience that stipulations on the methodology and scope of studies creates efficiencies for all parties regardless of perspective. In keeping with the statute, private facility applicants may limit their description and evaluation of alternative locations to parcels owned by, or under option to, such private facility applicants or their affiliates, and private facility applicants may limit their description and evaluation of alternative sources to those that are feasible considering the objectives and capabilities of the sponsor. Review of case history under former Article X demonstrates that many applicants, in the early stages of their projects, tend to focus on electric system and environmental issues and fail to understand and fully consider key issues regarding, among other topics, state laws, local laws, real property rights, and the interplay between the siting statute and other required approvals. Such shortcomings ultimately lead to delays in the review process or the later identification of flaws in a proposal after applicants and the stakeholders have expended considerable time and resources on the review of a proposal. The regulations require applicants to address such issues as part of their preliminary planning and will hopefully lead to better proposals. The regulations also require a consideration of environmental justice issues at the earliest stage possible. They also require early consultation with the Department of Defense and other airport operators to encourage a dialog that will result in minimized conflicts between energy projects and aviation. In addition the regula-

tions provide for funds to be made available to municipalities and local parties (during both the pre-application and post-application phases of proceedings) on an equitable basis in relation to the potential for such funding to make an affective contribution to the proceedings.

Part 1001 contains sections specifying general application requirements and exhibits concerning overview and public involvement, location of facilities, land use, electric system effects, wind, natural gas and nuclear power facilities, electric system production modeling, alternatives, consistency with energy planning objectives, preliminary design drawings, construction, real property, cost of facilities, public health and safety, pollution control facilities, air pollutant emissions, safety and security, noise and vibration, cultural resources, geology, seismology and soils, terrestrial ecology and wetlands, water resources and aquatic ecology, visual impacts, effects on transportation and communications, socioeconomic effects, environmental justice, site restoration and decommissioning, state and local laws and ordinances, other filings, electric, gas, water, wastewater and telecommunications interconnections, electric and magnetic fields, back-up fuel, and applications to modify or build adjacent to existing facilities. The goal of Part 1001 is to require enough information in applications to allow the board to make the findings and determinations required by PSL Section 168, recognizing that additional information will be provided as the record of the certification proceeding is developed and also that final construction-type details are unnecessary and costly to provide until after generating facilities are authorized.

Part 1002 contains general procedures and requirements regarding compliance filings, reporting and inspection. Detailed information to enable construction to proceed consistent with certificates is required after certificates are granted.

Final rule as compared with last published rule: Nonsubstantive changes were made in Parts 1000 and 1001.

Text of rule may be obtained from: Leann Ayer, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

Revised Regulatory Impact Statement

Nonsubstantive changes were made to the text in Parts 1000 and 1001 as summarized by section in greater detail below. They are all minor, non-substantive changes that accomplish the original objectives while responding to stakeholder concerns for minor enhancements, clarifications and technical corrections. The essential scope of the regulations and the projected costs to regulated persons of complying with the proposed regulations, and the estimated paperwork requirements, remain within the range estimated in the original Regulatory Impact Statement. None of the changes affect the statutory authority, legislative objectives, needs and benefits, local government mandates, duplication, federal standards or compliance schedule analyses in the original Regulatory Impact Statement. As to the alternative approaches analysis, the addition of an average noise scenario to the noise exhibit does not alter the original "worst case" noise analysis approach, but provides for additional information to broaden the record that was requested by stakeholders representing the interests of regulated persons that will be complying with the proposed regulations. The original Regulatory Impact Statement as published in the Notice of Proposed Rule Making remains valid, and does not need to be amended to reflect the changes made to the text of the regulation.

Summary of Changes in Text

Nonsubstantive changes were made to the text, as follows:

(a) Section 1000.2(x) and (ak): enhancements to the definitions of "Modification" and "Revision" to allow the shifting of ancillary access roads or electric collector lines when allowing the shifting of wind turbine sites.

(b) Section 1000.4(f): enhancement that public outreach must include consultations with operators of airports or heliports.

(c) Section 1000.5(1), (4) and (5); Section 1001.12(a); Section 1001.18(a), (b) and (c); Section 1001.21(r)(1); and Section 1001.39 (f): clarifications that the required statement, explanation, Quality Assurance and Control plan, safety and security plans, engineering as-

assessment, and interconnection description may be “preliminary” in nature.

(d) Section 1000(b)(1): enhancement that notices published in languages other than English shall be published in newspapers, if any are available, serving the appropriate language community.

(e) Section 1000.8 (a) (5) and (6); Section 1001.17; Section 1001.22(i), (j), (k), (l), (m) and (n); and Section 1001.25(d)(4) and (5): minor technical language corrections regarding the electric system production modeling, air emissions, terrestrial ecology and wetlands, and effect on transportation exhibits.

(f) Section 1000.10(b)(2) and 1000.13(b): enhancements that instead of a flat fee of \$75,000, the intervenor fee to be submitted with a revision to an application is to be in the amount equal to \$1,000 for each 1,000 kilowatts of capacity of the proposed project, as amended, but no more than \$75,000.00, except the presiding examiner may increase the level up to the maximum level of \$75,000 if circumstances require a higher level.

(g) Section 1001.4(c): clarification that the proposed land use plans to be shown may be limited to plans that are “publicly known”.

(h) Section 1001.5(n): enhancement that the required electric system effects showing include a consideration of compliance with all relevant applicable local reliability criteria, including any criteria regarding blackstart and fuel switching capabilities.

(i) Section 1001.18(h): enhancement that the preliminary safety response plan is to be provided to local emergency first responders for comment.

(j) Section 1001.19(c): modified to eliminate the requirement that prominent discrete (pure) tones, and amplitude modulated sound during construction be evaluated.

(k) Section 1001.19(f)(7), (8) and (9): enhancements to include average noise levels as an additional scenario in the noise analysis.

(l) Section 1001.22(a): clarification that the required identification and description of the type of plant communities present on adjacent properties based upon field observations and data collection is to be consistent with “access availability” to the adjacent properties.

(m) Section 1001.25(e) and (f): enhancements to the required analysis and evaluation of the impacts of the facility on airports to ensure that impacts on military use airspace are considered and to ensure the analysis is informed by consultations with operators of airports or heliports, the Department of Defense and the Federal Aviation Administration.

(n) Section 1001.26(a): modified to eliminate a two-mile radius limit on the identification of impacts on microwave transmission, Doppler/weather radar, air traffic control, armed forces and LORAN communications.

(o) Section 1001.26(f): clarifications enhancing what are meant by “radar systems” and “air traffic control” to include instrument systems, guidance, weather, and military operations including training.

(p) Section 1001.28(b)(3): correction to eliminate the words “or minimized” from the phrase “impacts cannot be avoided”.

Revised Regulatory Flexibility Analysis

Nonsubstantive changes were made to the text in Parts 1000 and 1001 as summarized in the Statement as to why a revised Regulatory Impact Statement is not required. They are all minor, non-substantive changes that accomplish the original objectives while responding to stakeholder concerns for minor enhancements, clarifications and technical corrections. The essential scope of the regulation remains the same as described in the original Regulatory Flexibility Analysis. None of the changes affect the types and number of small businesses and local governments affected by the regulations, the compliance requirements, professional services, compliance costs, economic and technological feasibility needs, degree of minimization of adverse impacts, or the opportunities for participation of small businesses and local governments. While there is a change that modifies the amount of intervenor fee to be submitted with a revision to an application, the regulation provides that the presiding examiner may increase the level up to the maximum level of \$75,000, the level originally proposed, if circumstances require a higher level. The original Regulatory Flexibility Analysis for Small Businesses and Local Governments as published in the Notice of Proposed Rule Making remains valid, and does not need to be amended to reflect the changes made to the text of the regulation.

Revised Rural Area Flexibility Analysis

Nonsubstantive changes were made to the text in Parts 1000 and 1001 as summarized in the Statement as to why a revised Regulatory Impact Statement is not required. They are all minor, non-substantive changes that accomplish the original objectives while responding to stakeholder concerns for minor enhancements, clarifications and technical corrections. The essential scope of the regulation remains the same as described in the original Rural Area Flexibility Analysis. None of the changes affect the types and number of rural areas affected by the regulations, the compliance requirements, professional services, compliance costs, degree of minimization of adverse impacts, or the opportunities for participation of rural communities. While there is a change that modifies the amount of intervenor fee to be submitted with a revision to an application, the regulation provides that the presiding examiner may increase the level up to the maximum level of \$75,000, the level originally proposed, if circumstances require a higher level. The original Rural Area Flexibility Analysis as published in the Notice of Proposed Rule Making remains valid, and does not need to be amended to reflect the changes made to the text of the regulation.

Revised Job Impact Statement

Nonsubstantive changes were made to the text in Parts 1000 and 1001 as summarized in the Statement as to why a revised Regulatory Impact Statement is not required. They are all minor, non-substantive changes that accomplish the original objectives while responding to stakeholder concerns for minor enhancements, clarifications and technical corrections. The essential scope of the regulation remains the same as described in the original Job Impact Statement. None of the changes affect the indirect positive impact the regulation will have on employment opportunities for economic, engineering, and environmental consultants and lawyers employed to assist applicants and parties in administrative proceedings. The original Job Impact Statement as published in the Notice of Proposed Rule Making remains valid, and does not need to be amended to reflect the changes made to the text of the regulation.

Assessment of Public Comment

The Board on Electric Generation Siting and the Environment (Board) received comments from over 100 individuals and organizations. Overall, the comments were consistent with those received during an extensive stakeholder process conducted in early 2012 and few new significant alternatives were suggested. More detailed explanations of the proposals and a full assessment of the public comment with the Board’s response is available in the “Memorandum and Resolution Adopting Article 10 Regulations” adopted by the Board in Case 12-F-0036 accessible at <http://www.dps.ny.gov/SitingBoard/>. The short summary provided below does not include a summary of comments on the statute that were not directed to the regulations, comments focusing on minor wording changes, or proposals that were clearly outside of the intended scheme of the regulations.

PART 1000

Definitions

Several wind development supporters request that the definition of “Modification” include, and the definition of “Revision” exclude, the shifting of an access road or electric collector line to a new location within a 500 foot radius of the original location in the manner allowed for the shifting of wind turbines. The Board agreed that the addition of access roads and electric collector lines to the allowance is a logical and practical extension of what was intended by the original allowance with respect to turbine placement, with the expectation that most such shifts will be motivated by decreasing adverse impacts.

Public Involvement

To promote the development of facilities, project advocates asserted that the public involvement plan should be merged with the preliminary scoping statement thereby eliminating any time between the two and any requirement for public involvement activities prior to submission of the preliminary scoping statement, or that timeframes should be optional or shortened. Many individuals and municipalities provided comments to the contrary asserting that the public should become involved in planning at the earliest possible time before scoping begins. Several members of the State Assembly urge that the regulations provide for meaningful outreach to stakeholders in environmental justice communities. The Board determined that no changes were warranted because it is important that public involvement activities begin as early as practicable before development plans

are so far advanced that the developer feels it cannot be flexible or open to beneficial modifications.

Pre-Application Procedures

Advocates for wind energy and repowering projects sought further streamlining by reducing time allowances for public comment and intervenor funding processes; reducing public notice requirements; reducing pre-application information requirements; and providing for an early determination on the waiver of local laws. Many others argued that the time allowances for public comment and the public notice requirements should be broadened, not reduced, and that the scope of pre-application studies should be expanded. The Board determined that the timeframes provided are already the minimum necessary to conduct a workable process.

Fund for Municipal and Local Parties

Wind project advocates asserted that the requirement that the applicant submit an additional intervenor fee in the amount of \$75,000 for amendments might be higher than the original fee for the entire application. The Board was persuaded that the fee that is paid at the time of submitting a revision to an application should logically not be higher than the fee paid initially and imposed a floor funding amount of \$1,000 per megawatt for revisions to application, retaining the full discretion provided by the State Legislature to require up to \$75,000 for a revision regardless of facility size in appropriate circumstances.

Evidence

Some wind project advocates asserted the standard for evidence should be “substantive and significant” while others asserted that the standard should be “relevant and material.” Individuals and a State Senator urged that the regulations maintain the option that a party can force a hearing by showing there is a material and relevant issue, a provision that should be neither diluted nor eliminated. The Board explained that the “substantive and significant” standard is a special standard applied in certain Department of Environmental Conservation (DEC) proceedings and that the Article 10 statute does not support application of the “substantive and significant” standard.

PART 1001

Study Area

Many parties wanted the required “study area” to be either further limited in scope, or expanded significantly, depending on their perspective. The Board determined that its minimum five-mile study area for wind projects would minimize conflicts, and that it expects the pre-application stipulations process will be useful for other projects in defining study areas that relate to the nature of the technology involved and the setting of the proposed site.

Electric System Effects

The Board rejected claims that the required system reliability impact study from the NYISO will provide the basis for much of what is required to consider electric system effects, or to address deliverability in the sense that the Board has used that term in relation to estimating the effects of the proposed facility on emissions and the energy dispatch of existing must-run resources, such as wind, hydroelectric and nuclear facilities. It agreed that it would be a beneficial enhancement to require an identification and demonstration of the degree of compliance with all relevant applicable reliability criteria including that of the local interconnecting transmission utility that may have criteria regarding blackstart and fuel switching capabilities.

Safety and Security

In response to the comment of a county planning office, the Board noted that safety response plans ensure the safety and security of the local community, therefore, it made sense to add the requested requirement that the applicant consult with local first responders. The Board found no compelling reason to exempt wind developers from security consultations.

Wind Turbine Setbacks and Noise Limits

In response to many comments proposing minimum setbacks for wind turbines and maximum caps on noise levels, the Board decided to follow a case by case approach in the regulations.

Third Party Certification of Wind Turbines

In response to comments, the Board noted that the requirement is

for a status report, not a mandate of final third party review and certification at the time of application.

Meteorological Analyses

Regarding competing comments about whether wind meteorological data must be disclosed, the Board noted that the language of the regulation requires submittal of an analysis of the data; it does not expressly mandate the raw data itself. Applicants can pursue their rights to limit public disclosure if the information qualifies for protection.

Property Value Guarantees

The Board declined to grant the request of several individuals that wind developers provide guarantees on the value of neighboring property in the form of insurance, cash payments, or buyouts if their wind projects cause property devaluation.

Low-Frequency Noise and Infrasound

A number of comments debated both sides of the issue whether C-weighted noise measurements should be required. Applicants must provide an analysis of whether the facility will produce significant levels of low frequency noise or infrasound, without specifically requiring the measurement and estimation of C-weighted/dBC sound levels, but do not preclude a case-by-case determination requiring the measurement and estimation of C-weighted/dBC sound levels in a proceeding in an appropriate circumstance.

Noise and Vibration

In response to comments, the Board agreed to eliminate an evaluation of pure tone and amplitude modulation for the construction period because it expects that construction noise will be managed by limits on construction hours. It also agreed to provide for average sound condition cases in addition to the already required ambient and worst case scenarios.

Electric System Production Modeling

Regarding competing comments about whether capacity factor and other production modeling data must be disclosed, the Board determined that the production information is necessary as an important input for the modeling used for simulation analyses that will inform the necessary statutory findings and determinations.

Cost of Facilities

Regarding competing comments about whether cost information must be disclosed, the Board determined that the cost information is necessary for analyses that will inform the necessary statutory findings and determinations. If the information qualifies for confidential treatment, the regulations provide a process for limiting public disclosure.

Back-Up Fuel

In response to objections to supplying pricing information, the Board determined that the regulation does not ask an applicant to reveal its fuel price, it only asks for an analysis of the impact of facility use of fuel oil on the supplies and prices of others.

Environmental Justice

The Board agreed with a public interest coalition recommendation that the words “or minimized” be removed from the language because if impacts are “minimized”, by definition they are not fully avoided and there are residual impacts for which it may be appropriate to require an offset.

Terrestrial Ecology and Wetlands

In response to comments, the Board clarified that delineation techniques necessary for federal permitting require on-site sampling, therefore the rules will distinguish between delineation of wetlands on facility site properties within 500 feet of areas to be disturbed by construction, and identification of mapped or predicted wetlands on adjacent properties based on analysis of mapped and remotely-sensed data where access is not available.

Effect on Communications

As a result of consultations with the Department of Defense, the Board determined that proposed two-mile study area is technically insufficient for certain technologies, particularly radar, and that the scope of inquiry for those technologies should include all “affected sources”.

Effect on Transportation

As a result of consultations with the Department of Defense regarding impacts of the facility on “airports”, enhanced language was added to the regulations in substance merely requiring applicants to consult with airport operators in conducting their analysis and evaluation of the impacts of the facility on airports (and heliports) in the pre-application and application preparation phases. It is important that tall structures do not obstruct air traffic or unnecessarily interfere with radar and other communications used in flying.

Site Restoration and Decommissioning

In response to many comments about site restoration and decommissioning directed towards ensuring that wind turbines are dismantled and removed from the landscape at the end of their useful lives at the expense of the wind developers, and not the taxpayers, the Board determined that the regulations, as written, are adequate to address the site restoration and decommissioning issues raised on a case by case basis in Article 10 proceedings.

Local Laws and Ordinances

Many comments urge that local laws be earnestly addressed and upheld to the extent possible so as not to deprive the municipality of its ability to protect landowner rights and the health and safety of the community. A State Senator urged that the needs and desires of the community be taken into consideration when determining what is unduly burdensome. Several individuals assert that due to the level of disagreement within communities and the controversy involved regarding wind projects, the State should make these decisions. A number of wind power supporters urged that the standard for demonstrating the override of local laws should be low, and once the applicant has met a minimal standard, the burden to maintain local laws should shift to the municipality. They also assert that applicants should not have to demonstrate that they could not comply with local law via design changes or that any departures are the minimum necessary. Some assert that local governments should not be able to impact the review of an application by passing laws addressed towards the specific proposed project. Another asserts that the Board should retain authority to review and approve building code issues. The Board outlined the scheme mandated by the statute and determined that the regulations follow the statutory scheme. It also noted that it will have to consider local laws adopted after the submission of an application, on a case by case basis and that the function of administering building codes must be performed by a local or State agency qualified by the Secretary of State.

PART 1002

Part 1002 Procedures

In response to comments, the Board decided that it is not realistic to expect parties to review compliance filings and comment on them in less than the 21 day timeframe provided. It also determined that allowing for a comment period would defeat the purpose of having a minor change process to quickly process inconsequential changes.

NOTICE OF ADOPTION

Approve NYISO to Enter into a Loan for Up to \$45 Million to Refinance the Construction

I.D. No. PSC-18-12-00014-A

Filing Date: 2012-07-12

Effective Date: 2012-07-12

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

Action taken: On 7/12/12, the PSC adopted an order approving the New York Independent System Operator Inc.’s (NYISO’s) petition to enter into a loan for up to \$45 million to refinance the construction of the NYISO’s new power control centers.

Statutory authority: Public Service Law, sections 4(1), 5(2), 65(1), 66(1), (2), (4), (5) and 69

Subject: Approve NYISO to enter into a loan for up to \$45 million to refinance the construction.

Purpose: To approve NYISO to enter into a loan for up to \$45 million to refinance the construction.

Substance of final rule: The Commission, on July 12, 2012 adopted an order approving the New York Independent System Operator Inc.’s (NYISO’s) petition, filed on April 11, 2012, pursuant to Public Service Law § 69 to enter into a loan for up to \$45 million to refinance the construction of the NYISO’s new power control centers, 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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(12-E-0168SA1)

NOTICE OF ADOPTION

Amendments to P.S.C. No. 10 — Electricity, Eff. 7/23/12 for Redistribution of High-Tension Service

I.D. No. PSC-19-12-00028-A

Filing Date: 2012-07-12

Effective Date: 2012-07-12

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

Action taken: On 7/12/12, the PSC allowed Consolidated Edison Company of New York, Inc.’s amendments to P.S.C. No. 10 — Electricity, eff. 7/23/12 for residential and non-residential redistribution of high-tension service to become effective.

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

Subject: Amendments to P.S.C. No. 10 — Electricity, eff. 7/23/12 for redistribution of high-tension service.

Purpose: To approve amendments to P.S.C. No. 10 — Electricity, eff. 7/23/12 for redistribution of high-tension service.

Substance of final rule: The Commission, on July 12, 2012 allowed Consolidated Edison Company of New York, Inc.’s amendments to P.S.C. No. 10 — Electricity, to go into effect on July 23, 2012 for provisions to specify new criteria for residential and non-residential redistribution where the customer receives high-tension service.

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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(12-E-0177SA1)

NOTICE OF ADOPTION

To Include the Metropolitan Commuter Transportation Mobility Tax in Its Electric Tariff Schedule

I.D. No. PSC-19-12-00029-A

Filing Date: 2012-07-12

Effective Date: 2012-07-12

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

Action taken: On 7/12/12, the PSC adopted an order approving Central Hudson Gas & Electric Corporation’s amendments to PSC No. 15 — Electricity, eff. 8/1/12, to include the Metropolitan Commuter Transportation Mobility Tax.

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

Subject: To include the Metropolitan Commuter Transportation Mobility Tax in its Electric tariff schedule.

Purpose: To approve the inclusion of the Metropolitan Commuter Transportation Mobility Tax in its Electric tariff schedule.

Substance of final rule: The Commission, on July 12, 2012 adopted an order approving Central Hudson Gas & Electric Corporation's amendments to PSC No. 15 — Electricity, effective August 1, 2012, to include the Metropolitan Commuter Transportation Mobility Tax in its Electric tariff schedule.

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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(12-E-0178SA1)

NOTICE OF ADOPTION

To Include the Metropolitan Commuter Transportation Mobility Tax in Its Gas Tariff Schedule

I.D. No. PSC-19-12-00031-A

Filing Date: 2012-07-12

Effective Date: 2012-07-12

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

Action taken: On 7/12/12, the PSC adopted an order approving Central Hudson Gas & Electric Corporation's amendments to PSC No. 12 — Gas eff. 8/1/12, to include the Metropolitan Commuter Transportation Mobility Tax.

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

Subject: To include the Metropolitan Commuter Transportation Mobility Tax in its Gas tariff schedule.

Purpose: To approve the inclusion of the Metropolitan Commuter Transportation Mobility Tax in its Gas tariff schedule.

Substance of final rule: The Commission, on July 12, 2012 adopted an order approving Central Hudson Gas & Electric Corporation's amendments to PSC No. 12 — Gas, effective August 1, 2012, to include the Metropolitan Commuter Transportation Mobility Tax in its Gas tariff schedule.

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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(12-G-0179SA1)

NOTICE OF ADOPTION

Transfer of Caithness Long Island Energy Center

I.D. No. PSC-20-12-00006-A

Filing Date: 2012-07-16

Effective Date: 2012-07-16

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

Action taken: On 7/12/12, the PSC adopted an order approving the petition of Caithness Long Island LLC, Caithness Brookhaven LLC, Caithness Brookhaven II LLC, Caithness Energy LLC and Brookhaven Electric LLC for the transfer of Caithness L.I. Energy Center.

Statutory authority: Public Service Law, sections 69 and 70

Subject: Transfer of Caithness Long Island Energy Center.

Purpose: To approve the transfer of Caithness Long Island Energy Center.

Substance of final rule: The Commission, on July 12, 2012 adopted an order approving the petition of Caithness Long Island LLC (Caithness), Caithness Brookhaven LLC (CBL I), Caithness Brookhaven II LLC (CBL II), Caithness Energy LLC (Caithness Energy) and Brookhaven Electric

LLC (Brookhaven) (collectively, the Petitioners) for the transfer of the approximately 326 MW Caithness Long Island Energy Center located in the Town of Brookhaven, 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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(12-E-0197SA1)

NOTICE OF ADOPTION

Financing by Emkey for a Total of \$11.0 Million

I.D. No. PSC-20-12-00008-A

Filing Date: 2012-07-13

Effective Date: 2012-07-13

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

Action taken: On 7/12/12, the PSC adopted an order approving the petition of Emkey Gathering LLC and Emkey Transportation, Inc. (collectively, Emkey) for financing of up to \$8,000,000 in a revolving credit loan and \$3,000,000 in a term loan, for a total of \$11.0 million.

Statutory authority: Public Service Law, section 69

Subject: Financing by Emkey for a total of \$11.0 million.

Purpose: To approve financing by Emkey for a total of \$11.0 million.

Substance of proposed rule: The Commission, on July 12, 2012 adopted an order approving the petition of Emkey Gathering LLC (Emkey LLC) and Emkey Transportation, Inc. (Emkey Corp) (collectively, Emkey), for financing under Public Service Law § 69, of up to \$8,000,000 in a revolving credit loan and \$3,000,000 in a term loan, for a total financing of \$11.0 million, 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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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.

(12-G-0196SA1)

NOTICE OF ADOPTION

Modification to SAFET Program

I.D. No. PSC-21-12-00007-A

Filing Date: 2012-07-12

Effective Date: 2012-07-12

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

Action taken: On 7/12/12, the PSC adopted an order approving a modification to the Standardized Facility and Equipment Transfer Program (SAFET) program that would establish the National Joint Utilities Notification System as the software vendor selected by pole owners.

Statutory authority: Public Service Law, sections 2(12), (18), 4(1) and 5(1)

Subject: Modification to SAFET Program.

Purpose: To modify the SAFET program to establish the National Joint Utilities Notification System as the software vendor for pole owners.

Substance of final rule: The Commission, on July 12, 2012 adopted an order approving a modification to the Standardized Facility and Equipment Transfer Program (SAFET) program that would establish the National Joint Utilities Notification System (NJUNS) as the software

vendor selected by utility pole owners, 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, (518) 486-2655, email: leann.ayer@dps.ny.gov 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-0593SA2)

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

To Effectuate the Continuation of Certain Tariff Provisions in P.S.C. No. 4 — Gas

I.D. No. PSC-31-12-00007-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 tariff filing by Orange and Rockland Utilities, Inc. to propose revisions to the Company's rules and regulations contained in P.S.C. No. 4 — Gas to become effective November 1, 2012.

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

Subject: To effectuate the continuation of certain tariff provisions in P.S.C. No. 4 — Gas.

Purpose: To approve certain tariff provisions beyond the three-year term of the Gas Rate Plan in P.S.C. No. 4 — Gas.

Substance of proposed rule: The Commission is considering whether to approve, modify or reject, in whole or in part, a tariff filing by Orange and Rockland Utilities, Inc. to effectuate the continuation of certain tariff provisions in P.S.C. No. 4 — Gas beyond the three-year term of the Gas Rate Plan approved in the Commission's Order Adopting Joint Proposal and Implementing a Three-Year Rate Plan, issued October 16, 2009 in Case 08-G-1398. The proposed filing has an effective date of November 1, 2012. The Commission may resolve related matters.

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/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.ny.gov

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

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

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

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

(08-G-1398SP3)

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

Whether to Approve, Deny or Modify, in Whole or in Part, the Petition of Consolidated Edison Regarding Certain Wheeling Costs

I.D. No. PSC-31-12-00008-P

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

Proposed Action: The Commission is considering the petition of Consolidated Edison Company of New York, Inc. seeking recovery of PJM OATT charges and disposition of amounts presently collected in base rates for expired wheeling contracts.

Statutory authority: Public Service Law, sections 65, 66(1), (2), (9), (12)(a), 72-a and 113

Subject: Whether to approve, deny or modify, in whole or in part, the petition of Consolidated Edison regarding certain wheeling costs.

Purpose: Whether to approve, deny or modify, in whole or in part, the petition of Consolidated Edison regarding certain wheeling costs.

Substance of proposed rule: The Public Service Commission is considering whether to grant, deny or modify, in whole or in part, a petition dated July 9, 2012 by Consolidated Edison Company of New York, Inc. (Con Edison or the Company) seeking recovery of charges incurred under the PJM Open Access Transmission Tariff (PJM OATT) though the Monthly Adjustment Clause (MAC) and disposition of amounts presently collected in base rates for a two grandfathered Transmission Service Agreements (TSAs or wheeling contracts). Since the grandfathered TSAs could not be extended past April 30, 2012, the Company entered into two pro forma agreements with PJM for long-term transmission service, at a cost of approximately \$35 million, which were approved by the Federal Energy Regulatory Commission (FERC).

The Public Service Commission is considering whether to grant, deny or modify, in whole or in part the Company's proposal regarding the crediting to customers of monies collected through base rates for the expired grandfathered wheeling contracts totaling approximately \$15 million.

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.ny.gov/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.ny.gov

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

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-0428SP5)

**Urban Development
Corporation**

**EMERGENCY
RULE MAKING**

Bonding Guarantee Assistance Program

I.D. No. UDC-31-12-00004-E

Filing No. 697

Filing Date: 2012-07-13

Effective Date: 2012-07-13

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

Action taken: Addition of Part 4253 to Title 21 NYCRR.

Statutory authority: Urban Development Corporation Act, section 5(4); L. 1994, ch. 169, section 16-f; and L. 1968, ch. 174

Finding of necessity for emergency rule: Preservation of public health, public safety and general welfare.

Specific reasons underlying the finding of necessity: The current economic crisis, including high unemployment and the immediate lack of capital for job generating small business, are the reasons for the emergency adoption of this Rule which is required for the immediate implementation of the Bonding Guarantee Assistance Program. The Program will provide surety companies the additional financial backing needed in order to induce such companies to issue payment and performance bonds for contractors that are small businesses, certified minority-owned enterprises or women-owned business enterprises, in order for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and to provide technical assistance in

completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects. This assistance will sustain and increase employment generated by these businesses.

Subject: Bonding Guarantee Assistance Program.

Purpose: Provide the basis for administration of the Bonding Guarantee Assistance Program.

Text of emergency rule: Bonding Guarantee Assistance Program

21 NYCRR Part 4253

Statutory Authority

Section 16-f of the New York State Urban Development Corporation Act,

Chapter 174 of the Laws of 1968, as amended

4253.1 Purpose

The purpose of this rule and these regulations is to effectuate section 16-f of the New York State Urban Development Corporation Act, that authorizes the Bonding Guarantee Assistance Program, and to provide for the implementation and administration of the program by the New York State Urban Development Corporation which is authorized by the Program (i) to provide to surety companies the additional financial backing needed in order to induce such companies to issue payment and performance bonds for contractors that are small businesses, as defined in this rule, and certified, pursuant to article fifteen-A of the Executive Law, minority-owned business enterprises or women-owned business enterprises, in order for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and (ii) to provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects.

4253.2 Definitions

a) "Agent" shall mean a third party that has entered into an agreement with the Corporation for the purpose of administering the Program.

b) "Bid Bond" shall mean a written guaranty provided to a principal by a surety on behalf of a contractor who is submitting a bid, in order to ensure that upon acceptance of the bid by the principal, the contractor will proceed with the contract and will replace the bid bond with a performance bond.

c) "Program" shall mean the Bonding Guarantee Assistance Program created pursuant to section 16-f of the New York State Urban Development Corporation Act.

d) "Certified" shall mean certification of a business enterprise as a Minority-Owned Business Enterprise or a Women-Owned Business Enterprise pursuant to article 15-A of the Executive Law.

e) "Corporation" shall mean the new York State Urban Development Corporation d/b/a Empire State Development, a corporate governmental agency of the State of New York, constituting a political subdivision and public benefit corporation created by chapter one hundred seventy-four of the Laws of nineteen hundred sixty-eight, as amended.

f) "Minority-Owned Business Enterprise" shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (1) at least fifty-one percent owned by one or more Minority Group Members; (2) an enterprise in which such minority ownership is real, substantial and continuing; (3) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (4) an enterprise authorized to do business in this state and independently owned and operated; (5) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (6) an enterprise that is a Small Business, unless the term Minority-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

g) "Minority Group Members" shall mean persons who are:

- 1) Black;
- 2) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American descent or either Indian or Hispanic origin, regardless of race;
- 3) Asian and Pacific Islander persons having origins in the Far East, Southeast Asia, the Indian sub-continent or the Pacific Islands; or
- 4) American Indian or Alaskan Native persons having origins in any of the original people of North America and maintaining identifiable tribal affiliations through membership and participation or community identifi-

cation, unless the term Minority Group Member is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

h) "Payment bond" shall mean a written guaranty provided to a principal by a surety on behalf of a contractor that guarantees that a contractor will pay suppliers, laborers, and subcontractors subject to contract terms for labor and materials.

i) "Performance bond" shall mean a written guaranty provided to a principal by a surety on behalf of a contractor that guarantees that a contractor will adhere to the terms and conditions of a contract.

j) "Small Business" shall mean a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, whose primary place of business is in New York State, and that employs one hundred or fewer persons on a full time basis, unless such term is otherwise defined in section 131 of the Economic Development Law, in which case the definition shall be as set forth for such term in such section.

k) "State" shall mean the State of New York.

l) "Surety Company" shall mean a surety company that has a certificate of solvency from, and its rates approved by, the New York State Department of Financial Services and/ or appears in the most current edition of the U.S. Department of Treasury Circular 570 as eligible to issue bonds in connection with procurement contracts for the United States of America.

m) "Women-Owned Business Enterprise" shall mean a business enterprise, including a sole proprietorship, partnership or corporation that is: (1) at least fifty-one percent owned by one or more United States citizens or permanent resident aliens who are women; (2) an enterprise in which the ownership interest of such women is real, substantial and continuing; (3) an enterprise in which such women ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (4) an enterprise authorized to do business in State and independently owned and operated; (5) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (6) an enterprise that is a Small Business, unless the term Women-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section.

4253.3 Program Overview

a) The amount of additional Program assistance provided to a Surety Company with respect to each contract shall generally not be greater than the amount necessary to induce such Surety Company to issue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the Surety Company for such contract.

b) The Corporation may provide to Small Businesses, Certified Minority-Owned Business Enterprises and Certified Women-Owned Business Enterprises seeking surety bonding in preparation for bidding on construction projects, including transportation related projects, technical assistance in completing bonding applications. The Corporation may refer such businesses to various business service providers or the Department of Economic Development for technical assistance as such businesses may need, including, but not limited to:

1. a review of the applicant's market and business competitive strategy;
2. consultation and review of the development and planned implementation of a working capital budget;
3. assistance with applications for the receipt of funding from other financial sources and providing referrals to other appropriate public and private sources of financing; and
4. assistance from the regional offices of the Department of Economic Development, pursuant to article 11 of the Economic Development Law, and the Entrepreneurial Assistance Program, pursuant to article 9 of such law, and any other such program receiving State funds from the New York State Urban Development Corporation Act or the Department of Economic Development or any other state agency that is intended to provide technical assistance to Small Businesses, Certified Minority-owned Business Enterprises and Certified Women-owned Business Enterprises.

4253.4 Eligible Contractors

a) In order to be eligible for consideration for Program assistance, a contractor must be a Small Business, a Certified Minority-Owned Business Enterprise or a Certified Women-Owned Businesses Enterprise that is unable to obtain a bond from a Surety Company without Program assistance.

b) *The Corporation may provide each Surety Company that participates in the Program with additional requirements or guidelines on contractor eligibility, such as minimum years in businesses, contract performance history, revenue limits or minimums, or other factors. The Surety Company may be required to verify information regarding Program eligible contractors or to secure such assurances from prospective Program eligible contractors as the Corporation may deem necessary.*

4253.5 Eligible Surety Companies

In order to be eligible to participate in the Program, a surety company must, among other requirements to be determined by the Corporation:

a) *have a certificate of solvency (pursuant to section 111 of the Insurance Law) from, and have its rates approved by, the New York State Department of Financial Services and/or appear in the most current edition of the U.S. Department of Treasury Circular 570 as eligible to issue bonds in connection with procurement contracts for the United States of America;*

b) *have a satisfactory performance record regarding contractor default, termination of contracts, application of satisfactory underwriting standards and principles and practices for evaluating contractor credit and capacity and processing claims, including diligent and commercially reasonable recovery efforts; and*

c) *be rated B+ or higher if rated by A.M Best's Key Rating Guide Property/Casualty.*

4253.6 Financial Backing Program Assistance

Program assistance is limited to the financial backing necessary to secure Bid Bonds, Performance Bonds, and Payment Bonds issued in connection with contract bids or awards. Such Program assistance shall be in such form as the Corporation may determine, and may include irrevocable standby letters of credits issued to a Surety Company by a financial institution for the account of the Corporation in connection with the Surety Company providing such bonds on behalf of a Program eligible contractor with respect to a contract. The amount of such Program assistance provided to a Surety Company with respect to each contract shall generally not be greater than the amount necessary to induce such Surety Company to issue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the Surety Company for such contract. Generally, a Surety Company may not receive Program assistance for more than two contracts for the same contractor at the same time.

4253.7 Program Administration

a) *In order for a Surety Company to participate in the Program, the Surety Company shall enter into a Program participation agreement with the Corporation in such form as the Corporation or the Agent may prescribe. Such agreements may include provisions for proof of contractor default; termination of contracts; underwriting standards and principles and practices used in evaluating credit and capacity; and requirements for the claims process, including requirements that the Surety Company conduct diligent and commercially reasonable recovery efforts.*

b) *The Corporation shall conduct the oversight and management of the Program, and the Corporation may engage an Agent for administration and implementation of the Program.*

c) *The Corporation may contract with one or more financial institutions in order that such financial institution will provide to Surety Companies, as additional financial backing Program assistance, letters of credit or other guarantees for the account of the Corporation.*

d) *The Corporation or the Agent shall evaluate applications for Program Assistance and make determinations as to business creditworthiness and whether to provide the requested additional financial backing Program assistance. Evaluations of eligible contractors may, among other things, include review of financial information, contract performance history, documents submitted to the Surety Company and other business information.*

e) *The Corporation may facilitate the provision of technical assistance to eligible Small Businesses and Certified Minority-Owned Business Enterprises and Certified Women-Owned Business Enterprises in accordance with applicable law and regulations.*

f) *The Corporation or the Agent shall prepare annual reports for the Program.*

4253.8 Fees

A participating Surety Company may charge application fees, commitment fees, bonding premiums and other reasonable fees and expenses pursuant to a schedule of fees and expenses adopted by the Surety Company and approved in writing by the Corporation. The Corporation may require a contractor participating in the Program to pay the Corporation for its out-of-pocket costs in connection with the Program assistance for the

contractor, including, without limiting the foregoing, the costs with respect to letter of credit and other guarantees to be provided to a Surety Company in connection with bonds for such contractor's contract.

4253.9 Confidentiality and State Employees

a) *To the extent permitted by law, all information regarding the financial condition, marketing plans, customer lists, or other trade secrets and proprietary information of a person or entity requesting assistance from the Program administered through the participating Surety Company, shall be confidential and exempt from public disclosures.*

b) *No full time employee of the State of New York or any agency, department, authority or public benefit corporation thereof shall be eligible to receive assistance under this Program.*

4253.10 Non-Discrimination and Affirmative Action

The Corporation's affirmative action and non-discrimination policies and programs are grounded in both public policy and applicable law, including but not limited to, Section 2879 of the Public Authorities Law, Article 15 of the Executive Law, Article 15-A of the Executive Law and Section 6254(11) of the Unconsolidated Laws. These laws mandate the Corporation to take affirmative action in implementing programs. The Corporation has charged the affirmative action department with overall responsibility to ensure that the spirit of these mandates is incorporated into the Corporation's policies and projects. Where applicable, the Affirmative Action department will work with applicants in developing an appropriate Affirmative Action Program for business and employment opportunities generated by the Corporation's participation of the Program.

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires October 10, 2012.

Text of rule and any required statements and analyses may be obtained from: Antovk Pidedjian, Sr. Counsel, New York Urban Development Corporation, 633 Third Avenue, 37th Floor, New York, NY 10017, (212) 803-3792, email: apidedjian@esd.ny.gov

Regulatory Impact Statement

1. **Statutory Authority:** Section 9-c of the New York State Urban Development Corporation Act Chapter 174 of the Laws of 1968 (Uncon. Laws section 6259-c), as amended (the "Act"), provides, in part, that the Corporation shall, assisted by the Commissioner of Economic Development and in consultation with the Department of Economic Development, promulgate rules and regulations in accordance with the State Administrative Procedure Act.

Section 16-f of the Act provides for the creation of the Bonding Guarantee Assistance Program (the "Program") and authorizes the New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation"), within available appropriations, to provide small businesses and minority and women-owned business enterprises the additional financial backing needed in order to induce surety companies to issue payment and performance bonds necessary for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and to provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects.

2. **Legislative Objectives:** Section 16-f of the Act (Uncon. Laws section 6266-f, added by Chapter 169 of the Laws of 1994) sets forth the legislative objective of authorizing the Corporation, within available appropriations, to provide the assistance described above. The adoption of 21 NYCRR Part 4253 will further these goals by setting forth the types of available assistance, evaluation criteria, the application process and related matters for the Program.

3. **Needs and Benefits:** The State has allocated \$10,405,173.00 of Federal funds for this program. The Bond Guarantee Assistance Program will provide assistance to New York's eligible small businesses, minority-owned business enterprises and women-owned business enterprises, in order to provide the collateral support necessary to secure surety bonds. These businesses have been determined to be a major source of employment throughout New York State. These businesses have historically had difficulties obtaining financing or refinancing in order to remain competitive and grow their operations, and the current economic difficulties have exacerbated this problem. Providing assistance to these businesses should sustain and potentially increase the employment provided by such businesses, especially during this period of historically high unemployment and underemployment. The rule defines eligible and ineligible businesses and eligible uses of the assistance and other criteria to be applied to qualify small businesses for the collateral support.

4. **Costs:** The Program is funded by a State appropriation in the amount of \$10,405,173.00 dollars. Pursuant to the rule, the amount of such assistance provided to a surety company with respect to each contract shall not be greater than the amount necessary to induce such surety company to is-

sue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the surety company for such contract. The costs to a participating surety company would depend on the extent to which they participate in the Program and their effectiveness and efficiency providing assistance.

5. **Paperwork / Reporting:** There are no additional reporting or paperwork requirements as a result of this rule for Program participants except those required by the statute creating the Program such as an annual report on the organization's lending activity and providing information in connection with an audit by the Corporation with respect to the organization's use of Program funds. Standard applications and documents used for most other assistance by the Corporation will be employed in keeping with the Corporation's overall effort to facilitate the application process for all of the Corporation's clients.

6. **Local Government Mandates:** The Program imposes no mandates - program, service, duty, or responsibility - upon any city, county, town, village, school district or other special district.

7. **Duplication:** The regulations do not duplicate any existing state or federal rule.

8. **Alternatives:** While surety companies already provide business credit through surety bonding, access to such credit remains difficult to obtain for contractors that are small businesses and/or certified minority-owned enterprises or women-owned business enterprises. The State has established the Program in order to enhance the access of such businesses to such credit, and the proposed rule provides the regulatory basis for inducing surety companies to provide credit for contractors that are small businesses and/or certified minority-owned enterprises or women-owned business enterprises.

9. **Federal Standards:** There are no minimum federal standards related to this regulation. The regulation is not inconsistent with any federal standards or requirements.

10. **Compliance Schedule:** The regulation shall take effect immediately upon adoption.

Regulatory Flexibility Analysis

a) **Effects of Rule:** In the rule: "Small business" is defined as a business that is resident and authorized to do business in the State, independently owned and operated, not dominant in its field, and employs one hundred or fewer persons on a full time basis; "Women owned Business Enterprise" is defined as a business enterprise, including a sole proprietorship, partnership or corporation that is: (i) at least fifty-one percent owned by one or more United States citizens or permanent resident aliens who are women; (ii) an enterprise in which the ownership interest of such women is real, substantial and continuing; (iii) an enterprise in which such women ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (iv) an enterprise authorized to do business in State and independently owned and operated; (v) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (vi) an enterprise that is a Small Business, unless the term Women-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section; "Minority-Owned Business Enterprise" is defined as a business enterprise, including a sole proprietorship, partnership or corporation that is: (i) at least fifty-one percent owned by one or more Minority Group Members; (ii) an enterprise in which such minority ownership is real, substantial and continuing; (iii) an enterprise in which such minority ownership has and exercises the authority to control independently the day-to-day business decisions of the enterprise; (iv) an enterprise authorized to do business in this state and independently owned and operated; (v) an enterprise owned by an individual or individuals, whose ownership, control and operation are relied upon for certification, with a personal net worth that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year; and (vi) an enterprise that is a Small Business, unless the term Minority-Owned Business Enterprise is otherwise defined in section 310 of the Executive Law, in which case the definition shall be as set forth for such term in such section; and "Surety Company" is defined as a surety company that has a certificate of solvency from, and its rates approved by, the New York State Department of Financial Services and/or appears in the most current edition of the U.S. Department of Treasury Circular 570 as eligible to issue bonds in connection with procurement contracts for the United States of America. The rule will facilitate the statutory Program's purpose of having New York State Urban Development Corporation d/b/a Empire State Development (the "Corporation") provide assistance to surety companies in order to provide financial backing to eligible small businesses, certified minority-owned business enterprises or certified women-owned business enterprises to secure bid

bonds, performance bonds and payment bonds issued in connection with contract bids or awards. The amount of such assistance provided to small businesses and minority and women-owned small businesses with respect to each contract shall not be greater than the amount necessary to induce such surety company to issue the bonds required for the contract, and in no event shall exceed fifty percent of the face value of bonds to be issued by the surety company for such contract.

1. **Compliance Requirements:** There are no compliance requirements for local governments in these regulations. Small businesses must comply with the compliance requirements applicable to all participating surety companies regardless of size. This is a voluntary program. Companies not wishing to undertake the compliance obligations need not participate.

2. **Professional Services:** Applicants do not need to obtain professional services to comply with these regulations.

3. **Compliance Costs:** There are no compliance costs for local governments in these regulations. Small businesses bear no costs, other than the fees imposed by surety companies for the surety bond or by banks for issuing a letter of credit. This program is voluntary. If it is not financially advantageous for a company to participate, then it is not required to do so.

4. **Economic and Technological Feasibility:** There are no compliance costs for small businesses and local governments in these regulations so there is no basis for determining the economic and technological feasibility for compliance with the rule by small businesses and local governments.

5. **Minimizing Adverse Impact:** This rule has no adverse impacts on small businesses or local governments because it is designed to provide letters of credit to enhance the ability of small businesses to secure surety bonding.

6. **Small Business and Local Government Participation:** Small business contractors have repeatedly identified securing surety bonds as a major obstacle to securing government and private contracts.

Rural Area Flexibility Analysis

1. **Types and Estimated Numbers of Rural Areas:** Surety companies serving all of the 44 counties defined as rural by the Executive Law § 481(7), are eligible to apply for the Bonding Guarantee Assistance Program (the "Program") assistance pursuant to a State-wide request for proposals.

2. **Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:** The rule will not impose any new or additional reporting or recordkeeping requirements other than those that would be required of any surety company receiving similar assistance regarding such matters as financial condition, required matching funds, and utilization of Program funds, and the statutorily required annual report on the use of Program funds; no additional acts will be needed to comply other than the said reporting requirements and the making of surety bonds to small businesses in the normal course of the business for any surety company that receives Program assistance; and, it is not anticipated that applicants will have to secure any additional professional services in order to comply with this rule.

3. **Costs:** The costs to surety companies that participate in the Program would depend on the extent to which they choose to participate in the Program, including the amount of required matching funds for their surety bonds to small businesses and the administrative costs in connection with such small business surety bonds and the fees, if any, charged to small businesses in connection with surety bonds to such businesses that include Program funds.

4. **Minimizing Adverse Impact:** The purpose of the Program is to provide surety companies the additional financial backing needed in order to induce such companies to issue payment and performance bonds for contractors that are small businesses, certified minority-owned enterprises or women-owned business enterprises, in order for such contractors to meet payment and performance bonding requirements for construction projects, including but not limited to, government sponsored, transportation related construction projects and to provide technical assistance in completing bonding applications for such contractors seeking surety bonding in preparation for bidding on construction projects, including transportation related projects. This rule provides a basis for cooperation between the State and surety companies, including surety companies that serve rural areas of the State, in order to maximize the Program's effectiveness and minimize any negative impacts for such surety companies and the small businesses, including small businesses located in rural areas of the State that such surety companies serve.

5. **Rural Area Participation:** This rule maximizes geographic participation by not limiting applicants to those located only in urban areas or only in rural areas. A number of surety companies that engage in underwriting surety bonds to rural and urban small businesses responded to a survey circulated by the Corporation regarding implementation of the Program. Their comments were considered in the rulemaking process.

Job Impact Statement

These regulations will not adversely affect jobs or employment opportunities in New York State. The regulations are intended to improve

the economy of New York by providing small businesses greater access to surety bonds required to participate in the construction industry. The Program includes minorities, women and other New Yorkers who have difficulty accessing regular credit markets.

There will be no adverse impact on job opportunities in the state.