

# 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.

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## Department of Civil Service

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

#### Jurisdictional Classification

**I.D. No.** CVS-29-18-00001-P

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

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

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

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of State, by increasing the number of positions of Special Assistant from 23 to 24.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

#### Regulatory Impact Statement

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### Regulatory Flexibility Analysis

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### Rural Area Flexibility Analysis

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

#### Job Impact Statement

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

#### Jurisdictional Classification

**I.D. No.** CVS-29-18-00002-P

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

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

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Executive Department under the subheading "Office of General Services," by deleting therefrom the positions of General Services Curatorial Program Supervisor (2) and General Services Curatorial and Tour Services Director (1), and by adding thereto the positions of Curatorial and Visitor Services Specialist 1 (6), Curatorial and Visitor Services Specialist 2 (2), Curatorial and Visitor Services Specialist 3 (2), Director Curatorial and Visitor Services (1), and Manager Curatorial and Visitor Services (1).

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

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#### Regulatory Flexibility Analysis

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#### Rural Area Flexibility Analysis

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previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

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

**Jurisdictional Classification**

**I.D. No.** CVS-29-18-00003-P

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

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

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

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Executive Department under the subheading "Office of Indigent Legal Services," by increasing the number of positions of Special Assistant from 7 to 8.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

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**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

**Jurisdictional Classification**

**I.D. No.** CVS-29-18-00004-P

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

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

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

**Subject:** Jurisdictional Classification.

**Purpose:** To classify positions in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Audit and Control, by increasing the number of positions of Investigative Auditor from 14 to 17.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

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**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

**Jurisdictional Classification**

**I.D. No.** CVS-29-18-00005-P

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

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

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

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Corrections and Community Supervision, by increasing the number of positions of Assistant Commissioner from 15 to 16.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

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**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously

printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

**Jurisdictional Classification**

**I.D. No.** CVS-29-18-00006-P

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

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

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

**Subject:** Jurisdictional Classification.

**Purpose:** To classify a position in the exempt class.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Health, by increasing the number of positions of Research Associate from 11 to 12.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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

**Jurisdictional Classification**

**I.D. No.** CVS-29-18-00007-P

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

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

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

**Subject:** Jurisdictional Classification.

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

**Text of proposed rule:** Amend Appendix 2 of the Rules for the Classified Service, listing positions in the non-competitive class, in the Department of Mental Hygiene under the subheading "Office of Mental Health," by increasing the number of positions of Advocacy Specialist 2 from 7 to 13.

**Text of proposed rule and any required statements and analyses may be obtained from:** Jennifer Paul, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-6598, email: commops@cs.ny.gov

**Data, views or arguments may be submitted to:** Marc Hannibal, Counsel, NYS Department of Civil Service, Empire State Plaza, Agency Building 1, Albany, NY 12239, (518) 473-2624, email: public.comments@cs.ny.gov

**Public comment will be received until:** 60 days after publication of this notice.

**Regulatory Impact Statement**

A regulatory impact statement is not submitted with this notice because this rule is subject to a consolidated regulatory impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Regulatory Flexibility Analysis**

A regulatory flexibility analysis is not submitted with this notice because this rule is subject to a consolidated regulatory flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Rural Area Flexibility Analysis**

A rural area flexibility analysis is not submitted with this notice because this rule is subject to a consolidated rural area flexibility analysis that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

**Job Impact Statement**

A job impact statement is not submitted with this notice because this rule is subject to a consolidated job impact statement that was previously printed under a notice of proposed rule making, I.D. No. CVS-12-18-00012-P, Issue of March 21, 2018.

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**Education Department**

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**NOTICE OF EMERGENCY**

**ADOPTION**

**AND REVISED RULE MAKING**

**NO HEARING(S) SCHEDULED**

**Implementation of New York’s Approved ESSA Plan to Comply with the Provisions of the Every Student Succeeds Act**

**I.D. No.** EDU-19-18-00006-ERP

**Filing No.** 612

**Filing Date:** 2018-06-29

**Effective Date:** 2018-07-01

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

**Action Taken:** Amendment of sections 100.2(m), (ff), 100.18, 100.19, Part 120; and addition of section 100.21 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 101, 112(1), 207, 210, 215, 305(1), (2), (20), 309, 3713(1), (2); The Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et. seq. (Public Law 114-95, 129 STAT.1802)

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

**Specific reasons underlying the finding of necessity:** On December 10, 2015, the Every Student Succeeds Act (ESSA) was signed into law by President Obama. This bipartisan measure reauthorized the 50-year-old Elementary and Secondary Education Act, which provides federal funds to improve elementary and secondary education in the nation’s public schools and requires states and school districts, as a condition of funding, to take a variety of actions to ensure all children, regardless of race, income, background, or where they live, receive the education they need to prepare them for success in postsecondary education, careers, and citizenship. New York State receives approximately \$1.6 billion annually in funding through ESSA.

After an extensive, 18-month long public engagement process, the Department, with Board approval, submitted New York State’s ESSA plan to the USDE for review on September 17, 2018. Subsequently, the Department met regularly with the USDE to provide clarifications on the plan. On January 17, 2018, the USDE approved the State’s plan. In January 2018, the Department provided the Board of Regents with an update on the approved plan and in March 2018, the Department provided an update regarding the financial transparency requirements related to ESSA. In April 2018, the Department provided Board of Regents with a detailed summary of the proposed amendment and the Board of Regents voted to authorize Department staff to publish the proposed amendment in the State Register for the 60-day public comment period so that the Department had



an opportunity to receive as much public comment as possible before adoption as an emergency rule for the 2018-2019 school year, as required under ESSA.

In order to conform the Commissioner's Regulations to the State's USDE approved ESSA Plan and to prepare for implementation of the plan beginning with the 2018-19 school year, the proposed rulemaking adds a new section 100.21 and amends Commissioner's Regulations sections 100.2(ff), 100.2(m), 100.18, 100.19 and Part 120 to align the Commissioner's Regulations with the approved ESSA plan, relating to New York State's updated accountability system. Adoption of the proposed amendment is necessary to ensure a seamless transition to the new accountability plan under ESSA and will allow school districts the option to demonstrate improvements, by creating improvement plans that address the needs and resource issues found in identified schools.

A Notice of Proposed Rulemaking was published in the State Register on May 9, 2018 and based on comments from the field, revisions were made to the proposed amendment. As a result, a Notice of Emergency Adoption and Revised Rule Making will be published in the State Register on July 18, 2018. Because the Board of Regents meets at scheduled intervals, the September 2018 meeting is the earliest the proposed rule could be presented for adoption, after expiration of the 30-day public comment period required under the State Administrative Procedure Act. However, the 2018-2019 school year begins on July 1, 2018 which is after the expiration of the required 30-day public comment period for revised rule makings and prior to the date which the regulations adopted at the September 2018 meeting could take effect on October 3, 2018. Therefore, emergency adoption is necessary for the preservation of the general welfare to conform the Commissioner's Regulations to timely implement New York State's approved ESSA plan, so that school districts may timely meet school/school district accountability requirements for the 2018-2019 school year and beyond, consistent with the approved ESSA plan and pursuant to statutory requirements. It is anticipated that the proposed rule will be presented to the Board of Regents for permanent adoption at its September 17-18, 2018 meeting.

**Subject:** Implementation of New York's approved ESSA plan to comply with the provisions of the Every Student Succeeds Act.

**Purpose:** To implement New York's approved ESSA plan and to comply with the provisions of the Every Student Succeeds Act.

**Substance of emergency/revised rule (Full text is posted at the following State website: <http://www.counsel.nysed.gov/rulesandregs>):** The Commissioner of Education proposes to amend sections 100.2(ff), 100.2(m), 100.18, 100.19 and Part 120 of the Regulations of the Commissioner of Education relating to Relating to the implementation of the State's Approved Every Student Succeeds Act (ESSA) Plan. The following is a summary of the proposed rule:

The proposed amendment to subdivision 100.2(ff) relates to the enrollment of youth released or conditionally released from residential facilities. This amendment clarifies the existing requirement that districts designate an employee(s) to be the transition liaison(s) with residential facility personnel, parents, students, and State and other local agencies for the purpose of facilitating a student's effective educational transition into, between, and out of such facilities to ensure that each student receives appropriate educational and appropriate supports, services, and opportunities; and this amendment also provides an overview of the duties of the liaison(s).

The proposed amendment to subdivision 100.2(m) relates to requirements for the New York State report card for schools and districts. This amendment updates the information to be provided in report cards to align with the provisions of ESSA and requires local educational agencies (LEAs) to post the local report cards on their website, where one exists, to satisfy ESSA's local report card requirements. If an LEA does not operate a website, the LEA must provide the information to the public in another manner determined by the LEA.

The proposed amendments to 100.18 clarify that this section, which contains provisions relating to implementation of New York's approved ESEA flexibility waiver, only applies to accountability designations made prior to July 1, 2018, except as otherwise provided in the new section 100.21.

In order to implement the State's approved ESSA plan, the proposed amendments to section 100.19 clarify that Failing Schools means schools that have been identified as Priority Schools and/or Comprehensive Support and Improvement Schools (CSI) for at least three consecutive years. (See Attachment A for criteria for identification of a Comprehensive Support and Improvement School.) These amendments also clarify that beginning with the 2018-19 school year, removal from receivership will be based upon a school's status as a CSI rather than as a Priority School.

The proposed creation of section 100.21 implements the new accountability and support and interventions of the State's approved ESSA plan commencing with the 2018-2019 school year. Such provisions shall include, but not be limited to, the following:

- Subdivision (a) sets forth an applicability clause which says that section 100.21 supersedes paragraphs (p)(1) through (11) and (14) through (16) of section 100.2 and section 100.18, which are the provisions of Commissioner's Regulations that were in place under the No Child Left Behind Act (NCLB) and the Department's Elementary and Secondary Education Act (ESEA) flexibility waiver, and that the new section 100.21 shall apply in lieu of such provisions during the period of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act, and any revisions and extensions thereof, except as otherwise provided in section 100.21. If a provision of section 100.2(p) or of section 100.18 conflicts with section 100.21, the provisions of section 100.21 shall prevail.

- Subdivision (b) defines various terms, which are divided into general definitions, definitions related to school and district accountability, definitions related to school and district accountability designations, and definitions related to interventions for designated schools and districts to implement the new accountability system in New York State's approved ESSA plan.

- Subdivision (c) outlines the procedures and requirements for registration of public schools, which remain the same as under the previous accountability regulations.

- Subdivision (d) relates to the requirements for the registration of public schools.

- Subdivision (e) provides that, commencing with the 2017-2018 school year results, the Commissioner will annually review the performance of all public schools, charter schools, and school districts in the State. The Commissioner shall determine whether such public school, charter school or school district shall be identified for Comprehensive Support and Improvement (CSI), Targeted Support and Improvement (TSI), or identified as a Target District in accordance with the criteria set forth in subdivision (f) of the regulation.

- Subdivision (f) specifies the differentiated accountability methodology by which schools will be identified as either CSI (which will be identified every three years beginning with the 2018-2019 school year using 2017-2018 school year results) or TSI (which will be identified annually beginning with the 2018-2019 school year), and the methodology for identifying Target Districts. This section describes how six indicators (composite performance, student growth, combined composite performance and growth, English language proficiency, academic progress, and chronic absenteeism) are used in the methodology for identification of elementary and middle schools. This section also details how seven indicators (composite performance; graduation rate; combined composite performance and graduation rate; English language proficiency; academic progress; chronic absenteeism; and college, career, and civic readiness) are used in the methodology for identifying high schools. This subdivision also explains how each of these indicators is computed, how these computations are converted into a Level 1-4 for each accountability group for which a school or district is accountable, and how these levels assigned to the accountability groups are used to determine whether a school will be identified as in Good Standing, TSI, or CSI, and whether a district will be identified as a District in Good Standing or a Target District. This subdivision also contains provisions regarding the identification of high schools for CSI based on graduation rates below 67% beginning with 2017-18 school year results. In addition, this subdivision contains provisions regarding the identification of TSI schools for additional support as required by ESSA if an accountability group for which a school is identified performs at a level that would have caused the school to be identified as CSI if this had been the performance of the "all students" group. Revisions were made to this subdivision related to changing from 1.5 to 2.0 the weighting for students who take a dual credit course and receive high school credit in the College, Career, and Civic Readiness Index. Revisions were also made to change from 0 to 2.0 the weighting for ELLs who earn a Regents Diploma and Seal of Biliteracy after 4 years in the College, Career, and Civic Readiness Index.

- Subdivision (g) provides that preliminarily identified CSI and TSI schools and Target Districts shall be given the opportunity to provide the Commissioner with any additional information concerning extenuating or extraordinary circumstances faced by the school or district that should be cause for the Commissioner to not identify the school as CSI or TSI or the district as a Target District.

- Subdivision (h) establishes the public notification requirements upon receipt of a designation of CSI or TSI school or a Target District.

- Subdivision (i) specifies the interventions that must occur in schools identified as CSI or TSI, as well as districts identified as Target Districts. This section describes the requirements for identified schools as they relate to parental involvement, participatory budgeting, school comprehensive improvement plans, and school choice. This subdivision also describes the increased support and oversight that schools that fail to improve will receive. This subdivision also outlines the interventions for schools that, beginning with 2017-18 and 2018-19 school year results, fail for two consecutive years to meet the 95% participation rate requirement for annual

state assessments for the same accountability group for the same accountability measure and are not showing improvement in the participation rate for that accountability group. This subdivision also specifies the support that districts must provide to a school that is not CSI or TSI but has performed at Level 1 for an accountability group for an accountability measure.

- Subdivision (j) establishes the criteria for a school's or a district's removal from an accountability designation.

- Subdivision (k) provides the criteria for the identification of schools for public school registration review. Under this subdivision, the Commissioner may place under preliminary registration review any school identified for receivership; any school that is identified as CSI for three consecutive years; and any school that has been identified as a poor learning environment. Also, under this subdivision, a school under registration review shall also be identified as a CSI school, and subject to all the requirements of that designation.

- Subdivision (l) specifies the process by which the Commissioner will place a school under registration review; and the required actions of the district and the school related to the designation. This subdivision also describes the requirements for receivership schools that have also been identified for registration review. Revisions were made to this subdivision to modify the requirement that a new school replace a closed and restructured SURR/CSI school with staff who consist "primarily" of experienced teachers (at least three years) who have been rated Effective/Highly Effective in each of the past three years, to clarify that this provision is subject to collective bargaining as required under article 14 of the Civil Service Law, and require that any successor collective bargaining agreement authorize such appointments unless otherwise prohibited by law.

- Subdivision (m) specifies the criteria and process for removal of schools from registration review, school phase-out or closure.

The proposed amendments to Part 120 update provisions in the existing regulations pertaining to the sunset of No Child Left Behind requirements regarding highly qualified teachers and provide for the continuation under ESSA of provisions pertaining to persistently dangerous schools and unsafe school choice and updates to public school choice provisions.

**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 May 9, 2018, I.D. No. EDU-19-18-00006-P. The emergency rule will expire September 26, 2018.

**Emergency rule compared with proposed rule:** Substantial revisions were made in section 100.21(f)(2) and (l)(5).

**Text of rule and any required statements and analyses may be obtained from:** Kirti Goswami, NYS Education Department, 89 Washington Avenue, Room 148, Albany, NY 12234, (518) 474-6400, email: [legal@nysed.gov](mailto:legal@nysed.gov)

**Data, views or arguments may be submitted to:** Dr. Lisa Long, NYS Education Department, Office of Accountability, 55 Hanson Place, 4th Floor, Brooklyn, NY 11217, (718) 722-4553, email: [ESSAREGCOMMENT@nysed.gov](mailto:ESSAREGCOMMENT@nysed.gov)

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

**Summary of Revised Regulatory Impact Statement (Full text is posted at the following State website:** <http://www.counsel.nysed.gov/rulesandregs>):

#### 1. STATUTORY AUTHORITY:

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

Ed.L. § 112(1) authorizes Commissioner to require schools and school districts to facilitate the prompt enrollment of children who are released or conditionally released from residential facilities.

Ed.L. § 207 empowers Regents and Commissioner to adopt rules and regulations to carry out State education laws and functions and duties conferred on the Department.

Ed.L. § 210 authorizes Regents to register domestic and foreign institutions in terms of State standards, and fix the value of degrees, diplomas and certificates issued by institutions of other states or countries and presented for entrance to schools, colleges and professions in the State.

Ed.L. § 215 authorizes Commissioner to require schools and school districts to submit reports containing such information as Commissioner shall prescribe.

Ed.L. § 305(1) and (2) provide Commissioner, as chief executive officer of the State's education system, with general supervision over all schools and institutions subject to the Education Law, or any statute relating to education, and responsibility for executing all educational policies of the Regents.

Ed.L. § 305(20) provides Commissioner shall have such further powers and duties as charged by the Regents.

Ed.L. § 309 charges the Commissioner with the general supervision of boards of education and their management and conduct of all departments of instruction.

Ed.L. § 3713(1) and (2) authorize State and school districts to accept federal law making and appropriations for educational purposes and authorize Commissioner to cooperate with federal agencies to implement such law.

The Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT.1802).

#### 2. LEGISLATIVE OBJECTIVES:

The proposed rule is consistent with the above statutory authority and is necessary to implement New York's approved ESSA plan and to comply with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

#### 3. NEEDS AND BENEFITS:

On December 10, 2015, ESSA was signed into law by President Obama. This bipartisan measure reauthorized the 50-year-old ESEA, which provides federal funds to improve elementary and secondary education in the nation's public schools and requires states and school districts, as a condition of funding, to take a variety of actions to ensure all children, regardless of race, income, background, or where they live, receive the education they need to prepare them for success in postsecondary education, careers, and citizenship. New York State receives approximately \$1.6 billion annually in funding through ESSA.

After an extensive, 18-month long public engagement process, the Department, with Board approval, submitted New York State's ESSA plan to the USDE for review on September 17, 2018. On January 17, 2018, the USDE approved the State's plan. In April 2018, the Department provided the Board of Regents with a description of the draft regulatory terms and the Board directed the Department to finalize the draft regulatory terms for publication in the State Register.

The rule will ensure a seamless transition to the revised accountability plan as authorized under the approved ESSA plan, and provide school districts with the opportunity to demonstrate improvements by creating improvement plans that address the needs and resource issues found in identified schools.

Revisions were made to the proposed amendment as follows:

- First, the Department proposes changing from 1.5 to 2.0 the weighting for students who take a dual credit course and receive high school credit in the College, Career, and Civic Readiness Index.

- Second, the Department proposes changing from 0 to 2.0 the weighting for ELLs who earn a Regents Diploma and Seal of Biliteracy after 4 years in the College, Career, and Civic Readiness Index.

- The Department also proposes modifying the requirement that a new school replace a closed and restructured SURR/CSI school with staff who consist "primarily" of experienced teachers (at least three years) who have been rated Effective/Highly Effective in each of the past three years, to clarify that this provision is subject to collective bargaining as required under article 14 of the Civil Service Law, and require that any successor collective bargaining agreement authorize such appointments unless otherwise prohibited by law.

For a more complete explanation please see the Regulatory Impact Statement posted here: <http://www.counsel.nysed.gov/rulesandregs>

#### 4. COSTS:

**Cost to the State:** The proposed rule does not generally impose any new costs beyond those consistent with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

**Costs to local government:** The rule does not generally impose any new costs beyond those consistent with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802), but rather requires, in some instances, that school districts spend a portion of their Title I, Title IIA, and Title III funds on specific programs and activities, except that a school identified for Comprehensive Support and Improvement may in some cases need to spend an amount that is anticipated to be less than \$10,000 per year in state and/or local funds to meet the participatory budgeting requirements of the regulations. The rule also provides school districts with substantial additional flexibility in how they use program funds compared to current regulations pertaining to schools identified as Priority or Focus.

Based upon the requirements described in the rule to implement certain activities based upon a school or district's accountability status, there may be some associated costs. These activities, include, but are not necessarily limited to, annual notifications of accountability status; participation in comprehensive needs assessments; conduct of parent, staff and student surveys; and development and implementation of improvement plans. For



school districts with schools receiving Title I, IIA or III funding, these funds may be used to pay the associated costs. School districts with Title I funded schools that are designated as Comprehensive Support and Improvement (CSI) schools or Targeted Support and Improvement (TSI) schools, will also be required to use their Title I, IIA, III funding to implement programs and services in CSI and TSI schools that address the needs and resource limitations found as a result of the needs assessments conducted at the schools. CSI schools that fail to show progress on their Annual Achievement Progression targets for two consecutive years will be required to enter into a partnership with a BOCES, Regional Bilingual Education Resource Network, Teacher Center or other Regional Technical Assistance Center, or other technical assistance provider as determined by the Commissioner to support the implementation of the Comprehensive Education Plan. Depending on the nature of such partnership, and whether such partnership already exists, a school district may incur costs to implement this provision of the regulations.

In some instances, school districts newly identified as Target Districts with schools that are designated as CSI or TSI that do not receive Title I funding may incur costs. These costs will generally be limited to the cost of site visits and implementation of any elements of District Comprehensive Education Plans and Comprehensive Education Plans that involve activities that are in addition to the district's or the school's regular educational program and that the district chooses not to fund through reallocation of existing resources. However, it is anticipated that non-Title I schools will be eligible to receive federal 1003 School Improvement Grants that can be used to fund these activities.

Districts that have schools that fail to meet the 95% participation rate requirements must develop a participation rate improvement plan, which in some cases beginning in the 2021-22 school year shall include partnering with a BOCES or other technical assistance provider to conduct a participation rate audit and to update the participation rate improvement plan. Because these partnerships will likely vary significantly in cost based on the number of schools for which a plan is required no estimate can be made at this time regarding required costs. Similarly districts that have schools that will be closed or phased out as a consequence of these regulations may incur costs in developing and implementing a closure or phase out plan.

In other instances, school districts and their schools will be designated as in Good Standing, when under the present accountability system these school districts and schools might otherwise have been designated as Priority, Focus or Local Assistance Plan schools. In these cases, school districts may incur cost savings as they will no longer be required to participate in site visits or in the other previously required interventions for districts with such designations. In addition, a number of previous requirements for schools identified as Priority or Focus have been reduced or eliminated, thereby providing districts with increased flexibility in use of funds. For example, the current requirement for Title I Schools that are designated as Priority and Focus Schools to offer public school choice has been replaced by a substantially more limited public school choice program for a subset of Comprehensive Support and Improvement Schools. Because of the number of school districts and schools involved, and the fact that the allowable services and activities to be provided will vary greatly from district-to-district, as well as school-to-school, depending on the school and district designation, the district's choices, and the needs presented in each school, a complete cost statement cannot be provided. No additional costs have been identified with respect to the implementation of the updated accountability system, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Cost to private regulated parties: None.

Cost to regulating agency for implementation and continued administration of this rule: None.

#### 5. LOCAL GOVERNMENT MANDATES:

The rule is necessary to assist school districts to be able to meet the provisions of New York's approved ESSA plan. The proposed regulation will require districts with schools identified as CSI or TSI to make significant changes to these schools' educational programs. See the response to Question #3, Needs and Benefits in the full Regulatory Impact Statement available here: <http://www.counsel.nysed.gov/rulesandregs>

#### 6. PAPERWORK:

The proposed rule generally contains paperwork requirements consistent with those in existing regulations and does not generally impose any new paperwork requirements beyond those consistent with the above statutory authority and the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802). For further information please see the above response to Question #3, Needs and Benefits in the full Regulatory Impact Statement available here: <http://www.counsel.nysed.gov/rulesandregs>

#### 7. DUPLICATION:

The rule does not duplicate existing State or federal regulations.

#### 8. ALTERNATIVES:

After an extensive, 18-month long public engagement process, the Department, with Board approval, submitted New York State's ESSA plan to the USDE for review on September 17, 2018 which was approved on January 17, 2018. The proposed rule is necessary conform Commissioner's Regulations to New York's approved ESSA plan.

#### 9. FEDERAL STANDARDS:

The rule is necessary to conform regulations to New York's approved ESSA plan and the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. § 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

#### 10. COMPLIANCE SCHEDULE:

It is anticipated that parties will be able to timely implement the rule's requirements beginning with its effective date.

#### *Revised Regulatory Flexibility Analysis*

##### Small Businesses:

The proposed rule relates to public school and school district accountability and is necessary to implement New York's approved ESSA plan and to comply with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802). Commissioner's Regulations to New York State's Elementary and Secondary Education Act (ESEA) Flexibility Waiver Request; which was approved by the Secretary to the United States Education Department on May 29, 2012 pursuant to ESEA section 9401.

The purpose of the proposed rule is to ensure a seamless transition to the revised accountability plan as authorized under the approved ESSA plan, and provide school districts with the opportunity to demonstrate improvements by creating improvement plans that address the needs and resource issues found in identified schools. The State and local educational agencies (LEAs) are required to comply with the ESSA as a condition to their receipt of federal funds under Title I of the ESEA Act of 1965, as amended by the Every Student Succeeds Act of 2015.

The rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the ESSA, and does not impose any adverse economic impact, reporting, record keeping or any other compliance requirements on small businesses. Because it is evident from the nature of the proposed amendment that it does not affect small businesses, no further measures were needed to ascertain that fact and none were taken. Accordingly, a regulatory flexibility analysis for small businesses is not required and one has not been prepared.

##### Local Governments:

#### 1. EFFECT OF RULE:

The rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the Elementary and Secondary Education Act of 1965, as amended.

#### 2. COMPLIANCE REQUIREMENTS:

See the response to Question #3, Needs and Benefits in the full Regulatory Impact Statement available here: <http://www.counsel.nysed.gov/rulesandregs>

#### 3. PROFESSIONAL SERVICES:

The rule imposes no additional professional service requirements.

#### 4. COMPLIANCE COSTS:

For further information related to the costs of implementation please see the response to Question #4, Costs in the full Regulatory Impact Statement available here: <http://www.counsel.nysed.gov/rulesandregs>

#### 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY:

The rule imposes no technological requirements on school districts. Costs are discussed under the Compliance Costs section above.

#### 6. MINIMIZING ADVERSE IMPACT:

The proposed rule is necessary to implement New York's approved ESSA plan and to comply with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802). Commissioner's Regulations to New York State's Elementary and Secondary Education Act (ESEA) Flexibility Waiver Request; which was approved by the Secretary to the United States Education Department on May 29, 2012 pursuant to ESEA section 9401. The State and local educational agencies (LEAs) are required to comply with the ESEA as a condition to their receipt of federal funds under Title I of the ESEA Act of 1965, as amended.

The rule adds a new section 100.21 and revises sections 100.2(m), 100.2(ff), 100.18, 100.19 and Part 120 of the Commissioner's Regulations to align New York's public school and school district accountability system to the approved ESSA plan and to ensure a seamless transition to the revised accountability plan as authorized under the approved ESSA plan. The rule has been carefully drafted to meet specific federal and State requirements.

#### 7. LOCAL GOVERNMENT PARTICIPATION:

Copies of the proposed rule have been provided to District Superintendents with the request that they distribute it to school districts within their supervisory districts for review and comment. Copies were also provided for review and comment to the chief school officers of the five big city school districts and to charter schools.

#### **Revised Rural Area Flexibility Analysis**

##### **1. TYPES AND ESTIMATED NUMBERS OF RURAL AREAS:**

The proposed rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the Elementary and Secondary Education Act (ESEA) of 1965, as amended by the Every Student Succeeds Act (ESSA), including those located in the 44 rural counties with less than 200,000 inhabitants and the 71 towns in urban counties with a population density of 150 per square mile or less.

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

The rule is necessary to necessary to implement New York's approved ESSA plan and to comply with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802). For a more complete explanation please see the Regulatory Impact Statement posted here: <http://www.counsel.nysed.gov/rulesandregs>

##### **3. COSTS:**

**Cost to the State:** The proposed rule does not generally impose any new costs beyond those consistent with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

**Costs to local government:** The rule does not generally impose any new costs beyond those consistent with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802), but rather requires, in some instances, that school districts spend a portion of their Title I, Title IIA, and Title III funds on specific programs and activities, except that a school identified for Comprehensive Support and Improvement may in some cases need to spend an amount that is anticipated to be less than \$10,000 per year in state and/or local funds to meet the participatory budgeting requirements of the regulations. The rule also provides school districts with substantial additional flexibility in how they use program funds compared to current regulations pertaining to schools identified as Priority or Focus.

Based upon the requirements described in the rule to implement certain activities based upon a school or district's accountability status, there may be some associated costs. These activities, include, but are not necessarily limited to, annual notifications of accountability status; participation in comprehensive needs assessments; conduct of parent, staff and student surveys; and development and implementation of improvement plans. For school districts with schools receiving Title I, IIA or III funding, these funds may be used to pay the associated costs. School districts with Title I funded schools that are designated as Comprehensive Support and Improvement (CSI) schools or Targeted Support and Improvement (TSI) schools, will also be required to use their Title I, IIA, III funding to implement programs and services in CSI and TSI schools that address the needs and resource limitations found as a result of the needs assessments conducted at the schools. CSI schools that fail to show progress on their Annual Achievement Progression targets for two consecutive years will be required to enter into a partnership with a BOCES, Regional Bilingual Education Resource Network, Teacher Center or other Regional Technical Assistance Center, or other technical assistance provider as determined by the Commissioner to support the implementation of the Comprehensive Education Plan. Depending on the nature of such partnership, and whether such partnership already exists, a school district may incur costs to implement this provision of the regulations.

In some instances, school districts newly identified as Target Districts with schools that are designated as CSI or TSI that do not receive Title I funding may incur costs. These costs will generally be limited to the cost of site visits and implementation of any elements of District Comprehensive Education Plans and Comprehensive Education Plans that involve activities that are in addition to the district's or the school's regular educational program and that the district chooses not to fund through reallocation of existing resources. However, it is anticipated that non-Title I schools will be eligible to receive federal 1003 School Improvement Grants that can be used to fund these activities.

Districts that have schools that fail to meet the 95% participation rate requirements must develop a participation rate improvement plan, which in some cases beginning in the 2021-22 school year shall include partnering with a BOCES or other technical assistance provider to conduct a participation rate audit and to update the participation rate improvement plan. Because these partnerships will likely vary significantly in cost based on the number of schools for which a plan is required no estimate can be made at this time regarding required costs. Similarly districts that have

schools that will be closed or phased out as a consequence of these regulations may incur costs in developing and implementing a closure or phase out plan.

In other instances, school districts and their schools will be designated as in Good Standing, when under the present accountability system these school districts and schools might otherwise have been designated as Priority, Focus or Local Assistance Plan schools. In these cases, school districts may incur cost savings as they will no longer be required to participate in site visits or in the other previously required interventions for districts with such designations. In addition, a number of previous requirements for schools identified as Priority or Focus have been reduced or eliminated, thereby providing districts with increased flexibility in use of funds. For example, the current requirement for Title I Schools that are designated as Priority and Focus Schools to offer public school choice has been replaced by a substantially more limited public school choice program for a subset of Comprehensive Support and Improvement Schools. Because of the number of school districts and schools involved, and the fact that the allowable services and activities to be provided will vary greatly from district-to-district, as well as school-to-school, depending on the school and district designation, the district's choices, and the needs presented in each school, a complete cost statement cannot be provided. No additional costs have been identified with respect to the implementation of the updated accountability system, given the similarities in current requirements and an inability to determine differences aside from those in respect to depth of focus.

Cost to private regulated parties: None.

Cost to regulating agency for implementation and continued administration of this rule: None.

##### **4. MINIMIZING ADVERSE IMPACT:**

The rule is necessary to conform the Commissioner's Regulations to New York State's approved ESSA plan and to comply with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

The rule adds a new section 100.21 and revises sections 100.2(m), 100.2(ff), 100.18, 100.19 and Part 120 of the Commissioner's Regulations to align New York's public school and school district accountability system to the approved ESSA plan and to ensure a seamless transition to the revised accountability plan as authorized under the approved ESSA plan. The rule has been carefully drafted to meet specific federal and State requirements. Since these requirements apply to all local educational agencies in the State that receive ESSA funds, it is not possible to adopt different standards for school districts in rural areas.

##### **5. RURAL AREA PARTICIPATION:**

The rule was submitted for review and comment to the Department's Rural Education Advisory Committee, which includes representatives of school districts in rural areas.

#### **Revised Job Impact Statement**

The proposed rule making relates to public school and school district accountability and is necessary to implement New York's approved ESSA plan and to comply with the provisions of the Elementary and Secondary Education Act of 1965, as amended by the Every Student Succeeds Act of 2015, 20 U.S.C. sections 6301 et seq. (Public Law 114-95, 129 STAT. 1802).

The purpose of the proposed rule is to ensure a seamless transition to the revised accountability plan as authorized under the approved ESSA plan, and provide school districts with the opportunity to demonstrate improvements by creating improvement plans that address the needs and resource issues found in identified schools. The State and local educational agencies (LEAs) are required to comply with the ESSA as a condition to their receipt of federal funds under Title I of the ESEA Act of 1965, as amended by the Every Student Succeeds Act of 2015.

The proposed rule applies to public schools, school districts and charter schools that receive funding as LEAs pursuant to the ESSA, and will not have an adverse impact on jobs or employment opportunities. Because it is evident from the nature of the proposed rule that it will have 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**

Following publication of the Notice of Proposed Rule Making in the State Register on May 9, 2018 through June 4, 2018, the Department received the following comments on the proposed amendment:

1. COMMENT: A student should be credited as achieving Level 2 on the high school Composite Performance Level based on whether the student has met the graduation assessment in the subject as opposed to scoring at least 65 on the examination. This would ensure equal weighting for students with disabilities who are eligible for the safety net provision.

DEPARTMENT RESPONSE: No change necessary. ESSA requires that



a uniform standard be applied to all students in computing Academic Achievement. It would be inconsistent with ESSA to define achievement levels differently for different groups of students.

2. COMMENT: The levels assigned to the ELP success ratio should be revised. The threshold would be a more reliable measure if the Success Ratio for Level 2 were 0.50 to 0.85 (or 0.90) and Level 3 were 0.86 to 1.24.

DEPARTMENT RESPONSE: No change necessary. The ELP success ratio has been designed so that schools that have below average performance receive Level 2.

3. COMMENT: The commenter indicates that the proposed regulation allows a single student to be counted multiple times to determine if there are 30 or more students. The commenter recommends that there be a minimum of 80% of the students being counted only once for each of the 3 subject areas. This will prevent the situation where the results from a very small number of students over two years could result in a school meeting the minimum n-size of 30 for an accountability group.

DEPARTMENT RESPONSE: The computation of minimum n-size in the draft regulations is consistent with the requirements of ESSA and New York's approved ESSA plan. While it is true that a student may be calculated twice over a two-year period, the calculation used for minimum n-size was developed to strike a balance between ensuring reliability of the measure and maximizing the number of students for whom a school is held accountable. The Department does not believe a change is necessary.

4. COMMENT: Those who are at the 40th or 45th percentile should be assigned a Level 3 in the conversion chart so that 55 to 60% of the schools will be at Level 3 or 4 on measures such as Composite Performance or student growth.

DEPARTMENT RESPONSE: These measures have been designed so that schools that have below average performance receive Level 2. The Department does not believe that a school that performing at the 40th or 45th percentile should be assigned Level 3 because these percentiles mean that on average students in the accountability group have shown less growth than their peers. Therefore, no change is necessary.

5. COMMENT: It seems unfair to expect a newly arrived ELL to graduate within a four-year window. Perhaps there could be some leeway to examine the graduation of newly arrived ELLs within a different cohort for graduation and accountability purposes.

DEPARTMENT RESPONSE: Schools have flexibility to determine the appropriate grade to which to assign a newly arrived ELL. Once a student has been assigned to a high school cohort, ESSA does not allow for different rules to be applied to how the graduation rate is computed for English language learners. However, New York uses a four-, five-, and six-year graduation rate for accountability purposes in recognition of the fact that some students will need more than four years to graduate from high school. The Department does not believe any change is warranted.

6. COMMENT: The College Career and Civic Readiness Index is based on the four-year graduation rate cohort. Although Skills and Achievement Commencement Credentials are included in the 2.0 weighting and 1.5 weightings, these students typically do not graduate in 4 years. They are most likely to attend school until they are 21. The commenter recommends that students with disabilities on track for a Skills and Achievement Credential should not be held to the four-year graduation criteria.

DEPARTMENT RESPONSE: Ungraded students with disabilities are included in the Accountability Cohort and the Four-Year, Five-Year, and Six-Year Graduation Rate Cohorts in the school year in which they attain the age of 17. The Department does not believe a change is warranted.

7. COMMENT: Several commenters expressed concern with the process by which the draft regulations were presented to the Board of Regents and believes that the Board should have seen and had the opportunity to review and discuss the full text of the proposed regulations prior to their publication as a proposed rulemaking in the State Register.

DEPARTMENT RESPONSE: At its April 2018 meeting, the Board of Regents was presented with a detailed summary of the proposed amendment and the Board of Regents voted to authorize Department staff to publish the proposed amendment in the State Register for the 60-day public comment period so that the Department had an opportunity to receive as much public comment as possible before adoption as an emergency rule for the 2018-2019 school year, as required under ESSA. On April 24, the Board of Regents was provided with the materials filed with the Department of State for publication in the State Register, and as soon as the full text was finalized and posted on the Department's website on May 9, the text was made available to the Board of Regents. The Board of Regents will be presented with the full text for emergency adoption at the June 2018 meeting.

8. COMMENT: Several commenters expressed the position that the proposed ESSA regulations make a direct frontal assault on the rights of parents to opt-out their children from the state testing system. This is contrary to the intent of ESSA and good public policy. Further, a number of these provisions were never discussed in public and were not detailed in

the summary provided to the Board of Regents at the April Regents meeting.

DEPARTMENT RESPONSE: ESSA requires that LEAs provide parents upon their request with information on any state or local policy or procedures and parental rights regarding student participation in mandated assessments, where applicable. ESSA also makes clear that it does not preempt any state or local law with regard to a parental decision regarding participation in State assessments. The proposed regulations, therefore, contain no provisions relating to the right of parents to opt their children out of the State assessment system.

ESSA requires that State assessments annually measure the achievement of not less than 95% of all students, and 95% of all students in each subgroup of students. Therefore, the proposed regulations, consistent with the requirements of ESSA and New York's approved plan, specify how academic achievement is computed and what the consequences are for schools when, for at least two consecutive years, fewer than 95% of students in an accountability subgroup do not participate in the grades 3-8 English language arts or mathematics assessment.

9. COMMENT: In the plan that New York submitted to the United States Department of Education, Academic Achievement in elementary/middle ELA and math was to be computed using the higher of two ways of ranking performance: one using as the denominator the greater of the number of continuously enrolled students tested or 95% of the number of continuously enrolled students and the other using as the denominator the number of continuously enrolled students tested. However, in the proposed regulations, these two performance scores are added together to calculate the "Composite Performance Index." This has the effect of lowering the "score" in schools with higher opt-out rates for the Composite Performance Index that is then used to identify schools for CSI and TSI status. The higher score will only be used as a "tie-breaker" when two schools have the identical Composite Performance Index score.

DEPARTMENT RESPONSE: This revision (to add the two performance scores together) was made to the State's ESSA plan based on discussions with the United States Department of Education that ultimately led to approval of New York's plan in January 2018. The proposed regulatory provisions conform to the State's approved ESSA plan.

10. COMMENT: The proposed regulations establish an Academic Progress Index for each school. This Index is based on performance levels on the ELA and Math assessments using continuously enrolled students as the student count. This is a measure used to identify CSI and TSI schools. Several commenters expressed that this measure penalizes schools with opt-outs since it assumes all students are taking the state assessments.

DEPARTMENT RESPONSE: As indicated in the April summary of the proposed regulations, the Academic Progress Index is computed based upon the State long-term goals and Measures of Interim Progress (MIPs) in the schools. ESSA requires that goals and MIPs be computed using as the denominator for the computations the greater of the number of continuously enrolled students tested or 95% of the number of continuously enrolled students. These long-term goals and MIPs are computed using the above denominator as the baseline, thus taking into account that not all students participate in State assessments.

11. COMMENT: The proposed regulations provide that a school cannot exit CSI or TSI status if the school has a participation rate below 95 percent, regardless of all other indicators. This will block schools from exiting CSI or TSI status which otherwise have met performance targets set by SED.

DEPARTMENT RESPONSE: The proposed regulations provide that a school that is required to implement a participation rate improvement plan may not exit CSI or and may not exit TSI status if it is required to implement a participation rate improvement plan for an accountability group for which it has been identified as CSI. This provision is a modification of the existing more rigorous provisions pertaining to Priority and Focus Schools, which require that, in order to exit Priority or Focus status, the school must meet the 95% participation rate requirement for all groups for which the school is accountable for two consecutive years.

12. COMMENT: Several commenters expressed concern with the provision that permits the Commissioner to place under preliminary registration review (SURR) any school with "excessive percentages of students that fail to fully participate in the state assessment program." This authority does not exist in the current SURR regs. If these regulations are enacted the Commissioner would have the unilateral authority to close schools that have high opt-out rates but are otherwise high performing.

DEPARTMENT RESPONSE: These are not new requirements. Section 100.18(k)(3) of the Commissioner's regulations currently authorizes the Commissioner to place under registration review any school in "which excessive percentages of students fail to fully participate in the State assessment program," and a similar provision has existed in § 100.2(p) for over a decade.

13. COMMENT: Several commenters express concerns with the provisions that permit the Commissioner to impose a financial penalty by



requiring districts to set aside Title I funds if the participation rate on state tests do not improve by the third year. This provision was not included in the summary provided to the Regents at the April Regents meeting.

**DEPARTMENT RESPONSE:** This provision, which permits but does not mandate that the Commissioner require a set aside to increase student participation, is consistent with New York's approved ESSA plan and was referenced in the April Regents summary as follows:

"In the third year of identification, for any school for which a district audit and district participation improvement plan was completed in the previous school year and that fails to improve its participation rates for the subgroup(s) and subject(s) for which the plan was required, the district must work with a Board of Cooperative Educational Services (BOCES) to conduct a participation rate audit and develop an updated participation rate plan."

"In the fourth year of identification, for any school for which a BOCES audit and BOCES participation improvement plan was completed in the previous school year and that fails to improve its participation rates for the subgroup(s) and subject(s) for which the plan was required, the Department will conduct an audit of the participation rate and the school may be required by the Commissioner to undertake additional activities to raise student participation in State assessments."

14. **COMMENT:** The proposed regulations require any new collective bargaining agreement to limit teachers transferring into a CSI school to those rated effective/highly effective. Many collective bargaining agreements contain provisions that govern the transfer of teachers. Several commenters expressed concern and believe that this provision of the draft regulations would impair these existing and long standing collective bargaining agreements by requiring that any future agreement preclude certain teacher transfers.

**DEPARTMENT RESPONSE:** The proposed regulation provides that any such requirement would not affect current CBAs and would only be applicable to the extent permitted by law. Therefore, this provision would not impair existing collective bargaining agreements. No change is warranted.

15. **COMMENT:** Districts that create a new school to replace a closed and restructured SURR/CSI school must select staff that consists "primarily" of experienced teachers (at least three years) who have been rated Effective/Highly Effective in each of the past three years and are not currently assigned to the school. Several commenters expressed concern and believe that this is in an inappropriate intrusion into collective bargaining.

**DEPARTMENT RESPONSE:** This provision is consistent with current requirements in Commissioner's regulations § 100.18 for implementation of a whole school reform model, which currently requires that districts review "the quality of all staff and retain only those who have the ability to be successful in the turnaround effort." Nevertheless, in an effort to address the commenter's concerns, the Department recommends revising the proposed amendment to make it clear that this provision shall not abrogate any existing collective bargaining agreement and that any new successor agreement shall authorize such appointments.

16. **COMMENT:** The committee that is established to develop the corrective action plan in schools with high opt-out rates must include teaching and support staff. However, beginning with the third year of a corrective action plan, only half the staff members can be selected by the bargaining unit. All staff should be selected by the respective bargaining units. Several commenters expressed concern and believe that it is inappropriate for the administration to select employees to serve on such committees.

**DEPARTMENT RESPONSE:** This provision is applicable only after a school has failed to improve its participation rate following two years of implementing a participation rate improvement plan. The intent is to allow districts to select teachers to participate in development of the next plan who may have new ideas for increasing participation rates. Therefore, the Department does not believe any change is warranted.

## Department of Environmental Conservation

### NOTICE OF ADOPTION

#### Revisions to the Regulations That Implement the State Environmental Quality Review Act (Article 8 of the ECL)

**I.D. No.** ENV-06-17-00001-A

**Filing No.** 602

**Filing Date:** 2018-06-27

**Effective Date:** 2019-01-01

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

**Action taken:** Amendment of Part 617 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, section 8-0113

**Subject:** Revisions to the regulations that implement the State Environmental Quality Review Act (article 8 of the ECL).

**Purpose:** Streamline SEQR without sacrificing meaningful environmental review.

**Substance of final rule:** The 2018 amendments to the State Environmental Quality Review Act (SEQR) regulations serve to modernize the SEQR process. The amendments are the Department's first significant update to the SEQR regulations since 1995. They are among the steps that the Department has taken to modernize the SEQR process that includes the new environmental assessment forms along with the creation of workbooks and a spatial data platform on DEC's website (EAF Mapper). The Mapper enables users in performing environmental assessments to access the same geographic information relied on by DEC staff. The Department's proposed changes reduce the number of minor projects and routine governmental decisions that are subject to SEQR by adding them to the statewide list actions that are exempt from further SEQR review, which is known as the "Type II list of actions". Some examples of the new Type II actions include the following: Retrofitting of a structure to incorporate green infrastructure practices; installation of solar energy arrays on sanitary landfills and Superfund sites, at water treatment facilities, or on existing structures including parking lots; acquisition and dedication of parkland; certain transfers of land; and construction and operation of an anaerobic digester, at a municipal solid waste landfill. The amendments would also modify certain thresholds in the Type I list of actions (actions deemed more likely to require the preparation of an environmental impact statement (EIS) (see 6 NYCRR 617.4); make scoping of environmental impact statements (see 6 NYCRR 617.8) mandatory (scoping is now optional) except for supplements to EISs; and more precisely define and tighten the acceptance procedures for draft environmental impact statements. Finally, the Department is proposing rules to implement the statutory EIS on the web requirement (Chapter 641 of the Laws of 2005) along with a number of other changes to encourage the electronic filing of EISs (see Express Terms, 6 NYCRR section 617.12) and changes to 617.13 to add greater transparency to consulting costs when a lead agency engages private consulting firms and charges the costs back to project sponsors.

The full text of the express terms and SEQR findings are posted on the Department's website at <http://www.dec.ny.gov/permits/83389.html>. The Department has also prepared (and posted on its website in the same location) a final environmental impact statement (FGEIS) that, among other things, assesses the impact on the environment of the proposed changes. The FGEIS is combined with the regulatory impact statements required by the State Administrative Procedure Act.

**Final rule as compared with last published rule:** Nonsubstantive changes were made in sections 617.2, 617.4, 617.5, 617.6, 617.9, 617.10, 617.17, 617.19 and 617.20.

**Revised rule making(s) were previously published in the State Register on April 4, 2018.**

**Text of rule and any required statements and analyses may be obtained from:** James Eldred, Environmental Analyst, Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1750, (518) 402-9167, email: DEPpermitting@dec.ny.gov

#### Revised Regulatory Impact Statement

1. Statutory Authority

The New York State Department of Environmental Conservation's (the

“Department) statutory authority to amend Part 617 is in Environmental Conservation Law (ECL) § 8-0113, which authorizes the Department, through the Commissioner, to adopt rules and regulations to implement the State Environmental Quality Review Act (SEQR).

#### 2. Legislative Objectives

The purpose of the proposed amendments to Part 617 is to update and improve the efficiency of the SEQR process without sacrificing meaningful environmental review. The proposed changes build on regulatory changes from past SEQR rulemakings, namely the 1995 amendments (effective January 1, 1996) to the SEQR regulations (which supplemented the Type II list and established a more detailed scoping process for environmental impact statements, among other changes) and on the rulemaking that established the new electronic environmental assessment forms that became effective October 7, 2013.

#### 3. Needs and Benefits

The last major amendments to the SEQR regulations occurred more than two decades ago. This rule making is intended to update the SEQR regulations with additional Type II actions, i.e., adding more actions to the list of actions not subject to further review under SEQR, and with other changes more fully described in the express terms and accompanying environmental impact statement. Many of the concepts and ideas underlying the proposed changes had their genesis in 2011 when the Department convened a series of round table meetings among stakeholders in the SEQR process on ways to streamline the SEQR process without sacrificing meaningful environmental review.

Beginning in 2011 and continuing through 2013, stakeholder meetings were held throughout the state with individuals representing governmental agencies, business, and environmental groups (see, final generic environmental impact statement or FGEIS, Appendix A, which has been published on the Department’s website at <http://www.dec.ny.gov/permits/83389.html>). In those meetings, the Department asked stakeholders to react to a skeletal outline of proposed changes and to also add their ideas to the list that was prepared by the Department’s staff. Stakeholders gave support to tightening the environmental impact statement process (requiring mandatory scoping and enacting more exact requirements on when a draft environmental impact statement can be rejected as inadequate). With some exception, stakeholders also gave support to a proposed list of additions to the Type II list of actions (i.e., actions that would not be subject to further review under SEQR). The express terms are, for the most part, the products of those meetings. Some ideas were first proposed in the 1995 rule making process.

The Department proposed a provision to recognize that an environmental impact statement may include, where relevant, an analysis of a project’s impacts on climate change and its associated impacts from the effects of climate change such as sea level rise and flooding. (Energy use and greenhouse gas emissions are already among the topics addressed by SEQR. See ECL § 8-0109(2)(h) as implemented by 6 NYCRR 617.9(b)(5)(iii)(e) and Policy on Assessing Energy Use and Greenhouse Gas Emissions in Environmental Impact Statements, dated July 15, 2009.) As discussed in the accompanying FGEIS associated with this rulemaking, this change implements a recommendation of the Governor’s 2100 Commission and ensures that where appropriate mitigation measures will be considered in mitigating the impacts of a project. The recent occurrence of extreme weather events underscores the need for SEQR reviews to address the effects of climate change, including preparation for the risks from climate change, as well as human activities that drive climate change.

#### 4. Benefits

The accompanying FGEIS contains a specific discussion of objectives and benefits for each proposed change to the SEQR regulations.

#### 5. Costs

##### a. To the regulated parties:

Because SEQR is a law that requires compliance by government agencies, any effect on the regulated public is indirect. Further, in most cases, the proposals, if adopted, would arguably reduce costs through the creation of additional Type II actions and further streamlining of the EIS process. This is the agency’s overall best estimate; however, the economic impact of the amendments to SEQR is impossible to quantify. Except for the small change to the Type I rule for a residential housing units and the proposed change to section 617.9 (regarding impacts to climate change and associated impacts from sea level rise and flooding), the changes streamline the regulations, which reduces costs to regulated parties. For example, the additional Type II actions would no longer be subject to review under SEQR. Mandatory scoping will help ensure that environmental issues are considered early on rather than at the end of the process after a project sponsor has already spent large sums of money on moving an application forward. On the other hand, reducing the thresholds for Type I actions involving residential developments may arguably raise costs for applicants, though there is no way to measure the effect since some of the developments effected by the new proposed rule would be Type I on account of other thresholds and the Type I requirement for coordinated

review results in more efficiency of review (which arguably has the effect of reducing costs). The proposed rules in section 617.9 related to sea level rise and flooding may arguably increase costs for some project sponsors of developments that are located in coastal and other flood prone areas where the project requires preparation of an environmental impact statement. The additional costs would be to assess, avoid or mitigate the impacts that may come about from sea level rise or flooding — which as recent storm events show would be a cost-saver in the life cycle of the project and to governmental responders should a major storm event impact the project.

Based on public comment, the Department has made other non-substantive changes to the proposal that add minimal cost. These are as follows:

In section 617.6, the Department removed the provision that provided for submission of draft EISs in lieu of EAFs. This was in response to a comment stating that the provision is an anachronism with the requirement for mandatory scoping. Inasmuch as scoping determines the contents of a draft EIS, an applicant would be putting the proverbial cart before the horse by submitting a draft EIS before scoping. Project sponsors are still free submit a draft EIS but cannot do so in lieu of an EAF. Consequently, project sponsors will elect not to submit a DEIS ahead of the EAF and scoping, which will provide a cost savings for the regulated community. In a few instances, the project sponsors have submitted DEISs to the Department and then have had to resubmit another version following scoping.

In section 617.9, the Department has modified the requirement that post scoping, raised issues, that are properly raised (with the required justifications for late submission), be evaluated in the draft EIS or, if not, that the comments are appended to the draft EIS. This change replaces a provision that allows applicants to address such late raised comments as responses in the FEIS if they are not addressed in the draft EIS. The change in requirement does not add costs because it merely adjusts when the late submission must be identified to the reviewing public. Under the existing regulations the comments would have to be addressed in the DEIS or as response to comment in the FEIS. Now the comments will have to be added to an appendix, provided they meet the test for relevancy and importance, and were not already addressed in the DEIS. Comments, under the new or existing rule, must be responded to in the FEIS.

Other changes include the requirement for publication in the Environmental Notice Bulletin (a free internet publication) of notice of the availability of the draft and final scopes for an EIS (6 NYCRR § 617.12). This is to ensure public notification of the draft and final scopes for an EIS. This requirement only entails completing a form and e-mailing it to the Environmental Notice Bulletin for publication. Also, in section 617.12, at the suggestion of the New York State Bar Association, Environmental Law Section, the Department has eliminated the qualifier “to the extent practicable” from the requirement for website posting of EISs. The Bar Association commented that it is always practical to post public EISs on the web, whereas that may not have been the case when the ECL was amended to provide for website posting of EISs in 2005.

##### b. To State and local governments:

State and local agencies may decrease their costs (as would project sponsors) where the action involves one of the proposed Type II actions (actions not subject to review under SEQR). State and local governments may incur additional costs on account of mandatory scoping. This cost is difficult to measure, however, because scoping can decrease costs later in the process by insuring that environmental issues are articulated at an early stage in project review. The concept of scoping is not new as it was first introduced into the SEQR regulations in 1987 and then detailed in the 1995 amendments to the SEQR regulations (effective January 1, 1996). Some manner of scoping currently occurs for all draft EISs. The regulation now specifies how scoping should be done when the scoping option is chosen. Agency staff time spent participating in scoping should be more than offset by a reduction in staff time currently spent determining adequacy of a submitted draft EIS and requesting more information from applicants. Scoping also makes the process more predictable for applicants. Agencies have the authority to assess a fee for preparation or review of a draft or final EIS. This fee includes the cost of scoping. The Department, therefore, believes that, as a whole, state and local governments will see a reduction in costs associated with implementation of SEQR due to the reduction in the number of projects that will be subject to SEQR and the changes that encourage timely and more efficient reviews of actions.

Costs to the Department mainly involve staff time and resources to promulgate these regulations and then to conduct training on them. The Department already conducts scoping on most EISs where it is lead agency. As with most regulatory amendments there will be some cost in retraining people in the SEQR process as a result of this rulemaking. The cost here is short term and minimal. The Department has maintained a training and assistance program for those interested in receiving training and those who have specific questions relating to implementation of the law. The Department also cooperates with the Department of State and statewide organizations such as the Association of Towns, the Conference

of Mayors and the New York Planning Federation in the conduct of training. This amendment would require that some additional staff time be devoted to training but it would be a relatively small change from currently existing efforts.

The second and third group of changes may be applicable to local governments where they serve as project sponsor.

#### 5. Local Government Mandates

There are no additional programs, services, duties or responsibilities imposed by the rule upon any county, city, town, village, school district, fire district or other special district except to require mandatory scoping of all environmental impact statements (where it is now optional). Statistically, there are very few environmental impact statements compared to actions that receive a negative declaration. The proposed regulations otherwise reduce mandates by adding to the number of Type II actions (which are not subject to further review under SEQR). The expansion of the Type II list for lot line adjustments and the creation of a category of Type II action for reuse of commercial, residential or mixed use buildings may reduce the regulatory workload of zoning or planning boards. A lot line adjustments would only be subject to SEQR if a project required other approvals or permits that were subject to SEQR (e.g., site plan review, legislative zoning changes, use variances and special use permits). A reuse of an existing commercial or residential or mixed commercial and residential building would only be subject to SEQR if it was accompanied by some other activity that was subject to SEQR. The requirement to look at sea level rise and flooding in a proper case is, at best, a minor mandate compared to the consequences of not doing so.

#### 6. Paperwork

With the addition of items to the list of Type II actions there will be a reduction in the need for applicants and lead agencies to complete environmental review forms. (It should be noted, however, that in 2013 the forms became electronic with links to GIS and are now quicker and easier to complete than before). The amendments may, however, result in lead agencies having to prepare more scoping documents because scoping would be mandatory under the proposed new rules. Nonetheless, scoping is only applicable where an environmental impact statement is required and only in a small percentage of actions is an environmental impact statement required. Scoping is, however, a long term time saver in that it allows for early identification of issues. There are no new or additional recordkeeping requirements of a regulated party. An additional requirement is imposed for internet posting of draft scopes. Additional paperwork includes publication of notices of draft and final scope and in rare cases the addition of appendix to the draft EIS containing late submitted scoping comments. The Department views these additional requirements as minimal.

#### 7. Duplication

There is no duplication of other state or federal requirements. With some of the Type II additions, the regulations are intended to reduce duplication of SEQR review requirements with those carried out under State land use enabling laws (e.g., the sustainable development Type II actions in section 617.5(c)).

#### 8. Alternatives

A list and discussion of the regulatory alternatives is contained in the draft final GEIS.

#### 9. Federal Standards

There are no applicable Federal standards inasmuch as SEQR is not a Federal delegated program.

#### 10. Compliance Schedule

The time necessary to comply with these regulatory amendments is not substantial. Some training time may be necessary for those unfamiliar with SEQR but for those familiar with the current regulations the amendments should be easily understood and implemented. Any particular questions will be answered by the Department in its assistance role to state and local agencies and to the regulated public. The Department does anticipate conducting general training on these amendments for those who may want to participate, which would include in person and the preparation of web-based training materials. Compliance is technically required on the effective date of the regulation. The Department proposes that the amendments should take effect six months or more from the date their adoption is noticed in the New York State Register. This delay in implementation would allow for explanatory materials to be produced and training to occur before the effective date of the new rules. In addition to physical outreach, the Department would utilize its electronic and web-based resources to train other agencies, local governments, and the public on the new regulations.

### **Revised Regulatory Flexibility Analysis**

#### 1. Effect of Rule

Presently, any proposal, whether made by a business or local government, that involves a discretionary decision by a government agency and that may affect the environment, is subject to an assessment under the State Environmental Quality Review Act (SEQR) — to determine whether

it may have a significant impact on the environment, and, if so, the lead agency must prepare an environmental impact statement. An exception lies where that action or project has been categorically determined not to be subject to environmental review (6 NYCRR 617.5(c)). The rulemaking effects all local governments (as they are required to comply with SEQR when approving or undertaking an action), and many small businesses, to the extent they may seek approvals or governmental funding for actions that may affect the environment. The actual effect on small businesses and local governments is very contextual depending on the action that is under consideration. Therefore, the proposed rules potentially affect all local governments and some small businesses but mostly in a way that is beneficial to them.

#### 2. Compliance Requirements

The Department expects that the proposed rules, overall or state-wide, to reduce the cost of complying with SEQR because of the addition of a number of Type II actions (actions that do not require the preparation of an environmental impact statement) and proposed changes to the environmental impact statement process that would streamline the regulatory decision-making process that is subject to SEQR. While a small number of large scale residential development projects may change classifications (due to changes proposed to the Type I list of actions contained in 6 NYCRR 617.4), from Unlisted to Type I, that change is procedural. Applicants for large scale subdivisions elevated to the Type I list would be required to complete the full EAF instead of the short EAF and the review of such residential units would require coordinated review. Type I actions are also deemed more likely to require the preparation of an EIS. However, only about 200 EISs are prepared on a yearly basis as compared to the tens of thousands of actions that are presumably the subject of a negative declaration. The imposition of mandatory scoping for EISs will mean more early work in the EIS process but statewide relatively few EISs are prepared. Finally, a provision has been added to the list of topics that an EIS may cover to insure consideration is given to climate change and the vulnerability of development projects to flooding and sea level rise on account of climate change. Particularly in coastal areas, this may require additional analysis by local governments when they serve as lead agencies, and by small businesses when they are project sponsors. It would be speculative to predict the number of times a project sponsor and lead agency must perform these analyses. Substantive assessment of these topics has long-term benefits, as the nation discovered following the spate of hurricanes that devastated coastal areas, e.g., “Superstorm” Sandy, and, in 2017, Puerto Rico, Florida and Houston Texas. Planning for major storm events is common sense.

#### 3. Professional Services

The Department expects that there would be little change, if any, in the professional services that a small business or local government would likely employ to comply with this rule. Currently, the professional services that may be needed to prepare SEQR documents include a wide range of technical expertise. Because of the proposed new Type II actions, there may be a decrease in professional services since those actions would no longer require further compliance with SEQR. However, such an effect is difficult to measure. Though not part of this rule making, the rulemaking to update the EAF forms made environmental analysis more accessible to non-professional who often serve on planning and zoning boards. The present rule making is part and parcel a follow up to the previous rulemaking to update the EAF forms.

#### 4. Compliance Costs

The additions to the list of Type II actions may result in the elimination of time and expense for local governments and small business project sponsors.

The proposed changes would also bring greater efficiency to the environmental impact statement process by mandating scoping, creating greater linkages between the determination of significance and the scope of the EIS. The new requirements serve to encourage lead agencies to build on their prior analyses. The proposed regulations would also tighten the rules on whether the lead agency can reject a draft EIS as inadequate. While relatively few actions subject to SEQR (usually larger scale ones) require the preparation of EISs, the business community may realize some benefit in compliance costs from the proposed new procedures that would bring greater certainty to the EIS process. Compliance costs will otherwise remain the same except as discussed above with respect to whether additional professional services may be needed in some cases to timely complete final environmental impact statements.

#### 5. Economic and Technological Feasibility

There are no economic or technological feasibility issues.

#### 6. Minimizing Adverse Impact

There are no adverse economic or regulatory impacts expected from adoption of these rules.

#### 7. Small Business and Local Government Participation.

In preparing the proposed regulatory changes, the Department held numerous stakeholder meetings (that were co-sponsored by the Empire



State Development Corporation) where individuals representing business and local governments (including Hudson Valley Patterns for Progress, which the Department partnered with prior to this rulemaking in evaluating ways to improve the implementation of SEQR) were asked to identify changes that could be made to the regulations. Overall, these meetings were very well attended and the exchange of ideas and proposals was extensive and exhaustive. The list of individuals is attached as Appendix A to the revised draft environmental impact statement. The Department also issued a draft scope to this draft generic environmental impact statement, which was noticed in the Environmental Notice Bulletin. Through that media, persons from all parts of the state, including businesses and local government officials, were asked to comment on the proposed changes described in the scoping statement. Scenic Hudson and the Environmental Law Section of the New York State Bar Association, in their comments, favorably remarked upon the extent to the Department's outreach to the stakeholder community.

#### **Revised Rural Area Flexibility Analysis**

##### 1. Types and estimated numbers of rural areas

The regulations are statewide and thus the rules would apply to all rural areas.

##### 2. Reporting, recordkeeping and other compliance requirements

There is no change from the existing rules except that a relatively small number of additional larger-scale subdivisions that would not otherwise be classified as Type I actions would now be classified as Type I and be subject to the full environmental assessment form rather than the short form coordinate review. Lead agencies will be required to conduct scoping in instances where an environmental impact statement is required.

##### 3. Costs

The Department does not expect any additional costs to comply with the new rules except as described in the Regulatory Flexibility Analysis for Small Businesses and Local Governments.

##### 4. Minimizing adverse impact

The proposed rules would not have an adverse impact on rural areas since they the Type II changes have the overall effect of decreasing the regulatory burden and the new scoping rules and EIS acceptance practices are expected to make the SEQR process more efficient.

##### 5. Rural area participation

The Department held stakeholder meetings and public hearings and informational sessions throughout the state. A roster of individuals who attended the stakeholder meetings is contained in attachment A to the final generic environmental impact statement accompanying the proposed rules. As indicated by the roster, meetings were held in upstate locations including Albany and Buffalo. The roster of persons attending the round table discussions included few persons located in rural areas of the State or who regularly work with rural communities. The Department also issued a draft scope to this draft generic environmental impact statement, which was noticed in the Environmental Notice Bulletin. Through that media, the Department solicited comments from all parts of the state including rural areas.

#### **Revised Job Impact Statement**

The proposed amendments to the State Environmental Quality Review Act (SEQR) regulations at 6 NYCRR Part 617 should have no impact on existing or future jobs and employment opportunities as these are procedural revisions to existing rules. The proposal to add categories of Type II actions would constitute a reduction in regulatory burden. The Type I changes are minor and will not affect development or employment. The changes to the environmental impact statement (EIS) process can be expected to bring greater efficiency. The remaining changes are minor, and would have no effect on jobs.

A Job Impact Statement is not submitted with this rulemaking proposal because the proposal will not have a "substantial adverse impact on jobs or employment opportunities," which is defined in the State Administrative Procedure Act Section 201-a to mean "a decrease of more than one hundred full-time annual jobs and employment opportunities, including opportunities for self-employment, in the state, or the equivalent in part-time or seasonal employment, which would be otherwise available to the residents of the state in the two-year period commencing on the date the rule takes effect." The proposed changes to Part 617, which again are generally procedural in nature, are not expected to have any such effect and most likely will not affect or impact jobs or employment opportunities.

#### **Initial Review of Rule**

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is no later than the 3rd year after the year in which this rule is being adopted.

#### **Assessment of Public Comment**

The Department received approximately 31 separate public comments on the revised proposal. The Final Generic Environmental Impact Statement (FGEIS) contains excerpts of representative public comments on the revised proposal. The FGEIS is published on the Department's website at

the following address: <http://www.dec.ny.gov/permits/83389.html>. The following is summary of the comments and responses included in the FGEIS:

#### **Regulatory Changes to the Type I List of Actions**

The Department did not make any substantive changes to the Type I list of actions in the revised proposal. While additional comments were received on those changes, they were repetitive of the comments received on the proposal in opposition to the inclusion of properties that the Commissioner of the Parks, Recreation and Historic Preservation has determined to be eligible for listing on the State Register of Historic Places. No changes to the proposal were made in response to the comment.

#### **Regulatory Changes to the Type II List of Actions**

The Department received additional comments on the proposed Type II category for green infrastructure. One comment, for example, said that unless the green infrastructure category was strictly defined impacts could go unmitigated. The Department's definition of green infrastructure addresses the comment because it clearly defines the green infrastructure practices that would be included in the Type II category. The fact that the category only applies to retrofit of an existing structure and its appurtenant areas also defines the applicability of the category.

Some commenters cautioned that the Type II category for telecommunications cables should not apply to other types of utility installations. It does not.

Some comments criticized the proposal to classify 25 acres or less of solar collectors in areas zoned for industrial use and on landfills. See FGEIS, pp. 67-69. The earlier proposal allowed for up to 5 megawatts to be classified as Type II. That proposal was criticized because the number of megawatts that a particular solar development may have does not directly bear on its environmental impacts. The Department agreed with this critique. In the revised proposal, the Department changed 5 megawatts to 25 acres. In response to comments on the revised proposal, the revised proposal was clarified to only apply to currently disturbed areas, which was the intent of the Type II category. One or more commenters criticized the proposal for the fact that the acreage limitation exceeds the existing Type I threshold of 10 acres of physical disturbance. The Department responded by noting that even Type I actions can receive a negative declaration and that has been the case statewide for solar proposals that exceeded 10 acres of physical disturbance. Moreover, the Type I threshold of ten acres is a general threshold, while the revision is for a category of specific actions in defined locations that have historically been the subject of negative declarations.

#### **Regulatory Changes to the Acceptance Procedures for DEISs in 6 NYCRR § 617.9**

Under the acceptance procedures for draft EISs in section 617.9, the Department had previously included a provision that says that on a resubmitted DEIS acceptance must be based on prior list of inadequacies so lead agencies can not engage in the tactic of moving the goal post to prevent a project sponsor from completing the DEIS. One commenter noted that sometimes there are circumstances that would render the deficiency letter obsolete. To remedy this potential problem, the Department added clarifying language to the provision to provide that if there are new circumstances or project changes, the lead agency can take stock of them in determining adequacy (referring to the existing provision in section 617.9 that would trigger a supplemental environmental impact statement).

The Department has included a provision in the proposal and revised proposal in section 617.10 (generic EISs) that no further SEQR compliance was required if the action was not undertaken; however, this is already provided for in the SEQR regulations under section 617.9. Hence, the section 617.10 proposal would just duplicate a provision that already exists in section 617.9. Consequently, the proposed change to section 617.10 was removed to avoid potential confusion with regard to its meaning.

In section 617.9 relating to the content of EISs, the Department had modified the provision on use and conservation of energy (that has existed since the beginning of SEQR) by adding the words "including the use of renewable energy." Here again, the existing provision already encompasses the larger subject of energy and the particular language is duplicative of the authority that already exists. Accordingly, the Department removed the phrase "including the use of renewable energy" to avoid potential confusion with regard to its meaning.

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## Department of Motor Vehicles

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### NOTICE OF EXPIRATION

The following notice has expired and cannot be reconsidered unless the Department of Motor Vehicles publishes a new notice of emergency proposed rule making in the *NYS Register*.

**Insurance requirements for TNC vehicles**

I.D. No.	Proposed	Expiration Date
MTV-26-17-00003-EP	June 28, 2017	June 28, 2018

**Public Service Commission**

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

**Participation in Targeted Accessibility Fund**

**I.D. No.** PSC-29-18-00008-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 a petition filed by Virgin Mobile USA L.P. seeking approval to participate in the New York State Telephone Lifeline Program (Lifeline) and receive distributions from the Targeted Accessibility Fund (TAF) Administrator.

**Statutory authority:** Public Service Law, section 92-h

**Subject:** Participation in Targeted Accessibility Fund.

**Purpose:** To encourage enhanced services for low-income consumers.

**Substance of proposed rule:** The Public Service Commission is considering a petition, filed on March 23, 2018, by Virgin Mobile USA L.P. seeking approval to participate in the New York State Telephone Lifeline Program and receive distributions from the Targeted Accessibility Fund (TAF) Administrator. Virgin Mobile specifically requests that the Commission (1) authorize Virgin Mobile to provide wireless Lifeline service pursuant to New York State’s Telephone Lifeline program and (2) authorize Virgin Mobile to receive distributions from the TAF in the amount of \$11.05 per household per month in order to fund Virgin Mobile’s enhanced service offering. The full text of the petition and the full record of the proceeding may be reviewed online at the Department of Public Service web page: [www.dps.ny.gov](http://www.dps.ny.gov). The Commission may adopt, reject or modify, in whole or in part, the action proposed and 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:** John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: [john.pitucci@dps.ny.gov](mailto:john.pitucci@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

**Public comment will be received until:** 60 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.

(18-C-0335SP1)

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

**Overvaluing Real Property Tax Expense Recovery in Water Rates**

**I.D. No.** PSC-29-18-00009-P

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

**Proposed Action:** The Commission is considering requiring New York American Water, Inc. (NYAW) to hire an independent monitor, and whether certain costs associated with NYAW’s failures should be paid for by shareholders rather than ratepayers.

**Statutory authority:** Public Service Law, sections 89-b and 89-c

**Subject:** Overvaluing real property tax expense recovery in water rates.

**Purpose:** To prevent unjust and unreasonable water rates.

**Substance of proposed rule:** The Commission is considering requiring

New York American Water, Inc. (NYAW) to hire an independent monitor, and whether certain costs associated with NYAW’s failures should be paid for by shareholders rather than ratepayers. This is in response to the Department of Public Service (DPS) report which determined that NYAW purposely concealed property tax valuation problems, which resulted in excessive rates. On June 29, 2018, DPS Staff filed a report of its investigation into the causes of the overvaluation of NYAW property, and NYAW’s failure to promptly inform the Commission of the problem. The report found that NYAW personnel failed to accept the findings of the Office of Real Property Tax Services (ORPTS) that the Company had misreported the age of the assets for several of its water systems, which resulted in inflated values for taxing purposes. When the problem was finally acknowledged by NYAW, and they began to work with ORPTS to correct the findings, the Company still failed to inform the Commission, even going so far as to provide incomplete and misleading responses to DPS information requests during the Company’s recent rate proceeding. It was only after current rates had been set that the Company informed the Commission of the error. Since reporting the error, NYAW has taken steps to reverse the rate effects of incorrect property tax valuations and refund ratepayers for the overvaluations. DPS Staff recommended, because of NYAW’s knowing concealment, the Commission should consider actions beyond making ratepayers whole, including requiring NYAW to hire an independent monitor and reviewing costs associated with NYAW’s failures in this matter. The full text of the report and the full record of the proceeding may be reviewed online at the Department of Public Service web page: [www.dps.ny.gov](http://www.dps.ny.gov). The Commission may adopt, reject or modify, in whole or in part, the action proposed and 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:** John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: [john.pitucci@dps.ny.gov](mailto:john.pitucci@dps.ny.gov)

**Data, views or arguments may be submitted to:** Kathleen H. Burgess, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: [secretary@dps.ny.gov](mailto:secretary@dps.ny.gov)

**Public comment will be received until:** 60 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.

(16-W-0259SP4)