

# RULE MAKING ACTIVITIES

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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; or 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 Agriculture and Markets

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

#### Various Trees and Plants of the Prunus Species

I.D. No. AAM-26-08-00016-P

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

**Proposed action:** Addition of Part 140 to Title 1 NYCRR.

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

**Subject:** Various trees and plants of the Prunus species.

**Purpose:** To establish a plum pox virus quarantine in New York State for purposes of helping prevent the further spread of this virus.

**Public hearing(s) will be held at:** 11:00 a.m., August 28, 2008 at 10B Airline Dr., Albany, NY.

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

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

**Text of proposed rule:** PART 140.

#### CONTROL OF THE PLUM POX VIRUS (POTYVIRUS DIDERON STRAIN)

##### Section 140.1 Definitions.

For the purpose of this Part, the following words, names and terms shall be construed, respectively, to mean:

(a) Certificate means a certificate issued or authorized to be issued by the Commissioner, certifying the eligibility of products for intrastate movement under the requirements of this Part.

(b) Commissioner means the Commissioner of Agriculture and Markets of the State of New York and any officer or employee of the New York State Department of Agriculture and Markets or the United States Department of Agriculture duly delegated pursuant to section 17 of the Agriculture and Markets Law.

(c) Compliance agreement means an agreement approved by the Commissioner and executed by persons or firms, covering the restricted movement, processing, handling or utilization of regulated articles not eligible for certification for intrastate movement.

(d) Infection means the presence of plum pox virus.

(e) Inspector means an inspector of the New York State Department of Agriculture and Markets, or representatives of the United States Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS), when authorized to act in that capacity.

(f) Limited permit means a permit issued by the Commissioner for the planting of regulated articles in the nursery stock regulated area for the restricted movement of regulated articles from a regulated area to a specified destination for specified processing, handling or utilization.

(g) Moved and movement means shipped, offered for shipment to a common carrier received for transportation or transported by a common carrier, or carried, transported, moved or allowed to be moved from the regulated area.

(h) Nursery dealer means any person, firm, partnership, association or corporation which or who is not a nursery grower or an original producer of nursery stock in the State and which or who buys, or acquires, or receives on consignment nursery stock for the purpose of reselling, transporting, or otherwise disposing of same.

(i) Nursery grower means the owner or operator of the grounds or premises, private or public, on or which nursery stock is propagated, grown or cultivated for the purpose of distribution or selling the same as a business. The term nursery grower shall not include persons engaged in the part-time production of plant products not sold in the regular channels of business.

(j) Nursery stock means all trees, shrubs, plants and vines and parts thereof.

(k) Nursery stock regulated area means any area so designated by this Part, which is within 11.5 kilometers of any location where plum pox virus has been detected within the preceding three years.

(l) Plum pox virus means the plum pox potyvirus Dideron strain, which is a pathogen affecting susceptible Prunus species.

(m) Quarantined area means the area designated as quarantined by this Part.

(n) Regulated area means an area designated as regulated pursuant to this Part due to the presence of plum pox virus in that area.

(o) Regulated articles means plant and plant materials, including trees, seedlings, root stock, budwood, branches, twigs and leaves of the following varieties of the Prunus species:

(1) Fruit-bearing and ornamental varieties of *Prunus americana* (American plum and wild plum); *Prunus armeniaca* (apricot); *Prunus cerasifera* (Myrobalan plum/cherry plum); *Prunus domestica* (European

plum); *Prunus dulcis* (sweet almond); *Prunus peresica* var. *persica* (peach and flowering peach); *Prunus persica* var. *nucipersica* (nectarine); and *Prunus salicina* (Japanese plum).

(2) Ornamental varieties of *Prunus cerasifera* (purple leaf plum); *Prunus x cistena* (purple leaf sand cherry); *Prunus glandulosa* (flowering almond); *Prunus persica* (flowering peach and purple leaf peach); *Prunus pumila* (sand cherry); *Prunus spinosa* (black thorn and sloe); *Prunus serrulata* (Japanese flowering cherry and Kwanzan cherry); *Prunus tomentosa* (Nanking cherry and Hansen's bush cherry); and *Prunus triloba* (flowering plum).

(3) For the purposes of this Part, the following varieties of the *Prunus* species are not regulated articles: *Prunus avium*; *Prunus cerasus*; *Prunus Effuse*; *Prunus laurocerasus*; *Prunus mahaleb*; *Prunus padus*; *Prunus sargentii*; *Prunus serotina*; *Prunus serrula*; *Prunus serrulata*; *Prunus subhirtella*; *Prunus yedoensis*; and *Prunus virginiana*.

(4) For the purposes of this Part, seeds and fruit that is free of leaves of all varieties of the *Prunus* species are not regulated articles.

(o) State means the State of New York.

#### Section 140.2 Quarantined area.

(a) That area of Niagara County which is bordered on the north by Lake Ontario and bordered on the east by Hartland Road, which extends south to its intersection with Ditch Road; extends west on Ditch Road to its intersection with Hosmer Road; extends south on Hosmer Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Orangeport Road; and extends south on Orangeport Road to its intersection with Slayton-Settlement Road; extends west on Slayton-Settlement Road to its intersection with Route 78 (Lockport-Olcott Road); extends south on Route 78 (Lockport-Olcott Road) to its intersection with Stone Road; extends northwest on Stone Road to its intersection with Sunset Drive; extends south on Sunset Drive to its intersection with Shunpike Road; extends west on Shunpike to its intersection with Route 93 (Townline Road); extends south on Route 93 (Townline Road) to its intersection with Route 270 (Campbell Boulevard); extends south on Route 270 (Campbell Boulevard) to its intersection with Beach Ridge Road; extends southwest on Beach Ridge Road to its intersection with Townline Road; extends south on Townline Road to its intersection with the Tonawanda Creek; following the Tonawanda Creek west to its entry into the Niagara River; following the Niagara River north to its entry into Lake Ontario.

(b) That area of Orleans County which is bordered on the north by Lake Ontario and bordered on the west by County Line Road; extends south on County Line Road to its intersection with Johnson Road; extends east on Johnson Road to its intersection with Salt Works Road; extends south on Salt Works Road to its intersection with the Orleans/Genesee County border; extends east along the Orleans/Genesee County border to its intersection with Route 98 (Quaker Hill Road); extends north on Route 98 (Quaker Hill Road) to its intersection with East Barre Road; extends east on East Barre Road to its intersection with Culver Road; extends north on Culver Road to its intersection with East Lee Road; extends east on East Lee Road to its intersection with Rich's Corners Road; extends north on Rich's Corners Road to its intersection with Route 31 (Telegraph Road) and Keitel Road; extends north on Keitel Road to its intersection with Zig Zag Road; extends north on Zig Zag Road to its intersection with Lattin Road; extends north on Lattin Road to its intersection with Route 104 (Ridge Road West); extends west on Route 104 (Ridge Road West) to its intersection with Sawyer Road; extends north on Sawyer Road to its intersection with Roosevelt Highway; extends west on Roosevelt Highway to its intersection with Oak Orchard Road; extends north on Oak Orchard Road to its intersection with Point Breeze Road; extends north on Point Breeze Road to its intersection with Lake Ontario.

#### Section 140.3 Regulated area.

The following areas within the quarantined area are regulated areas:

(a) That area bordered on the east by Porter Center Road; bordered on the south by Balmer Road which terminates on Creek Road; bordered on the west by Creek Road, Blairville Road and the Robert Moses Parkway; and bordered on the north by Lake Ontario in the Town of Porter in the County of Niagara, State of New York.

(b) That area bordered on the north by Lake Ontario; bordered on the west by Maple Road; extends south on Maple Road to its intersection with Wilson-Burt Road; extends east on Wilson-Burt Road to its intersection with Beebe Road; extends south on Beebe Road to its intersection with Ide Road; extends east on Ide Road to its intersection with Route 78 (Lockport-Olcott Road); extends north on Route 78 (Lockport-Olcott Road) to its intersection with Lake Ontario, in the Towns of Burt, Newfane, and Wilson in the County of Niagara, State of New York.

(c) That area bordered on the east by Porter Center Road starting at its intersection with Route 104 (Ridge Road) and extending north-northeast on Porter Center Road to its intersection with Langdon Road; extends east on Langdon Road to its intersection with Dickersonville Road; extends north on Dickersonville Road to its intersection with Schoolhouse Road; extends east on Schoolhouse Road to its intersection with Ransomville Road; extends south on Ransomville Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Simmons Road; extends south on Simmons Road to its intersection with Albright Road; extends east on Albright Road to its intersection with Townline Road; extends south on Townline Road to its intersection with Lower Mountain Road; extends west on Lower Mountain Road to its intersection with Meyers Hill Road; extends south on Meyers Hill Road to its intersection with Upper Mountain Road; extends west on Upper Mountain Road to its intersection with Indian Hill Road; extends northeast on Indian Hill Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Porter Center Road, in the Town of Lewiston, in the County of Niagara, State of New York.

(d) That area bordered on the south by the Erie Canal at its intersection with Culvert Road extending north on Culvert Road to its intersection with Route 104 (Ridge Road); extends east on Route 104 (Ridge Road) to its intersection with Kenyonville Road; extends south on Kenyonville Road to its intersection with Eagle Harbor- Knowlesville Road; extends east on Eagle Harbor- Knowlesville Road to its intersection with the Erie Canal; following west along the Erie Canal to its intersection with Culvert Road, in the Town of Ridgeway, in the County of Orleans, State of New York.

#### Section 140.4 Nursery stock regulated area.

The nursery stock regulated area shall consist of the quarantined area set forth in section 140.2 of this Part, exclusive of the regulated areas set forth in section 140.3 of this Part.

Section 140.5 Conditions governing the propagation of regulated articles.

Regulated articles originating from or growing within the regulated area or the nursery stock regulated area shall not be used as a source of propagated material (either root stock, scion or seed).

Section 140.6 Conditions governing the intrastate movement of regulated articles.

(a) Prohibited movement.

(1) The movement of any regulated article within the regulated area is prohibited.

(2) The intrastate movement of any regulated article from the regulated area to any point outside the regulated area is prohibited, except pursuant to a limited permit, authorizing such movement.

(3) The intrastate movement of any regulated article from any point outside the regulated area to the regulated area is prohibited, except pursuant to a limited permit, authorizing such movement.

(4) The intrastate movement of any article infected with or suspected of having been exposed to the plum pox virus is prohibited, except as provided in Section 140.12 of this Part.

(5) The handling of regulated articles by nursery dealers or nursery growers within the nursery stock regulated area is prohibited, except pursuant to a compliance agreement.

(6) The digging or moving of regulated articles by nursery dealers and nursery growers within the nursery stock regulated area is prohibited.

(7) The planting and over-wintering of regulated articles by nursery dealers and nursery growers within the nursery stock regulated area is prohibited.

(b) Regulated movement.

Regulated articles may be moved through the regulated area if the regulated articles originated outside the regulated area and:

(1) the point of origin of the regulated articles is on the waybill or bill of lading; and

(2) a certificate accompanies the regulated articles; and

(3) the vehicle moving the regulated articles does not stop within the regulated area except for refueling; and

(4) the vehicle moving the regulated articles during the period April 1 through November 30 is either an enclosed vehicle or a vehicle completely covered by canvas, plastic or closely woven cloth to prevent access by aphids or other vectors of plum pox virus.

#### Section 140.7 Records.

Nursery dealers and nursery growers handling regulated articles within the nursery stock regulated area shall compile, maintain and make available for inspection, for a period of two years, records of inventory

and sales of regulated articles on a form or forms prescribed by the Commissioner.

Section 140.8 Conditions governing the issuance of certificates and permits.

(a) Certificates may be issued for the intrastate movement of regulated articles under one or more of the following conditions:

(1) when they have been tested and found apparently free from infection; or

(2) when they have been grown, produced, manufactured, stored, or handled in such a manner that, in the judgment of the inspector, no infection would be transmitted thereby, provided, that subsequent to certification, the regulated articles will be loaded, handled, and shipped under such protection and safeguards against reinfection as are required by the inspector.

(b) Limited permits may be issued for the movement of noncertified regulated articles to specified destinations for specified processing, handling, or utilization. Persons shipping, transporting, or receiving such articles may be required to enter into compliance agreements to maintain such sanitation safeguards against the establishment and spread of infection and to comply with such conditions as to the maintenance of identity, handling, processing, or subsequent movement of regulated products and the cleaning of cars, trucks and other vehicles used in the transportation of such articles, as may be required by the inspector. Failure to comply with conditions of the agreement will result in cancellation of a limited permit.

(c) Certificates or limited permits issued under these regulations may be withdrawn or canceled by the Commissioner and further certification refused whenever in his or her judgment the further use of such certificates or limited permits may result in the spread of the plum pox virus.

Section 140.9 Inspection and disposition of shipments.

Any car or other conveyance, any package or other container, and any article or thing to be moved, which is moving, or which has been moved intrastate from the regulated area, which contains, or which the inspector has probable cause to believe may contain, regulated articles or other articles infected with the plum pox virus, may be examined by an inspector at any time or place. When regulated articles are found to be moving or to have been moved intrastate in violation of these regulations, the inspector may take such action as he or she deems necessary to eliminate the danger of the spread of the plum pox virus. If found to be infected, such articles or regulated articles shall be freed of infection without cost to the State except that for inspection and supervision.

Section 140.10 Assembly of regulated articles for inspection.

(a) Persons intending to move intrastate any of the articles covered by these regulations shall make application for certification as far in advance as possible, and will be required to prepare and assemble articles at such points and in such manner as the inspector shall designate, so that thorough inspection may be made or approved treatments verified. Articles to be inspected as a basis for certification must be free from matter which makes inspection impracticable.

(b) The New York State Department of Agriculture and Markets or the United States Department of Agriculture Animal and Plant Health Inspection Service (USDA APHIS) shall not be responsible for any cost incident to inspection, treatment, or certification other than the services of the inspector.

Section 140.11 Marking requirements.

Every container of regulated articles intended for intrastate movement shall be plainly marked with the name and address of the consignor and the name and address of the consignee, when offered for shipment, and shall have securely attached to the outside thereof a valid certificate or limited permit, issued in compliance with these regulations: provided, that:

(a) for lot freight shipments, other than by road vehicle, one certificate may be attached to one of the containers and another to the waybill; and for car lot freight or express shipment, either in containers or in bulk, a certificate need be attached to the waybill only and a placard to the outside of the car, showing the number of the certificate accompanying the waybill; and

(b) for movement by road vehicle, the certificate shall accompany the vehicle and be surrendered to consignee upon delivery of shipment.

Section 140.12 Shipments for experimental and scientific purposes.

Regulated articles may be moved intrastate for experimental or scientific purposes, on such conditions and under such safeguards as may be prescribed by the New York State Department of Agriculture and Markets. The container of articles so moved shall bear, securely attached to the outside thereof, an identifying tag issued by the New York State Depart-

ment of Agriculture and Markets showing compliance with such conditions.

**Text of proposed rule and any required statements and analyses may be obtained from:** Robert J. Mungarl, Director, Division of Plant Industry, Department of Agriculture and Markets, 10B Airline Dr., Albany, NY 12235, (518) 457-2087

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

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

**Regulatory Impact Statement**

1. Statutory authority:

Section 18 of the Agriculture and Markets Law provides, in part, that the Commissioner may enact, amend and repeal necessary rules which shall provide generally for the exercise of the powers and performance of the duties of the Department as prescribed in the Agriculture and Markets Law and the laws of the State and for the enforcement of their provisions and the provisions of the rules that have been enacted.

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

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

2. Legislative objectives:

The proposed rule establishing a quarantine accords with the public policy objectives the Legislature sought to advance by enacting the statutory authority in that it will help to prevent the further spread within the State of a serious viral infection of plants, the plum pox virus (Potyvirus).

3. Needs and benefits:

This rule establishes a plum pox virus quarantine in New York State for purposes of helping prevent the further spread of this viral infection of plants within the State.

The plum pox virus, Potyvirus, is a serious viral disease of stone fruit trees that affects many of the Prunus species. This includes species of plum, peach, apricot, almond and nectarine. The plum pox virus does not kill infected plants, but debilitates the productive life of the trees. This affects the quality and quantity of the fruit, which reduces its marketability. Symptoms of the plum pox virus may manifest themselves on the leaves, flowers and fruits of infected plants and include green or yellow veining on leaves; streaking or pigmented ring patterns on the petals of flowers; and ring or spot blemishing on the fruit which may also become misshapen. There is no known treatment or cure for this virus. The virus is spread naturally by several aphid species. These insects serve as vectors for the spread of the plum pox virus by feeding on the sap of infected trees and then feeding on plants which aren't infected with the virus. Plum pox virus may also be spread through the exchange of budwood and its propagation.

The plum pox virus was first reported in Bulgaria in 1915. It subsequently spread through Europe, the Middle East and Africa. Plum pox was first discovered in North America in 1999 when trees in an orchard in Pennsylvania were found to be infected with the virus. In the summer of 2000, the plum pox virus was discovered in Ontario within five miles of its border with New York. This prompted the Department, with the support of the United States Department of Agriculture (USDA), to begin annual plum pox surveys of stone fruit orchards in New York. From 2000 through 2005, more than 89,000 leaf samples were taken, analyzed and found to be negative for the plum pox virus. However, in 2006, the plum pox virus was detected in two locations in Niagara County near the Canadian border. As a result, on July 16, 2007, the Department adopted, on an emergency basis, a rule which immediately established a plum pox quarantine in that portion of Niagara County. The plum pox virus has since been detected in four (4) other locations in Niagara County as well as one location in Orleans County.

This rule establishes the plum pox virus quarantine in Orleans County and contains the necessary extensions of that quarantine in Niagara County. The amendments create two (2) separate and non-contiguous quarantined areas; one quarantined area is in Niagara County, and the other is in Orleans County.

Within the quarantined area in Niagara County, there are three (3) regulated areas and one nursery stock regulated area. The first regulated area extends 1.5 to 2 kilometers from one point where the plum pox virus

was detected in 2006. The second regulated area extends 1.5 to 2 kilometers from the point where the plum pox virus was recently detected this year. The third regulated area extends 1.5 to 2 kilometers from each of the three (3) points where the plum pox virus was recently detected this year as well as from one point where the virus was detected in 2006. The nursery stock regulated area extends 11.5 kilometers from the regulated areas in Niagara County where the plum pox virus was detected.

Within the quarantined area in Orleans County, there is one regulated area and one nursery stock regulated area. The regulated area extends 1.5 to 2 kilometers from the point in Orleans County where the plum pox virus was recently detected. The nursery stock regulated area extends 11.5 kilometers from the regulated area in Orleans County where the plum pox virus was detected.

The amendments prohibit the movement of any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State. Otherwise, only the movement of regulated articles *i.e.*, plants and trees of any *Prunus* species susceptible to plum pox virus, are restricted under the amendments, and the extent of those restrictions depends on whether the regulated articles are in the regulated areas or the nursery stock regulated areas.

In the regulated areas, the amendments prohibit the following: the movement of regulated articles within the regulated areas; the intrastate movement of regulated articles from the regulated areas to any point outside the regulated areas, except pursuant to a limited permit, authorizing such movement; and the intrastate movement of regulated articles from any point outside the regulated areas to the regulated areas, except pursuant to a limited permit, authorizing such movement.

The amendments also regulate the movement of regulated articles through the regulated areas. Under the amendments, regulated articles may be moved through the regulated areas if the regulated articles originate outside the regulated areas and the point of origin of the regulated articles is on the waybill or bill of lading; a certificate accompanies the regulated articles; the vehicle moving the regulated articles does not stop except for refueling; and the vehicle moving the regulated articles during the period April 1 through November 30 is either an enclosed vehicle or is completely covered by canvas, plastic or closely woven cloth.

In the nursery stock regulated areas, the amendments prohibit the following: the handling of regulated articles by nursery dealers or nursery growers, except pursuant to a compliance agreement; the digging or moving of regulated articles by nursery dealers and nursery growers; and the planting and over-wintering of regulated articles by nursery dealers and nursery growers.

Under the amendments, certificates may be issued when the regulated articles have been inspected and found to be free of infection or have been grown, produced, stored or handled in such a manner that, in the judgment of the inspector, no infection is present in the articles. Limited permits may be issued for the movement of noncertified articles to specified destinations for specified purposes. The amendments provide that persons shipping, transporting, or receiving such articles may be required to enter into written compliance agreements. These agreements would allow the shipment of articles without a state or federal inspection. They are entered into by the Department with persons who are determined to be capable of complying with the requirements necessary to insure that the plum pox virus is not spread. Under the amendments, certificates and limited permits may be withdrawn or canceled whenever an inspector determines that further use of such certificate or permit might result in the spread of infection.

The amendments are necessary, since although the virus has only been found in seven locations in Niagara County and Orleans County, the failure to immediately establish this quarantine could result in the unfettered spread of this plant virus throughout New York and into neighboring states. This would not only result in damage to the natural resources of New York, but could also result in the imposition on New York of a federal quarantine or quarantines by other states. Such quarantines would cause economic hardship for New York's nurseries and stone fruit growers, since such quarantines may be broader than this one. The consequent loss of business would harm industries which are important to New York's economy and as such, would harm the general welfare.

#### 4. Costs:

##### (a) Costs to the State government:

Regulated articles in the regulated area that are exposed to plum pox virus would be destroyed. Compensation for the regulated articles is predicted upon the age of the plants and trees. Compensation would range from \$4,368 to \$17,647 per acre, of which the USDA would pay 85% of the compensation. Accordingly, New York's 15% share of the compensation

would be \$655 to \$2,647 per acre, provided the owners of the regulated articles in question submit verified claims to the Department in accordance with section 165 of the Agriculture and Markets Law, and provided further that damages are awarded based on those claims.

Nursery dealers and nursery growers would also be eligible to receive compensation for regulated articles planted in the regulated areas and nursery stock regulated area that would otherwise be prohibited from sale. New York would pay up to \$1,000 per acre in costs to remove such regulated articles.

##### (b) Costs to local government: none

##### (c) Costs to private regulated parties:

Regulated parties handling regulated articles in the nursery stock regulated area, pursuant to a compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the regulated areas and nursery stock regulated areas.

##### (d) Costs to the regulatory agency:

It is anticipated that regulatory oversight and enforcement of the quarantine would require the hiring of two inspectors at an annual cost to the Department of \$150,900. This cost includes salary, fringe benefits, travel costs, computer hardware and support and cell phones for the persons hired.

##### 5. Local government mandate:

None.

##### 6. Paperwork:

Nursery dealers and nursery growers handling regulated articles in the nursery stock regulated area would require a compliance agreement with the Department. They may also require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement of these regulated articles.

##### 7. Duplication:

None.

##### 8. Alternatives:

None. The failure of the State to establish a quarantine could result in the establishment of quarantines by the federal government or other states. It could also place the State's own natural resources at risk from the further spread of plum pox virus which could result from the unrestricted movement of regulated articles in the regulated area. In light of these factors, there does not appear to be any viable alternative to the establishment of the quarantine proposed in this rulemaking.

##### 9. Federal standards:

Sections 301.74 through 301.74-5 of Title 7 of the Code of Federal Regulations (CFR) restricts the interstate movement of regulated articles susceptible to the plum pox virus. This rule does not exceed any minimum standards for the same or similar subject areas, since it restricts the intrastate, rather than interstate, movement of regulated articles by establishing a plum pox virus quarantine in New York State.

##### 10. Compliance schedule:

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

#### **Regulatory Flexibility Analysis**

##### 1. Effect on small business:

The rule establishes a plum pox virus quarantine in New York State. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are 22 stone fruit growers and 38 nursery growers or nursery dealers in the nursery stock regulated area, and 11 stone fruit growers in the regulated areas. Most of these entities are small businesses.

Although it is not anticipated that local governments would be involved in the handling or movement of regulated articles within the quarantined area, in the event that they do, they would be subject to the same requirements and restrictions as are other regulated parties.

##### 2. Compliance requirements:

All regulated parties in the nursery stock regulated area, which includes approximately 22 stone fruit growers and 38 nursery growers or nursery dealers, would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in the nursery stock regulated area would be required to enter into a compliance agreement.

The amendments would prohibit regulated parties in the nursery stock regulated area from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties would be required to maintain sales records of regulated articles for a period of three years.

All regulated parties in the regulated areas, which includes approximately 11 stone fruit growers, would be prohibited from moving regulated articles within the regulated areas. Regulated parties would, however, be able to move regulated articles to and from the regulated areas pursuant to a limited permit.

Under the amendments, all regulated parties would be prohibited from moving any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State.

### 3. Professional services:

In order to comply with the proposed rule, regulated parties handling regulated articles in the nursery stock regulated area, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

### 4. Compliance costs:

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

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

Regulated parties handling regulated articles in the nursery stock regulated area, pursuant to a compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs may be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles planted in the regulated areas.

Local governments moving regulated articles to or through the regulated areas would incur similar costs.

### 5. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses and local governments. The proposal limits the regulated articles to only those varieties of the *Prunus* species which are susceptible to infection by plum pox virus. The proposal also limits the inspection and permit requirements to only those necessary to detect the presence of plum pox virus and to prevent its spread through regulated articles in the regulated area. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the movement of regulated articles without state or federal inspection. These agreements are another way in which the proposed rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1) of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

### 6. Small business and local government participation:

In 1999, a Plum Pox Virus Task Force was established in response to the reported discovery of the virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference.

On October 3, 2006, February 15, 2007 and May 22, 2007, the director of the Department's Division of Plant Industry provided an overview of the plum pox virus and its discovery in New York to the Invasive Species Task Force in Albany; the Empire State Fruit and Vegetable Expo in Syracuse; and the Statewide Survey Committee of the Cooperative Agricultural Pest Survey Program in Albany, respectively.

The Department has provided Cornell Cooperative Extension with information on the plum pox virus for dissemination to stone fruit growers. Inspectors with the Department's Division of Plant Industry have also discussed the needs and benefits of this regulation with stone fruit growers in the regulated and quarantine areas.

On June 26, 2007, Department officials met with approximately 30 stone fruit growers to discuss the plum pox virus outbreak as well as the proposed regulations establishing the quarantine. Most of the growers

recognized the need to proceed with the quarantine, and expressed the desire that New York's response be consistent with that of Pennsylvania, Michigan and the federal government. Several growers also questioned when compensation would be paid following the destruction and removal of infected trees.

Outreach efforts will continue.

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

The economic and technological feasibility of compliance with the proposed rule by small businesses and local governments has been addressed and such compliance has been determined to be feasible. Nursery dealers and nursery growers handling regulated articles within the nursery stock regulated area, other than pursuant to a compliance agreement, would require an inspection and the issuance of a phytosanitary certificate. Most shipments, however, would be made pursuant to compliance agreements for which there is no charge.

### **Rural Area Flexibility Analysis**

#### 1. Type and estimated numbers of rural areas:

The rule establishes a plum pox virus quarantine in New York State. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are 22 stone fruit growers and 38 nursery growers or nursery dealers in the nursery stock regulated area, and 11 stone fruit growers in the regulated areas. Many of these entities are located in rural areas of New York State.

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

All regulated parties in the nursery stock regulated area, which includes approximately 22 stone fruit growers and 38 nursery growers or nursery dealers, would be prohibited from the propagation of regulated articles. Nursery growers and nursery dealers who wish to handle regulated articles in the nursery stock regulated area would be required to enter into a compliance agreement.

The amendments would prohibit regulated parties in the nursery stock regulated area from digging and moving regulated articles and planting or over-wintering regulated articles. In addition, regulated parties would be required to maintain sales records of regulated articles for a period of three years.

In order to comply with the proposed rule, regulated parties handling regulated articles in the nursery stock regulated area, pursuant to a compliance agreement, may require an inspection and issuance of a federal or state phytosanitary certificate for interstate movement.

All regulated parties in the regulated areas, which includes approximately 11 stone fruit growers, would be prohibited from moving regulated articles within the regulated areas. Regulated parties would, however, be able to move regulated articles to and from the regulated areas pursuant to a limited permit.

Under the amendments, all regulated parties would be prohibited from moving any article infected with or suspected of having been exposed to the plum pox virus, regardless of where the articles are located in the State.

### 3. Costs:

Regulated parties handling regulated articles in the nursery stock regulated area pursuant to compliance agreement, may require an inspection and the issuance of a federal or state phytosanitary certificate for interstate movement. This service is available at a rate of \$25.00 per hour. Most inspections would take one hour or less. It is anticipated that there would be 100 such inspections each year with a total annual cost of \$2,500.

Most shipments will be made pursuant to compliance agreements for which the costs will be lower.

Regulated parties would also incur those removal costs which exceed \$1,000 per acre for removal of regulated articles exposed to the plum pox virus.

### 4. Minimizing adverse impact:

The Department has designed the proposed rule to minimize adverse economic impact on small businesses and local governments. The proposal limits the regulated articles to only those varieties of the *Prunus* species which are susceptible to infection by plum pox virus. The proposal also limits the inspection and permit requirements to only those necessary to detect the presence of plum pox virus and to prevent its spread through regulated articles in the regulated area. As set forth in the regulatory impact statement, the rule provides for agreements between the Department and regulated parties that permit the movement of regulated articles without state or federal inspection. These agreements are another way in which the proposed rule was designed to minimize adverse impact. The approaches for minimizing adverse economic impact required by section 202-a(1) of the State Administrative Procedure Act and suggested by section 202-b(1)

of the State Administrative Procedure Act were considered. Given all of the facts and circumstances, it is submitted that the rule minimizes adverse economic impact as much as is currently possible.

**5. Rural area participation:**

In 1999, a Plum Pox Virus Task Force was established in response to the reported discovery of the virus in Pennsylvania. The Task Force presently consists of representatives of the Department, the New York State Agricultural Experiment Station in Geneva; the United States Department of Agriculture, Cornell Cooperative Extension, the New York State Farm Bureau, the Canadian Food Inspection Agency and the stone fruit industry. The Task Force has convened annually via teleconference.

On October 3, 2006, February 15, 2007 and May 22, 2007, the director of the Department's Division of Plant Industry provided an overview of the plum pox virus and its discovery in New York to the Invasive Species Task Force in Albany; the Empire State Fruit and Vegetable Expo in Syracuse; and the Statewide Survey Committee of the Cooperative Agricultural Pest Survey Program in Albany, respectively.

The Department has provided Cornell Cooperative Extension with information on the plum pox virus for dissemination to stone fruit growers. Inspectors with the Department's Division of Plant Industry have also discussed the needs and benefits of this regulation with stone fruit growers in the regulated and quarantine areas.

On June 26, 2007, Department officials met with approximately 30 stone fruit growers to discuss the plum pox virus outbreak as well as the proposed regulations establishing the quarantine. Most of the growers recognized the need to proceed with the quarantine, and expressed the desire that New York's response be consistent with that of Pennsylvania, Michigan and the federal government. Several growers also questioned when compensation would be paid following the destruction and removal of infected trees.

Outreach efforts will continue.

**Job Impact Statement**

The establishment of a plum pox virus quarantine is designed to prevent the further spread of this viral infection throughout New York State as well as into neighboring states and provinces. It is estimated that there are 312 stone fruit growers and 4,049 nursery growers and nursery dealers throughout New York State. Of these, there are 22 stone fruit growers and 38 nursery growers or nursery dealers in the nursery stock regulated area, and 11 stone fruit growers in the regulated areas. A further spread of this plant infection would have very adverse economic consequences to these industries in New York State, both from the destruction of the regulated articles upon which these industries depend, and from the more restrictive quarantines that could be imposed by the federal government and by other states. By helping to prevent the spread of the plum pox virus, the rule would help to prevent such adverse economic consequences and in so doing, protect the jobs and employment opportunities associated with the State's stone fruit and nursery industries.

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## Department of Civil Service

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### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-01-08-00008-A

**Filing No.** 560

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the non-competitive class in the Department of Environmental Conservation.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-01-08-00008-P, Issue of January 2, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00003-A

**Filing No.** 540

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the exempt class in the Department of Law.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00003-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00004-A

**Filing No.** 543

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00004-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00005-A

**Filing No.** 550

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00005-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00006-A

**Filing No.** 554

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Department of Family Assistance.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00006-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00007-A

**Filing No.** 541

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the exempt class in the Department of Law.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00007-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00008-A

**Filing No.** 548

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00008-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00009-A

**Filing No.** 547

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the exempt class in the Department of Mental Hygiene.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00009-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00010-A

**Filing No.** 542

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

**Purpose:** To classify a position in the non-competitive class in the Department of Family Assistance.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00010-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

**Jurisdictional Classification**

**I.D. No.** CVS-05-08-00012-A

**Filing No.** 549

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00012-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-05-08-00013-A

**Filing No.** 553

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

**Purpose:** To delete positions from the non-competitive class in the Department of Economic Development.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00013-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-05-08-00014-A

**Filing No.** 552

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

**Purpose:** To delete positions from the non-competitive class in the Education Department.

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00014-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-05-08-00015-A

**Filing No.** 546

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00015-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-05-08-00016-A

**Filing No.** 551

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00016-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Jurisdictional Classification

**I.D. No.** CVS-05-08-00017-A

**Filing No.** 545

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 2 of Title 4 NYCRR.

**Statutory authority:** Section 6(1) of the Civil Service Law

**Subject:** Jurisdictional classification.

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

**Text was published in the notice of proposed rule making,** I.D. No. CVS-05-08-00017-P, Issue of January 30, 2008.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us

**Assessment of Public Comment**

The agency received no public comment.

### NOTICE OF ADOPTION

#### Supplemental Military Leave Benefits

**I.D. No.** CVS-06-08-00001-A

**Filing No.** 558

**Filing date:** June 9, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of sections 21.15 and 28-1.17 of Title 4 NYCRR.

**Statutory authority:** Civil Service Law, section 6(1)  
**Subject:** Supplemental military leave benefits.  
**Purpose:** To extend the availability of supplemental military leave benefits for certain New York State employees until Dec. 31, 2008  
**Text or summary was published** in the notice of proposed rule making, I.D. No. CVS-06-08-00001-P, Issue of February 6, 2008.  
**Final rule as compared with last published rule:** No changes.  
**Text of rule and any required statements and analyses may be obtained from:** Shirley LaPlante, Department of Civil Service, AESSOB, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment..

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-07-08-00001-A  
**Filing No.** 557  
**Filing date:** June 9, 2008  
**Effective date:** June 25, 2008

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Section 6(1) of the Civil Service Law  
**Subject:** Jurisdictional classification.  
**Purpose:** To delete a position from and classify positions in the exempt class in the Department of Health.  
**Text was published in the notice of proposed rule making,** I.D. No. CVS-07-08-00001-P, Issue of February 13, 2008.  
**Final rule compared with proposed rule:** No changes.  
**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-07-08-00004-A  
**Filing No.** 559  
**Filing date:** June 9, 2008  
**Effective date:** June 25, 2008

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Section 6(1) of the Civil Service Law  
**Subject:** Jurisdictional classification.  
**Purpose:** To delete a position from and classify a position in the exempt class in the Executive Department.  
**Text was published in the notice of proposed rule making,** I.D. No. CVS-07-08-00004-P, Issue of February 13, 2008.  
**Final rule compared with proposed rule:** No changes.  
**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-07-08-00005-A  
**Filing No.** 556  
**Filing date:** June 9, 2008  
**Effective date:** June 25, 2008

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

**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Section 6(1) of the Civil Service Law  
**Subject:** Jurisdictional classification.  
**Purpose:** To delete a position from and classify a position in the exempt class in the Department of Transportation.  
**Text was published in the notice of proposed rule making,** I.D. No. CVS-07-08-00005-P, Issue of February 13, 2008.  
**Final rule compared with proposed rule:** No changes.  
**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-07-08-00006-A  
**Filing No.** 544  
**Filing date:** June 9, 2008  
**Effective date:** June 25, 2008

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 and Appendix 2 of Title 4 NYCRR.  
**Statutory authority:** Section 6(1) of the Civil Service Law  
**Subject:** Jurisdictional classification.  
**Purpose:** To classify positions in the exempt class and delete a position from the non-competitive class in the Executive Department.  
**Text was published in the notice of proposed rule making,** I.D. No. CVS-07-08-00006-P, Issue of February 13, 2008.  
**Final rule compared with proposed rule:** No changes.  
**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF ADOPTION**

**Jurisdictional Classification**

**I.D. No.** CVS-07-08-00010-A  
**Filing No.** 555  
**Filing date:** June 9, 2008  
**Effective date:** June 25, 2008

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:  
**Action taken:** Amendment of the Rules for the Classified Service in Appendix 1 of Title 4 NYCRR.  
**Statutory authority:** Section 6(1) of the Civil Service Law  
**Subject:** Jurisdictional classification.  
**Purpose:** To classify a position in the exempt class in the Department of Taxation and Finance.  
**Text was published in the notice of proposed rule making,** I.D. No. CVS-07-08-00010-P, Issue of February 13, 2008.  
**Final rule compared with proposed rule:** No changes.  
**Text of rule may be obtained from:** Shirley LaPlante, Department of Civil Service, Albany, NY 12239, (518) 473-6598, e-mail: shirley.laplante@cs.state.ny.us  
**Assessment of Public Comment**  
 The agency received no public comment.

**NOTICE OF EXPIRATION**

The following notice has expired and cannot be reconsidered unless the Department of Civil Service publishes a new notice of proposed rule making in the NYS Register.

**Jurisdictional Classification**

<b>I.D. No.</b>	<b>Proposed</b>	<b>Expiration Date</b>
CVS-23-07-00007-P	June 6, 2007	June 5, 2008

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

**Jurisdictional Classification**

**I.D. No.** CVS-26-08-00001-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the exempt class in the Department of Audit and Control.

**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 Special Investment Officer from 29 to 49.

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-26-08-00002-P

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

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

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

**Subject:** Jurisdictional classification.

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

**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 Parks, Recreation and Historic Preservation," by adding thereto the position of Affirmative Action Administrator 2 (1).

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-26-08-00003-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To classify positions in the exempt class in the Department of Law.

**Text of proposed rule:** Amend Appendix 1 of the Rules for the Classified Service, listing positions in the exempt class, in the Department of Law, by increasing the number of positions of Assistant Attorney General from 633 to 651, Investigator from 173 to 175 and Secretary from 31 to 32 and by adding thereto the positions of Confidential Systems Analyst (3) and Special Auditor Investigator (8).

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-26-08-00004-P

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

**Proposed action:** Amendment of Appendix 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 in the Executive Department.

**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 General Services," by adding thereto the position of Assistant Director, New York State Executive Mansion.

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-26-08-00005-P

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

**Proposed action:** Amendment of Appendix 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 in the Executive Department.

**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 for Technology," by increasing the number of positions of Special Assistant from 3 to 4.

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-26-08-00006-P

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

**Proposed action:** Amendment of Appendix 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 in the Department of Transportation.

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

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-26-08-00007-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from the exempt class in the Executive Department.

**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 General Services," by decreasing the number of positions of Assistant Counsel from 3 to 2.

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-26-08-00008-P

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

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

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

**Subject:** Jurisdictional classification.

**Purpose:** To delete a position from and classify positions in the exempt class in the Executive Department.

**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 "Division of Housing and Community Renewal," by deleting therefrom the position of Chief Rent Examiner and by increasing the number of positions of Special Assistant from 6 to 8.

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-26-08-00009-P

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

**Proposed action:** Amendment of 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 in the Department of Transportation.

**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 Transportation, by adding thereto the positions of Affirmative Action Administrator 1 (3).

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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

**Jurisdictional Classification**

**I.D. No.** CVS-26-08-00010-P

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

**Proposed action:** Amendment of 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 in the Executive Department.

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

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

## PROPOSED RULE MAKING NO HEARING(S) SCHEDULED

### Jurisdictional Classification

**I.D. No.** CVS-26-08-00011-P

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

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

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

**Subject:** Jurisdictional classification.

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

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

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

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

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

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

The proposed rule is subject to consolidated statements and analyses printed in the issue of January 30, 2008 under the notice of proposed rule making I.D. No. CVS-05-08-00003-P.

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## State Consumer Protection Board

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### ERRATUM

A Notice of Proposed Rule Making, I.D. No. CPR-16-08-00001-P, pertaining to Do Not Call, published in the April 16, 2008 issue of the *State Register* contained incorrect text for section 4603.2(c). The correct text follows:

(c) Existing customer shall mean [an individual who has entered into an arrangement, agreement, contract, or other such legal state of affairs between the telemarketer and the consumer where the payment or exchange of consideration for any goods or services has taken place within the preceding eighteen (18) months, or has been previously arranged to take place at a future time.] *a prior or existing relationship formed by a voluntary two-way communication between a consumer and a telemarketer with or without an exchange of consideration, on the basis of the consumer's purchase or transaction with the telemarketer within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the consumer's inquiry or application regarding products or services offered by the telemarketer within the three (3) months immediately preceding the date of the call, which relationship has not been previously terminated by either party.*

The Department of State apologizes for any confusion this may have caused.

### NOTICE OF ADOPTION

#### Do Not Call

**I.D. No.** CPR-16-08-00001-A

**Filing No.** 571

**Filing date:** June 11, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of sections 4602.1, 4602.2, 4603.1, 4603.2, 4603.3 and 4603.4 of Title 21 NYCRR.

**Statutory authority:** General Business Law, section 399-z; and L. 2000, ch. 547

**Subject:** Do not call.

**Purpose:** To provide technical changes that clarify and streamline the rules to conform them to Federal and State rules.

**Text of final rule:** Subdivisions (a) and (b) of section 4602.1 are amended to read as follows:

Section 4602.1 Authorization of transfer of telephone numbers to federal registry.

(a) The Consumer Protection Board is authorized to have the national "[D]do- [N]not-[C]call" registry, established, managed and maintained by the Federal Trade Commission pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B)\*, (herein referred to as the national "[D]do-[N]not-[C]call" registry), serve as the New York State "do-not-call" registry.

(b) Consumer telephone numbers listed on the New York State non-telemarketing sales calls statewide registry will be transferred to the Federal Trade Commission for inclusion in its national "[D]do-[N]not-[C]call" registry as established by 16 C.F.R. Section 310.4(b)(1)(iii)(B).

(c) The registry is open to all natural persons who: (1) reside in this state, and (2) have telephone service in this state that receives incoming calls.

\* The text of 16 C.F.R. Part 310, which codifies 15 U.S.C. 6108, the Telemarketing and Consumer Fraud and Abuse Prevention Act, as amended, appears in the "Federal Register", Vol. 68, No. 19, January 29, 2003.

Copies of the Rule are also available for public inspection and photocopying at the New York State Consumer Protection Board, 5 Empire State Plaza, Suite 2101, Albany, NY 12223.

Subdivisions (e) and (f) of section 4602.2 are amended to read as follows:

4602.2 Definitions.

(a) Consumer means any natural person who: (1) resides in this state; and (2) has telephone service in this state that receives incoming calls. The term "customer" shall have the same meaning as the definition of "consumer" defined herein.

(b) Doing business in this state means conducting telephonic sales calls: (1) from any location within New York State; or (2) from a location outside of New York State to consumers residing and having a telephone number in this state.

(c) Goods and services means any goods and services, including any real property or any tangible personal property, and services of any kind. (1) The term "goods" shall be the same as defined under Section 2-105 of the New York Uniform Commercial Code. (2) The term "services" shall be defined as the duty, labor, obligation, act, or commitment to be rendered by one person to another for profit, whereby the telemarketer offers, seeks to

offer, or contracts to offer any performance of labor or other such act for the benefit of the consumer, or at the consumer's direction or authority.

(d) Telemarketer means any person who, for financial profit or commercial purposes in connection with telemarketing, makes a telemarketing sales call to a consumer in this state or any person who directly controls or supervises the conduct of a telemarketer. Telemarketer shall also include any person, firm, or corporation acting as an agent or representative of such telemarketer. For purposes of this paragraph, commercial purposes shall mean the sale or offer for sale of goods and services. Charitable organizations as defined in § 171-a(1) of the Executive Law and registered pursuant to § 172 of the Executive Law, religious corporations as defined in § 2 of the Religious Corporations Law, political parties as defined in § 1-104(3) of the Election Law, and political committees as defined in § 14-100(1) of the Election Law, are deemed not able to conduct any act or activity for "commercial purposes" and are deemed not to be operating for financial profit for purposes of these regulations.

(e) Telemarketing means any plan, program or campaign which is initiated by a telephone call to a consumer or a message left on a telephone answering machine or voice mail system of a consumer, conducted to induce or encourage payment or the exchange of any other consideration for any goods or services by use of one or more telephones and which involves more than one telephone call by a telemarketer in which the [customer] consumer receiving such call or message is located within the state at the time of the call. Telemarketing does not include the solicitation of sales through media other than by telephone calls.

(f) Telemarketing sales call means a telephone call made by a telemarketer to a consumer for the purpose of encouraging the purchase or rental of, or investment in property, goods or services, or inducing payment or the exchange of any other consideration for any goods or services, where the consumer's receiving device is a telephone.

Subdivisions (b), (c), (d), (e) and (f) of section 4603.1 are repealed. Subdivision (a) of section 4603.1 is amended to read as follows:

Section 4603.1 [Enforcement and] [v] *Violations.*

[(a)] No telemarketer or seller may make or cause to be made any unsolicited telemarketing sales call to any consumer more than thirty-one (31) days after: (1) the telephone number appears on the national do-not-call registry, pursuant to 16 C.F.R. Section 310.4(b)(1)(iii)(B). [the then current registry is published or made available by the agency; and (2) the customer's telephone number(s) appears on the then current registry.] Each call to a telephone number shall be deemed a separate occurrence for purposes of the penalty and enforcement provisions of these regulations.

Subdivisions (a), (b) and (c) of section 4603.2 are amended to read as follows:

4603.2 Exceptions.

(a) ["Unsolicited telemarketing sales call"] means any telemarketing sales call other than a call made: (1) in response to an express written or verbal request of the specific customer called; (2) in connection with an established business relationship, which has not been terminated by either party, unless such customer has stated to the telemarketer or the telemarketer's agent that such customer no longer wishes to receive the telemarketing sales calls of such telemarketer; or (3) to an existing customer, unless such customer has stated to the telemarketer or the telemarketer's agent that such customer no longer wishes to receive the telemarketing sales calls of such telemarketer.

(b) Established business relationship shall mean [the existence of an oral or written arrangement, agreement, contract, or other such legal state of affairs between the telemarketer and an existing customer where both parties have a course of conduct or established pattern of activity for commercial or mercantile purposes and for the benefit or profit of both parties. A pattern of activity does not necessarily mean multiple previous contacts. The "established business relationship" must exist between the existing customer and the telemarketer directly, and does not extend to any related business entity or other business organization of the telemarketer or related to the telemarketer or the telemarketer's agent including, but not limited to, a parent corporation, subsidiary partnership, company, or other corporation or affiliate.] *a prior or existing relationship formed by a voluntary two-way communication between a consumer and a telemarketer with or without an exchange of consideration, on the basis of the consumer's purchase or transaction with the telemarketer within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the consumer's inquiry or application regarding products or services offered by the telemarketer within the three (3) months immediately preceding the date of the call, which relationship has not been previously terminated by either party.*

(c) Existing customer shall mean [an individual who has entered into an arrangement, agreement, contract, or other such legal state of affairs between the telemarketer and the consumer where the payment or exchange of consideration for any goods or services has taken place within the preceding eighteen (18) months, or has been previously arranged to take place at a future time.] *a prior or existing relationship formed by a voluntary two-way communication between a consumer and a telemarketer with or without an exchange of consideration, on the basis of the consumer's purchase or transaction with the telemarketer within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the consumer's inquiry or application regarding products or services offered by the telemarketer within the three (3) months immediately preceding the date of the call, which relationship has not been previously terminated by either party.*

(d) Person shall mean any natural person, association, partnership, firm, corporation, and its affiliates or subsidiaries or other business entity. 4603.3 Safe harbor provisions.

A person (which includes an entity, corporation, or other telemarketer) shall not be held liable for violating these regulations if the person can demonstrate, by clear and convincing evidence, that: (1) the person has obtained a [copy of an updated, quarterly 'do-not-call' registry] *version of the national "do-not-call" registry from the Federal Trade Commission no more than thirty-one (31) days prior to the date any telemarketing call is made, pursuant to 16 C.F.R. Section 310.4(6)(i)(iii)(B), and as a part of the person's routine business practice it has established and implemented written policies and procedures related to the requirements of these regulations;* (2) the person has trained [his or her] *all personnel conducting telemarketing sales calls* in the requirements of these regulations; (3) the person maintains records demonstrating compliance with this section and the requirements of these regulations in response to a notice from the board of alleged "do-not-call" violations; and (4) any subsequent unsolicited telemarketing sales call is the result of an error.

Section 4603.4 is repealed. New section 4603.4 reads as follows:

Section 4603.4 *Enforcement.*

(a) *Upon allegation(s) of non-compliance with applicable law, or upon its own initiative, the board may conduct an inquiry as to the sufficiency of any alleged violations. If the board finds any grounds to indicate that a violation(s) may have occurred, the board may, as the public interest demands, send a notice of apparent liability to the alleged violator seeking a response.*

(b) *The board shall mail a copy of the notice of apparent liability to the last known business address of the alleged violator. Mailing of the notice shall be deemed receipt thereof.*

(c) *The alleged violator shall respond to the notice not later than thirty-five (35) days from the date the board mailed such notice.*

(d) *The board will evaluate such response, conduct a review based on the evidence before it, and provide notice of its decision to the alleged violator within sixty (60) days of receipt of the response. Mailing of the decision shall be deemed receipt thereof.*

(e) *If the alleged violator disputes the board decision, such violator may file an administrative appeal with the board by requesting in writing an administrative hearing, within ten (10) days of receipt of the decision. The administrative hearing shall be subject to Article 3 of the State Administrative Procedure Act (SAPA).*

(f) *If the alleged violator does not file an administrative appeal by requesting a hearing in writing within ten (10) days of receipt of such decision, the initial decision of the board is deemed the final board decision and the alleged violator shall remit to the board a fine payable to the "State Consumer Protection Board" as set out in the initial decision of the board, within ten (10) days of receipt the initial decision of the board.*

(g) *If an administrative appeal is properly filed, the board shall stay any fine pending the decision of such appeal.*

(h) *During the hearing proceeding, the board may establish evidentiary rebuttable presumption(s).*

(i) *Any facts or evidence received by the board may be used in any proceeding and shall be afforded appropriate consideration by the presiding officer. All evidence shall be kept in the custody of the presiding officer.*

(j) *Where it is determined after the administrative hearing that the alleged violator has violated one or more provisions of these regulations, the presiding officer may assess a fine not to exceed eleven thousand dollars (\$11,000) for each violation.*

(k) *If the alleged violator requests an administrative appeal pursuant to paragraph (e) of this section and an administrative hearing is held, the administrative hearing decision shall constitute a final board decision.*

Violators shall remit to the board a fine payable to the "State Consumer Protection Board" as set out in the administrative hearing decision within ten (10) days of the receipt of such decision.

(1) If the alleged violator does not respond to the notice of apparent liability within thirty five (35) days of receipt of the notice pursuant to paragraph (c) of this section, said notice of apparent liability shall constitute the final board decision. The alleged violator shall remit to the board a fine payable to the "State Consumer Protection Board" as set out in the notice of apparent liability, within sixty (60) days from the date the board mailed such notice.

**Final rule as compared with last published rule:** Nonsubstantial changes were made in sections 4602.1, 4602.2 and 4603.1-4603.4.

**Text of rule and any required statements and analyses may be obtained from:** Lisa R. Harris, Consumer Protection Board, Five Empire State Plaza, Suite 2101, Albany, NY 12223, (518) 486-4852, e-mail: Lisa.Harris@consumer.state.ny.us

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

No RIS, RFA, RAFA or JIS are attached as no changes have been made to these documents which would require new versions to be submitted.

**Assessment of Public Comment**

The agency received no public comment.

## Education Department

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

#### Requirements for Course Work or Training in the Needs of Students with Autism and Autism Spectrum Disorders

I.D. No. EDU-15-08-00009-RP

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

**Revised action:** Amendment of sections 52.21 and 80-3.7, addition of Subpart 57-3 and section 80-1.12 to Title 8 NYCRR.

**Statutory authority:** Education Law, sections 207 (not subdivided), 208 (not subdivided), 212(3), 215 (not subdivided), 305(1) and (2), 3004(1), (4) and (5) and 3007 (not subdivided)

**Subject:** Requirements for course work or training in the needs of students with autism.

**Purpose:** To require teachers seeking certification in special education to have course work or training in the needs of students with autism and establish standards for Education Department approval of providers of course work or training in autism.

**Text of revised rule:** 1. Subclause (1) of clause (b) of subparagraph (vi) of paragraph (3) of subdivision (b) of section 52.21 of the Regulations of the Commissioner of Education is amended, effective October 9, 2008, as follows:

(1) study in the following:

(i) . . .

(ii) . . .

(iii) . . .

(iv) . . .

(v) . . .

(vi) . . .

(vii) use of assistive and instructional technology in the teaching of and learning by students with disabilities; [and]

(viii) . . .

(ix) understanding the needs of students with autism, including, but not limited to, the etiology, prevalence, characteristics, and evidence-based instructional methodology for teaching students with autism, instructional design and supports to promote communication and socialization skills and skill generalization and maintenance; positive behavioral supports, functional behavioral assessments and behavioral intervention plans; collaboration between the home, class, school and community to ensure that students are supported in the general education environment; and knowledge of resources such as early childhood sup-

ports, respite care, state agencies, transition services and vocational rehabilitation services and parent support networks and associations that are available to support students and families; and

2. Subpart 57-3 of the Regulations of the Commissioner of Education is added, effective October 9, 2008, as follows:

#### SUBPART 57-3 Training in Autism

57-3.1 Purpose.

The purpose of this Subpart is to set forth standards for approval and the approval process for providers of course work or training in the needs of students with autism that is offered to candidates for a teachers' certificate or license in any of the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing; and blind and visually impaired and for school administrators, to the extent required by section 3004 of the Education Law.

57-3.2 Definitions.

As used in this Subpart:

(a) course work or training means course work or training in the needs of students with autism.

(b) provider means any teachers' or professional organization or association, school district, board of cooperative educational services, non-public school, institution of higher education, hospital, health care facility, government agency or office, social service agency, or any other organization that has as its purpose the provision of course work or training in the needs of students with autism, and that is approved by the department to offer such course work or training pursuant to section 3004 of the Education Law.

57-3.3 Filing of application for approval as a provider.

(a) A person or organization seeking approval as a provider shall submit to the department, an application on forms prescribed by the commissioner, with a fee of \$600.

(b) To be approved, each applicant shall submit evidence acceptable to the department that the applicant:

(1) has and will maintain adequate resources to offer the course work or training;

(2) has and will ensure that faculty and educational specialists who will offer the course work or training have demonstrated by training, earned degrees or experience, their competence to offer the course work or training. The faculty or educational specialists who offer such course work or training must hold at least a master's degree; and have specialized training in autism or shall have demonstrated, in other widely recognized ways, their specialized knowledge in the area of autism, as determined by the department;

(3) certifies in writing that the course work or training will be conducted through use of a curriculum which, at a minimum, includes the syllabus prepared by the department; and

(4) certifies, in writing, that certification of completion forms obtained from the department will be issued to students upon completion of the course work or training for their use in documenting satisfaction of the requirement of course work or training in autism, as required under section 3004 of the Education Law.

57-3.4 Term of approval as a provider.

(a) Providers shall be approved for a period of six years, except that the approved status of such providers may be terminated during this term by the department in accordance with section 57-3.6 of this Subpart.

(b) At the expiration of said term, the provider may reapply to the department for approval following the requirements of section 57-3.3 of this Subpart, including payment of the required fee.

57-3.5 Responsibility of providers.

(a) Pursuant to the requirements of section 3004 of the Education Law, a provider, at a minimum, shall offer the syllabus prepared by the department. However, nothing in this section shall preclude providers from offering additional course work or training which exceeds, or expands upon, the three hour syllabus prescribed by the department.

(b) An approved provider of such course work or training shall execute a certification of completion of each person completing course work or training, and within 21 calendar days of the completion of course work or training, the provider shall submit the certification of completion to the person completing the course work or training for that person's use in documenting such completion.

(c) The provider shall retain a copy of the certification of completion in the provider's files for not less than six years from the date of completion of course work or training.

(d) In the event that an approved provider discontinues offering course work or training, all copies of certifications of completion issued within the six years prior to such discontinuance shall be transferred to the department.

(e) Course work or training shall be taught by instructors who have demonstrated by training, education and experience their competence to teach the course content prescribed in subdivision (a) of this section.

57-3.6 Review of providers by the department.

(a) The department may review approved providers during the term of approval to ensure compliance with the requirements of this Subpart and may request information from a provider and may conduct site visits, pursuant to such review.

(b) A determination by the department that the services offered by a provider are inadequate, incomplete or otherwise unsatisfactory pursuant to the standards set forth in this Subpart shall result in the denial or termination of the approved status of the provider.

57-3.7 Exemption.

An institution that offers a registered program leading to certification in any of the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing; and blind and visually impaired, pursuant to section 52.21 of this Title, shall be deemed approved, pursuant to this Subpart, for purposes of offering course work or training in autism within such program to students in the program.

3. A new Section 80-1.12 of the Regulations of the Commissioner of Education is added, effective October 9, 2008, as follows:

Section 80-1.12 Required study in the needs of students with autism for certificates in certain classroom teaching titles.

All candidates for a certificate or license valid for a certificate in the classroom teaching titles of students with disabilities in early childhood, childhood, middle childhood or adolescence; deaf and hard of hearing; blind and visually impaired and speech and language disabilities, who apply for a certificate or license on or after September 2, 2009, shall have completed at least three clock hours of course work or training in autism, as required by section 3004 of the Education Law, which is provided by a registered program leading to certification pursuant to section 52.21 of this Title or other approved provider pursuant to Subpart 57-3 of this Title.

4. Paragraph 3 of subdivision (a) of Section 80-3.7 of the Regulations of the Commissioner of Education is amended, effective October 9, 2008, as follows:

(3) Additional requirements. A candidate seeking to fulfill the education requirement for the initial certificate through individual evaluation of education requirements shall meet the additional requirements in this paragraph or their substantial equivalent as determined by the commissioner, if so prescribed for that certificate title, in addition to the general requirements prescribed in paragraph (2) of this subdivision.

- (i) . . .
- (ii) . . .
- (iii) . . .
- (iv) . . .

(v) Students with disabilities (birth-grade 2).

- (a) . . .
- (b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(vi) Students with disabilities (grades 1-6).

- (a) . . .
- (b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(vii) Students with disabilities (grades 5-9).

- (a) . . .
- (b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(viii) Students with disabilities (grades 7-12).

- (a) . . .
- (b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(ix) Deaf and hard of hearing (all grades).

- (a) . . .
- (b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(x) Blind or visually impaired (all grades).

- (a) . . .
- (b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(xi) Speech and language disabilities (all grades).

- (a) . . .
- (b) . . .

(c) For candidates applying for a certificate or license on or after September 2, 2009, the candidate shall complete study in autism, as prescribed in section 80-1.12 of this Part, or its equivalent as determined by the commissioner.

(xii) . . .

**Revised rule compared with proposed rule:** Substantial revisions were made in Subpart 57-3 and sections 52.21(b)(3)(vi)(b)(1)(ix), 80-1.12, 80-3.7.

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

**Data, views or arguments may be submitted to:** Johanna Duncan-Poitier, Senior Deputy Commissioner of Education - P16, Education Department, 2M West Wing, Education Bldg., 89 Washington Ave., Albany, NY 12234, (518) 474-3862, e-mail: p16education@mail.nysed.gov

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

**Revised Regulatory Impact Statement**

Since publication of a Notice of Emergency Adoption and Revised Rule Making in the *State Register* on April 9, 2008, the following substantial revisions were made to the proposed rule:

1. STATUTORY AUTHORITY:

Sections 52.21(b)(3)(vi)(b)(1), Subpart 57-3, 80-1.12 and 80-3.7(a)(3) were revised to delete the phrase autism in order to be consistent with Chapter 143 of the Laws of 2006.

Section 52.21(b)(3)(vi)(b)(1) of the Regulations of the Commissioner of Education was revised to provide clarification as to what a registered teacher preparation program must include in its study on autism.

Section 57-3.5 and 80-1.12 of the Regulations of the Commissioner of Education were revised, in response to public comment, to increase the amount of required course work or training in the needs of children with autism from two hours to three hours.

The above revisions to the proposed rule require that the Legislative Objectives, Needs and Benefits, Costs and Local Government Mandates sections of the previously published Regulatory Impact Statement be revised to read as follows:

2. LEGISLATIVE OBJECTIVES:

The proposed amendment is necessary to implement Education Law Section 3004(4), (5), as added by Chapter 143 of the Laws of 2006, by requiring teachers seeking certification in certain special education titles to have course work or training in the needs of students with autism and establishing standards for Education Department approval of providers of such course work or training.

3. NEEDS AND BENEFITS:

The proposed amendment is necessary to implement Education Law section 3004(4) and (5), by requiring teachers seeking certification in certain special education classroom teaching titles to have course work or training in the needs of students with autism and establishing standards for Education Department approval of providers of such course work or training.

4. COSTS:

(a) Costs to State government: The amendment will not impose any significant additional costs on State government including the State Education Department. The amendment will minimally affect the State Education Department's staffing and resources in reviewing and processing applications for certificates under individual transcript evaluation and in reviewing and processing applications for providers and monitoring approved providers.

(b) Costs to local governments: School districts and BOCES seeking status as an approved provider will be required to submit an application fee of \$600 to the Department. If granted, the provider receives approval for a six-year period, at the expiration of which, the provider must reapply. Proposed section 57-3.7 provides for an exemption to an institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, in which case the institution shall be deemed approved by the Department, for purposes of offering course work or training within such program to students in the program.

(c) Cost to private regulated parties: The proposed amendment will impose a cost of \$600 on private regulated parties that select to apply to become an approved provider of the required course work or training. Proposed section 57-3.7 provides for an exemption to an institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, in which case the institution shall be deemed approved by the Department, for purposes of offering course work or training within such program to students in the program.

For candidates seeking certification as a teacher in special education through individual evaluation pursuant to Section 80-3.7 of the Regulations of the Commissioner of Education, there is no additional cost to the applicant to apply for certification, but the candidate may need to pay a fee to take the three-hour course. This fee is estimated to be \$100.

(d) Costs to regulating agency for implementing and continued administration of the rule: As stated above in "Costs to State Government," the amendment will impose minimal additional costs on the State Education Department.

#### 5. LOCAL GOVERNMENT MANDATES:

School districts and BOCES seeking status as an approved provider must submit an application and a \$600 fee to the Department and will be required to:

(1) offer at least three clock hours of course work or training in understanding the needs of students with autism, including, but not limited to, the etiology, prevalence, characteristics, and evidence-based instructional methodology for teaching students with autism, instructional design and supports to promote communication and socialization skills and skill generalization and maintenance; positive behavioral supports, functional behavioral assessments and behavioral intervention plans; collaboration between the home, class, school and community to ensure that students are supported in the general education environment; and knowledge of resources such as early childhood supports, respite care, state agencies, transition services and vocational rehabilitation services and parent support networks and associations that are available to support students and families; and

(2) execute a certification of completion for each person completing course work or training and, within 21 calendar days of the completion of course work or training, submit the certification of completion to the person completing the course work or training for that person's use in documenting such completion; retain a copy of the certification of completion in the provider's files for not less than six years from the date of completion of course work or training; and in the event that a provider discontinues offering course work or training, all copies of certifications of completion issued within the six years prior to such discontinuance shall be transferred to the Department; and

(3) ensure that course work or training shall be taught by instructors who have demonstrated by training, education, and experience their competence to teach the course content.

The Department may approve a provider for a six year period. Upon expiration of the period, the provider may reapply to the Department for approval by submitting a new application and fee.

Proposed section 57-3.7 provides for an exemption to an institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, child-

hood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, in which case the institution shall be deemed approved by the Department, for purposes of offering course work or training within such program to students in the program.

#### Regulatory Flexibility Analysis

Since publication of a Proposed Rule Making in the *State Register* on April 9, 2008, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement filed herewith.

The above revisions to the proposed rule require that the Reporting, Recordkeeping and other Compliance Requirements and Professional Services, Costs and the Minimizing Adverse Impact sections of the previously published Rural Area Flexibility Analysis be revised to read as follows:

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

School districts and BOCES seeking status as an approved provider must submit an application and a \$600 fee to the Department and will be required to:

(1) offer at least three clock hours of course work or training in understanding the needs of students with autism, including, but not limited to, the etiology, prevalence, characteristics, and evidence-based instructional methodology for teaching students with autism, instructional design and supports to promote communication and socialization skills and skill generalization and maintenance; positive behavioral supports, functional behavioral assessments and behavioral intervention plans; collaboration between the home, class, school and community to ensure that students are supported in the general education environment; and knowledge of resources such as early childhood supports, respite care, state agencies, transition services and vocational rehabilitation services and parent support networks and associations that are available to support students and families; and

(2) execute a certification of completion for each person completing course work or training and, within 21 calendar days of the completion of course work or training, submit the certification of completion to the person completing the course work or training for that person's use in documenting such completion; retain a copy of the certification of completion in the provider's files for not less than six years from the date of completion of course work or training; and in the event that a provider discontinues offering course work or training, all copies of certifications of completion issued within the six years prior to such discontinuance shall be transferred to the Department; and

(3) ensure that course work or training shall be taught by instructors who have demonstrated by training, education, and experience their competence to teach the course content.

The Department may approve a provider for a six year period. Upon expiration of the period, the provider may reapply to the Department for approval by submitting a new application and fee.

Proposed section 57-3.7 provides for an exemption to an institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities; deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, in which case the institution shall be deemed approved by the Department, for purposes of offering course work or training within such program to students in the program.

An approved provider shall execute a certification of completion for each person completing course work or training, and within 21 calendar days of completion of the course work or training, the provider shall submit the certification of completion to the person completing the course work or training. The provider shall retain a copy of the certification of completion in the provider's files for not less than 6 years from the date of completion. In the event the provider discontinues offering course work or training, all copies of certifications of completion issued within the 6 years prior to the discontinuance shall be transferred to the Department.

#### 4. COMPLIANCE COSTS:

The proposed amendment will not impose costs on private regulated parties, unless they choose to become an approved provider of the course work or training in autism spectrum disorders. The cost for application to become an approved provider is \$600. If granted, approval would be for a period of six years. At the expiration of this period, reapplication would include submission of a \$600 fee to the Commissioner. Some approved providers may be able to charge fees to individuals taking the course, thereby recovering their costs. Also, section 57-3.7 of the proposed amendment provides an exemption to an institution that offers a registered program leading to certification in certain classroom teaching titles, pursuant

to 8 NYCRR 52.21, in which the institution shall be deemed approved by the Department for purposes of offering such course work or training within such program to students in the program.

For a candidate seeking certification in a special education title through individual evaluation pursuant to Section 80-3.7 of the Regulations of the Commissioner of Education, there is no additional cost to the applicant to apply for certification, but the candidate may need to pay a fee to take the three-hour training. This cost is estimated to be \$100.

#### 6. MINIMIZING ADVERSE IMPACT:

Only those small businesses that seek status as an approved provider must submit an application fee of \$600 to the State Education Department and meet the requirements of the proposed Subpart 57-3. Organizations approved to offer course work are not prevented by the proposed amendment from charging fees to students taking the course work or training. Because the costs imposed by this rule are minimal and may be defrayed by the fees charged to students, the proposed amendment is not expected to have any adverse economic impact on small businesses. It would be contrary to the public welfare to exempt small businesses from the requirements of the proposed amendment, or impose a lesser standard, because such requirements are designed to assure that approved providers offer adequate training in the needs of students with autism.

With respect to local governments, only those school districts and BOCES that seek status as an approved provider, would be required to pay the \$600 application fee and meet the requirements of 57-3.3. It would be contrary to the public welfare to exempt such local governments from the requirements of the proposed amendment, or impose a lesser standard, because such requirements are designed to assure that approved providers offer adequate training in the needs of students with autism.

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

Since publication of a Proposed Rule Making in the *State Register* on April 9, 2008, the proposed rule was revised as set forth in the Revised Regulatory Impact Statement filed herewith.

The above revisions to the proposed rule require that the "Reporting, Recordkeeping and other Compliance Requirements and Professional Services", "Costs" and the "Minimizing Adverse Impact" sections of the previously published Rural Area Flexibility Analysis be revised to read as follows:

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

School districts and BOCES seeking status as an approved provider must submit an application and a \$600 fee to the Department and will be required to:

(1) offer at least three clock hours of course work or training in understanding the needs of students with autism, including, but not limited to, the etiology, prevalence, characteristics, and evidence-based instructional methodology for teaching students with autism, instructional design and supports to promote communication and socialization skills and skill generalization and maintenance; positive behavioral supports, functional behavioral assessments and behavioral intervention plans; collaboration between the home, class, school and community to ensure that students are supported in the general education environment; and knowledge of resources such as early childhood supports, respite care, state agencies, transition services and vocational rehabilitation services and parent support networks and associations that are available to support students and families; and

(2) execute a certification of completion for each person completing course work or training and, within 21 calendar days of the completion of course work or training, submit the certification of completion to the person completing the course work or training for that person's use in documenting such completion; retain a copy of the certification of completion in the provider's files for not less than six years from the date of completion of course work or training; and in the event that a provider discontinues offering course work or training, all copies of certifications of completion issued within the six years prior to such discontinuance shall be transferred to the Department; and

(3) ensure that course work or training shall be taught by instructors who have demonstrated by training, education, and experience their competence to teach the course content.

The Department may approve a provider for a six year period. Upon expiration of the period, the provider may reapply to the Department for approval by submitting a new application and fee.

Proposed section 57-3.7 provides for an exemption to an institution that offers a registered program leading to certification in the following classroom teaching titles: students with disabilities in early childhood, childhood, middle childhood or adolescence; speech and language disabilities;

deaf and hard of hearing and blind and visually impaired, pursuant to 8 NYCRR section 52.21, in which case the institution shall be deemed approved by the Department, for purposes of offering course work or training within such program to students in the program.

An approved provider shall execute a certification of completion for each person completing course work or training, and within 21 calendar days of completion of the course work or training, the provider shall submit the certification of completion to the person completing the course work or training. The provider shall retain a copy of the certification of completion in the provider's files for not less than 6 years from the date of completion. In the event the provider discontinues offering course work or training, all copies of certifications of completion issued within the 6 years prior to the discontinuance shall be transferred to the Department.

#### 3. COSTS:

The proposed amendment will not impose costs on private regulated parties, unless they choose to become an approved provider of the course work or training in autism spectrum disorders. The cost for application to become an approved provider is \$600. If granted, approval would be for a period of six years. At the expiration of this period, reapplication would include submission of a \$600 fee to the Commissioner. Some approved providers may be able to charge fees to individuals taking the course, thereby recovering their costs. Also, section 57-3.7 of the proposed amendment provides an exemption to an institution that offers a registered program leading to certification in certain classroom teaching titles, pursuant to 8 NYCRR 52.21, in which the institution shall be deemed approved by the Department for purposes of offering such course work or training within such program to students in the program.

For candidates seeking certification as a teacher in special education through individual evaluation pursuant to Section 80-3.7 of the Regulations of the Commissioner of Education, there is no additional cost to the applicant to apply for certification, but the candidate may need to pay a fee to take the three-hour training or course in the needs of students with autism spectrum disorders. This cost is estimated to be \$100.

#### 4. MINIMIZING ADVERSE IMPACT:

Only those school districts, BOCES and other entities that seek status as an approved provider must submit an application fee of \$600 to the State Education Department and meet the requirements of proposed section 57-3.3. Because the costs imposed by this proposed amendment are minimal and may be defrayed by the fees charged to students, the proposed amendment is not expected to have any adverse economic impact on rural areas. It would be contrary to the public welfare to exempt rural areas from the requirements of the proposed amendment, or impose a lesser standard, because such requirements are designed to assure that approved providers offer adequate course work or training in the needs of students with autism. A uniform standard ensures the quality of certified special education and school administrators working in special education in all parts of the State.

#### **Job Impact Statement**

Since publication of the Notice of Proposed Rule Making in the *State Register* on April 9, 2008, the proposed regulation was revised as set forth in the Revised Regulatory Impact Statement filed herewith.

In order to implement the requirements of Education Law 3004(4) and (5), as added by Chapter 143 of the Laws of 2006, the purpose of the proposed amendment is to require teachers seeking certification in special education to have course work or training in the needs of students with autism. The proposed amendment also establishes standards for Education Department approval of providers of course work or training in autism.

The revised regulation will not have a substantial adverse impact on job or employment opportunities. Because it is evident from the nature of this regulation that it will have only a positive impact or no impact on jobs or employment opportunities, no further steps were needed to ascertain that fact and none were taken. Accordingly, a job impact statement is not required and one has not been prepared.

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

A Notice of Proposed Rule Making was published in the *State Register* on April 9, 2008. Below is a summary of written comments received by the State Education Department (SED) on the proposed amendment.

1. COMMENT: Teachers with existing certification should be required to obtain the same training in the needs of students with autism. Two hours of training can not make a teacher an expert. We must do a better job of ensuring that all students have the opportunity to become productive citizens.

DEPARTMENT RESPONSE: Chapter 143 of the Laws of 2006 does not require currently certified teachers to receive training in the needs of children with autism. However, the Department believes that existing special education teachers will be encouraged to receive this training once

approved providers are available. The Department agrees that we must do a better job of ensuring that all students have the opportunity to become productive citizens.

2. COMMENT: There are too many topics to be covered in a two hour workshop.

RESPONSE: The syllabus for the required course work or training through approved providers has not yet been developed by SED. The topics identified in the proposed amendment are for registered teacher education programs, not for the required course work or training. Moreover, in response to public comment, SED has extended the length of the required course work or training from two hours to three hours.

3. COMMENT: Institutions with registered programs leading to certification in any disability area do not all have faculty prepared to provide autism specific training and therefore such institutions should not be exempted from applying to be an approved provider.

DEPARTMENT RESPONSE: Current regulations require that institutions that prepare special education teachers have faculty with the knowledge and skills to prepare special education teachers to meet the needs of the full range of students with disabilities, including students with autism.

## Department of Environmental Conservation

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

#### Recreational and Commercial Harvest of Hudson River American Shad

**I.D. No.** ENV-14-08-00002-ERP

**Filing No.** 569

**Filing date:** June 9, 2008

**Effective date:** June 9, 2008

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

**Emergency action taken:** Amendment of Parts 10, 35, 36 and 40 of Title 6 NYCRR.

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

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

**Specific reasons underlying the finding of necessity:** The Department is adopting amendments to 6 NYCRR Parts 10, 35 and 36 which will implement a catch and release recreational fishery for American shad in the Hudson River; and gear limit and fishing restrictions for the Hudson River commercial fishery. These regulations are necessary in order for New York to comply with the Department's mandate of stewardship of the state's natural resource.

American shad of the Hudson River are anadromous. They spawn in the river, but spend most of their life in the near shore Atlantic Ocean from Virginia to Maine. They are caught by recreational and commercial fishermen while they are in the Hudson and by commercial fishermen while they are in the ocean.

Recently, DEC staff completed a stock assessment of the Hudson River American shad as part of a coast-wide assessment of American shad stocks under the coordination of the Atlantic States Marine Fisheries Commission (ASMFC). Abundance of Hudson River American shad has declined since the early 1990's and it is now at a historic low. Moreover, fish in the spawning stock (adult fish) became smaller and younger, mortality increased to excessive and unacceptable levels, and production of young dropped more than 70 percent to an all time low in 2002. The primary cause of these changes was over-fishing. Through the ASMFC, New York worked toward, and achieved closure of ocean harvest of Hudson shad in commercial fisheries that targeted shad in 2005. This closure substantially reduced losses of Hudson River American shad, but it did not solve the

problem in the face of continued low production of juveniles and continued excessive mortality. The few fish produced in 2002 to 2007 are now returning as adults and are what remains to recover the stock. These fish need substantial protection if the shad stock is to recover. Our analysis indicates that if river harvest could be maintained at 2004-2006 levels mortality would be a bit above that required to maintain the stock at low levels. However, mortality and harvest would still be more than twice the levels needed to allow the stock to begin recovery. The DEC recognizes that this is a serious problem which needs immediate attention.

Under ECL 11-0303, it is the DEC's responsibility to act in behalf of the natural resources of the state. New York will implement measures which will achieve a reduction in adult mortality and will also account for the recent recruitment failure (lack of young fish) in the stock. To allow for stock recovery, it is necessary to reduce recent levels of harvest by approximately 50 percent. In order to accomplish this reduction, the Department will implement actions to: 1) create a catch and release recreational fishery to eliminate recreational harvest 2) implement seasonal restrictions, from March 15th to June 15th, on the commercial fishery to include an increased escapement period (a period of no fishing each week), gear limits, and closed and restricted areas.

The promulgation of this regulation is necessary in order for the Department to protect and restore the Hudson River American shad stock. Failure by New York to adopt these amendments would jeopardize recovery of the Hudson River American shad stock.

Hickory shad are managed under the Atlantic States Marine Fisheries Commission Fisheries Management Plan (FMP) for Shad and River Herring. Regulations for recreational take limits in the Hudson River are necessary to comply with the interstate FMP and to be consistent with limits existing in New York's Marine District.

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

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

**Text of emergency/revised rule:** Part 10 of Title 6 of the Official Compilation of New York Codes, Rules and Regulations, entitled "Sportfishing Regulations" is amended as follows:

(Section 10.1(a) through paragraph 10.1(b)(12) remains unchanged)

Subdivision 10.1(b)(13) is amended to read as follows:

(b) "Table A. Sportfishing regulations"

	Species	Open Season	Minimum Length	Daily Limit
(13)	<i>American shad-in the Hudson River and tributaries north of the George Washington Bridge</i>	All year	[Catch and release only] Any size	1
	<i>American shad - all other inland waters</i>	All year	Any size	6
(19)	<i>Hickory shad</i>	August 1 to November 30	Any size	5

(Section 10.2 through Section 10.9 remain unchanged)

Amendment of Part 35 of Title 6 NYCRR.

Part 35 of Title 6 of the Official Compilation of New York Codes, Rules and Regulations, entitled "Licenses" is amended as follows:

Paragraph 35.1(a) is amended to read as follows:

Gear or operation	Nonresidents of the State	
	Residents	State
Scoop, Dip and Scap Nets 10 feet square or under	\$1.00	\$3.00
Scoop, Dip and Scap Nets Over 10 feet square	2.00	6.00
Fyke Nets In Lakes Erie and Ontario	15.00	30.00
Fyke Nets In Hudson River 1- to 3-foot hoop	1.00	3.00
Fyke Nets In Hudson River Over 3-foot hoop	2.00	6.00
Fyke Nets Elsewhere 1- to 3-foot hoop	2.00	3.00
Fyke Nets Elsewhere Over 3-foot hoop	3.00	6.00
Seines Per lineal foot	0.05	0.15
Seines 100 lineal feet of stake net or part thereof	3.00	9.00
Gill Nets Per lineal foot	0.05	0.15
Gill Nets In Hudson and Delaware Rivers from March 15 to June 15, [2,000] 600 feet or under	10.00	100.00
Gill Nets In Chaumont Bay and waters of Jefferson County within one-half mile of the shore between Horse Island and Tibbet's Light, 2,500 feet or under	15.00	45.00
Trap Nets In Lakes Erie and Ontario	20.00	45.00
Trap Nets Elsewhere 4 feet or under	3.00	12.00
Trap Nets Elsewhere Over 4 feet and up to 6 feet	5.00	15.00
Trap Nets Elsewhere Over 6 feet and up to 8 feet	7.00	21.00

Trap Nets Elsewhere Over 8 feet	10.00	30.00
Sturgeon Line	5.00	15.00
Tide Line	3.00	9.00
Eel Pot	0.50	1.50
Eel Weir	20.00	60.00
Rowboat or sailboat in Lakes Erie and Ontario	20.00	60.00
10 h.p. or under outboard motor in Lakes Erie and Ontario	20.00	60.00
Over 10 h.p. outboard motor in Lakes Erie and Ontario	40.00	120.00
Inboard motor boat under 10 tons in Lakes Erie and Ontario	40.00	120.00
Inboard motor boat 10 to 15 tons in Lakes Erie and Ontario	50.00	150.00
Inboard motor boat over 15 tons in Lakes Erie and Ontario	60.00	180.00

Amendment of Part 36 of Title 6 NYCRR.

Part 36 of Title 6 of the Official Compilation of New York Codes, Rules and Regulations, entitled "Gear and operation of gear" is amended as follows:

Subdivision 36.1(a), paragraphs (1) through (3) remain unchanged.

Addition of paragraph 36.1(4) reads as follows:

(4) *It is unlawful for any person to take American shad for commercial purposes without having in possession either a valid gill net or shad and herring gill net Marine permit. Only one valid licensed gill net per fisher may be used to take American shad.*

Section 36.2 remains unchanged.

Subdivision 36.3(a) remains unchanged.

Subdivision 36.3(b) is amended to read as follows:

(b) No net shall be staked, anchored or otherwise fixed in position in the waters of the Hudson River within 1,500 feet upriver or down river of any other licensee's net. No net shall exceed [1,200] 600 feet in length.

Paragraphs 36.3(c)(1) through 36.3(c)(7) are amended to read as follows:

(1) Seasonal restrictions. During the period December 1st-March 14th, both dates inclusive, no person shall set, place, possess or draw a [gill] net of any kind in or on that section of the Hudson River between the Troy Dam and the George Washington Bridge.

(2) Restricted [area] areas. From March 15th to June 15th, both dates inclusive:

i) [no] No nets of any kind shall be set, placed, drawn or in any way used on the shoals or flats in the Hudson River known as "The Flats" beginning at the red buoy north of Kingston point and continuing in a northerly direction to the red buoy opposite the Village of Barrytown.

ii) *No gill nets shall be possessed in or on that section of the Hudson River between the Federal dam at Troy and the Castleton-on-Hudson (Interstate 90 spur and railroad) bridges.*

iii) *Gill nets having a stretched mesh of a maximum of 3 1/2 inches stretched mesh, inside measure, through the net, may be possessed and used in or on that section of the Hudson River between the Castleton-on-Hudson (Interstate 90 spur and railroad) bridges and the George Washington Bridge.*

iv) *Gill nets having a stretched mesh equal to 5 1/2 inches stretched mesh, inside measure, through the net, may be possessed and used in or on that section of the Hudson River between the Rip VanWinkle Bridge and the George Washington Bridge.*

v) *No person shall set a gill net other than a drift gill net in the waters of the Hudson River lying between the Bear Mountain Bridge and the Beacon-Newburgh Bridge nor possess any gill net other than a drift gill net while on the shores or waters of that portion of the Hudson River. For the purposes of this subdivision a drift gill net is defined as a gill net that is not anchored or staked and is free to move with water currents.*

(3) Mesh restrictions. From March 15th through June 15th [gill nets with bar mesh size greater than 1 3/4 inches and less than 2 1/2 inches must not be set in the Hudson River from George Washington Bridge north to the Federal Dam at Troy, nor possessed while on those waters. Gill nets of less than 1 1/8 inch bar mesh must not be used at any time except that gill nets for taking Atlantic tomcod not less than 7/8 inch bar mesh may be used.] :

(i) *gill nets having a maximum of 3 1/2 inches stretched mesh, inside measure, through the net, may be used to take river herring (alewife or blueback herring). Any American shad taken must be immediately returned to the water.*

(ii) *gill nets equal to 5 1/2 inches stretched mesh, inside measure, through the net, may be used to take American shad.*

(4) Escapement period. During the shad and herring season, from March 15th to June 15th, both dates inclusive, no nets shall be set, placed

or drawn or allowed to remain in, or possessed on the waters of the Hudson River below the dam at Troy between 6 a.m. prevailing time on Friday and 6 p.m. prevailing time on the following Saturday; provided, however, that:

(i) fyke nets and scap nets may be set and operated at any time;

(ii) minnow nets may be set and operated to take bait fish at any time;

[(iii) seines and stake stop nets may be set and operated at any time from the Troy dam to the lighthouse at Esopus Meadows south of Kingston, except in the channel of the river.]

(iii) *Shad closure. Gill nets equal to 5 1/2 inches stretched mesh, inside measure, through the net, may not be set in or possessed on the waters of the Hudson River below the Rip VanWinkle Bridge to the George Washington Bridge between 6 a.m. prevailing time on Wednesday and 6 p.m. prevailing time on the following Saturday.*

Paragraph 36.3(c)(5) is rescinded.

(5) Closed area. From March 15th through June 15th, no person shall set a gill net other than a drift gill net in the waters of the Hudson River lying between the Bear Mountain Bridge and the Beacon-Newburgh Bridge nor possess any gill net other than a drift gill net while on the shores or waters of that portion of the Hudson River. For the purposes of this subdivision a drift gill net is defined as a gill net that is not anchored or staked and is free to move with water currents.]

Paragraph 36.3(c)(5) is adopted to read as follows:

(5) *Gear limits. In the Hudson River from the Bear Mountain Bridge north to the Castleton-on-Hudson (Interstate 90 spur and railroad) bridges, the permittee shall be in immediate attendance while fishing any gill net.*

Paragraph 36.3(c)(6) remains unchanged.

(7) Operation of licensed nets at night. Nets that have been duly licensed may be operated between [sunset and] 1/2 hour before sunrise and sunset in the Hudson River south of the barrier dam at Troy to the Bear Mountain Bridge, except as restricted by paragraphs (1) and (5) of this subdivision.

Part 40 of Title 6 of the Official Compilation of New York Codes, Rules and Regulations, entitled "Marine Fish" is amended as follows:

Existing Subdivision 40.1(f) of 6 NYCRR is amended to read as follows:

40.1 (f) Table A - Recreational Fishing.

Species	Open Season	Minimum Length	Possession Limit
Striped Bass (except the Hudson River north of the George Washington Bridge)	Apr 15 - Dec 15	Licensed Party/ Charter Boat anglers	2
		28" TL	
		All other anglers	1
Red Drum	All year	28" to 40" TL	
		>40" TL	1
		(Total Length) *	
Tautog	All year	No minimum size limit	No limit for fish less than 27" TL. Fish greater than 27" TL shall not be possessed
		Jan. 17-Apr. 30 and Oct. 1-Dec. 17	14" TL
		4	
American Eel	All year	6" TL	50
Pollock	All year	19" TL	No limit
Haddock	All year	19" TL	No limit
Atlantic cod	All year	22" TL	No limit
Summer flounder	May 15- Sept. 1	20.5" TL	4
Yellowtail Flounder	All year	13" TL	No limit
Atlantic Sturgeon	No possession allowed		
Spanish Mackerel	All year	14" TL	15
King Mackerel	All year	23" TL	3
Cobia	All year	37" TL	2
Monkfish (Goosefish)	All year	17" TL	No limit
Weakfish	All year	11" Tail Length #	
		16" TL	6
Bluefish	All year	10" Fillet length+ 12" Dressed length**	
		No minimum size limit for the first 10 fish; 12" TL for the next 5 fish.	15, no more than 10 of which shall be less than 12" TL.
Winter Flounder	Apr. 1 - May 30	12" TL	10
Scup (porgy)	June 12-Aug. 31	11" TL	10
Licensed Party/ Charter Boat anglers	Sept. 1-Oct. 15	11" TL	45

\*\*\*\*

Scup (porgy)	May 24-Sept. 26	10.5" TL	10
All other anglers			
Black Sea Bass	All year	12" TL	25
American Shad	All year	No minimum size limit	[5]
Hickory Shad	All year	No minimum size limit	5
Oyster toadfish	Jan 1 - May 14 and July 16 - Dec 31	10" TL	3
Large & Small Coastal Sharks ##, ###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###
Pelagic Sharks ++, ###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###	As per Title 50 CFR, Part 635###
Prohibited Sharks***, ###	No possession allowed		

\* Total length is the longest straight line measurement from the tip of the snout, with the mouth closed, to the longest lobe of the caudal fin (tail), with the lobes squeezed together, laid flat on the measuring device.

# The tail length is the longest straight line measurement from the tip of the caudal fin (tail) to the fourth cephalic dorsal spine (all dorsal spines must be intact), laid flat on the measuring device.

+ The fillet length is the longest straight line measurement from end to end of any fleshy side portion of the fish cut lengthwise away from the backbone, which must have the skin intact, laid flat on the measuring device.

\*\* Dressed length is the longest straight line measurement from the most anterior portion of the fish, with the head removed, to the longest lobe of the caudal fin (tail), with the caudal fin intact and with the lobes squeezed together, laid flat on the measuring device.

## Large and Small Coastal Sharks include those shark species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations

++Pelagic sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations

\*\*\*Prohibited sharks include those species so defined as in Table 1 to Appendix A to Part 635 of Title 50 Code of Federal Regulations

###Applicable provisions of the following are incorporated herein by reference: 50 CFR Part 635-Atlantic Highly Migratory Species, final rule as adopted by U.S. Department of Commerce as published in the Federal Register, Volume 64, Number 103, pages 29135-29160, May 28, 1999, and as amended in volume 68, Number 247, pages 74746-74789, December 24, 2003. A copy of the federal rule incorporated by reference herein may be viewed at: New York State Department of Environmental Conservation, Bureau of Marine Resources, 205 N. Belle Mead Road, East Setauket, New York, 11733.

\*\*\*\*See Special Regulations contained in 6 NYCRR 40.1(h)(3).

**This notice is intended** to serve as both a notice of emergency/proposed and a notice of revised rule making. The notice of emergency/proposed rule making was published in the *State Register* on April 2, 2008, I.D. No. ENV-14-08-00002-EP. The emergency rule will expire August 7, 2008.

**Emergency rule compared with proposed rule:** Substantial revisions were made in Parts 10 and 40.

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

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

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

**Revised Regulatory Impact Statement**

1. Statutory authority:

Environmental Conservation Law (ECL) sections 3 0301, 11 0303, 11 0305, 11 0306, 11 0315, 11 0317, 11 0319, 11 1301, 11 1303, 11 1305, 11 1501, 11 1503, 11 1505, 13 0105 and 13-0339 authorize the Department of Environmental Conservation (Department) to establish, by regulation, the open season, size and catch limits, possession and sale restrictions and manner of taking for American shad and hickory shad.

2. Legislative objectives:

It is the objective of the above cited legislation that the Department manage marine fisheries to optimize resource use for commercial and recreational harvesters, consistent with marine fisheries conservation and management policies and interstate Fishery Management Plans (FMPs).

3. Needs and benefits:

The Department is adopting amendments to 6 NYCRR Parts 10, 35, 36 and 40 which will implement recreational fishery restrictions for American shad in the Hudson River and Marine District, recreational fishery restrictions for hickory shad in the Hudson River, and implement commercial fishery gear limit and fishing restrictions for American shad in the Hudson River. These regulations are necessary to protect American shad and

hickory shad and therefore are a part of the Department's stewardship responsibilities over the state's natural resources.

American shad of the Hudson River are anadromous. They spawn in the river, but spend most of their life in the near shore Atlantic Ocean from Virginia to Maine. They are caught by recreational and commercial fishermen while they are in the Hudson and by commercial fishermen while they are in the ocean.

Recently, Department staff completed a stock assessment of the Hudson River American shad as part of a coast wide assessment of American shad stocks under the coordination of the Atlantic States Marine Fisheries Commission (ASMFC). Abundance of Hudson River American shad has declined since the early 1990's and is now at a historic low. Moreover, fish in the spawning stock (adult fish) became smaller and younger, mortality increased to excessive and unacceptable levels, and production of young dropped more than 70 percent to an all time low in 2002. The primary cause of these changes was over fishing. Through the ASMFC, New York worked toward, and achieved closure of ocean harvest of Hudson shad in commercial fisheries that targeted shad in 2005. This closure substantially reduced losses of Hudson River American shad, but it did not solve the problem in the face of continued low production of juveniles and continued excessive mortality. The few fish produced from 2002 to 2007 are now returning as adults and are what remains to recover the stock. These fish need substantial protection if the shad stock is to recover. Our analysis indicates that if river harvest remained at 2004-2006 levels mortality would be above that required to maintain the stock at low levels. However, mortality and harvest would still be more than twice the levels needed to allow the stock to begin recovery. The Department recognizes that this is a serious problem which needs immediate attention.

Under ECL 11-0303, it is the Department's responsibility to act in behalf of the natural resources of the state. New York will implement measures which will achieve a reduction in adult mortality and will also account for the recent recruitment failure (lack of young fish) in the stock. To allow for stock recovery, it is necessary to reduce recent levels of harvest by approximately 50 percent. In order to accomplish this reduction, the Department will implement actions to: 1) create fishing restrictions to reduce recreational harvest and 2) implement seasonal restrictions, from March 15th to June 15th, on the commercial fishery to include an increased escapement period (a period of no fishing each week), gear limits, and closed and restricted areas. Failure of New York to adopt these amendments would jeopardize recovery of the Hudson River American shad stock.

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

Confirming New York's actions, the ASMFC has initiated preparation of Amendment III to the Fishery Management Plan (FMP) for Shad and River Herring. This amendment will require reductions in mortality for shad stocks currently in decline such as the Hudson River stock. The new amendment will not be in place until May, 2009 meaning that any response would not be implemented until the 2010 fishery. It would be irresponsible for the Department to wait until then to implement measures to stop the stock's decline.

Hickory shad spawn in rivers south of New York, but spend most of their life in the near shore Atlantic Ocean from Virginia to Maine. Coastal migrants often appear in the lower Hudson River in late summer and are frequently caught by recreational fishermen. Hickory shad are managed under the ASMFC FMP for Shad and River Herring. Recreational take limits in the Hudson River are necessary to comply with the interstate FMP and to be consistent with limits existing in New York's Marine District.

4. Costs:

(a) Cost to state government:  
Minor costs will be incurred by the regulating agency. See below.

(b) Cost to Local government:  
There will be no costs to local governments.

(c) Cost to private regulated parties:

Certain regulated parties may experience some adverse economic effects due to the increase in the escapement period for American shad (i.e. loss of several days per week in the fishing season). The targeted party is

the commercial shad fishers who will be limited to three days per week to harvest shad. There will be some economic loss to these businesses. Over the last five years, an average of 25 commercial shad fishermen on the Hudson River targeted (intentionally fished for) American shad. Most of the fishermen work alone. Only a few hire assistants. Furthermore, American shad are now only in the river in harvestable numbers for up to eight weeks each spring. Therefore, commercial shad fishing constitutes by nature a short part-time job that provides supplemental income to fishermen and a few helpers.

Over the last 30 years, the number of weeks of fishing activity and the number of participants in the commercial fishery in the Hudson River has dwindled as the stock abundance has declined. This industry has probably reached a level where the costs associated with fishing are high in relation to profit, or even meeting costs, for most fishers. The proposed rule lessens the ability of licensed fishers to harvest American shad and because of this some individuals may stop fishing.

Over the long-term, however, the maintenance of sustainable shad fisheries will have a positive effect on small businesses in the Hudson River shad fishery. Any short-term losses will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. These regulations are designed to prevent over-harvest of stocks so stocks can rebuild for future utilization.

Another possible affected party is a co-occurring (during the same time period shad are present in the river) commercial bait fishery for river herring. However, proposed regulations were designed to allow this activity to continue without change. Thus, herring netters will retain the ability to harvest fish and bait shops to purchase bait as they have in the past. There should be little economic impact to these businesses.

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

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

5. Local government mandates:

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

6. Paperwork:

None.

7. Duplication:

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

8. Alternatives:

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

(1) Complete closure of the commercial and recreational fisheries for American shad in the Hudson River. Closure of the commercial fishery was rejected because commercial shad fishing holds a place as one of the longest and most enduring historic fisheries in the Hudson Valley. Archaeological sites indicate shad have been fished in the valley for several thousand years. The "modern" fishery began in the 1600's as colonists shared their fishing skills with the Native Americans in the valley. Department staff believe that the social and historical value of the commercial fishery is worth preserving. The selected option seeks to preserve the commercial fishery while providing needed protection to the Hudson River shad stock.

Closure of the recreational fishery was rejected because little added protection would be gained from such an action. The Department performed a catch and release study that examined the release mortality of shad caught by recreational hook and line fishers. The study found that if shad were minimally handled, that the release mortality was low (approximately 1.6 percent). Recent creel surveys indicate that most (approximately 93 percent) recreational shad fishers release their catch. Complete closure (stopping the act of recreational fishing for American shad) would not appreciably lower harvest, but would deny New Yorkers the ability to enjoy the use of this resource. Moreover, recreational shad fishing occurs at times and locations of recreational fishing for other fish species. Thus closure of the recreational shad fishery would be difficult to enforce.

(2) Reduce harvest of American shad from the recreational and commercial fishery to levels that might maintain the stock at current historic lows. This option was rejected because it puts the stock at unacceptable risk of survival. The current record low stock level and record low and persistent production of young would make it impossible for the spawning stock to compensate for any unfavorable environmental conditions during spawning. This would lead to loss of production and certain stock decline.

Department staff believe that maintaining the stock at current low levels would be inconsistent with a sustainable fishery.

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

The "no action" alternative would leave current regulations in place and further jeopardize the American shad stock status. This would put New York in a position of allowing continued excessive mortality as defined in the ASMFC shad management plan and allowing the potential demise of the Hudson River American shad. This result would be contrary to the objectives of ECL 11-0303 to effectively manage the fish resources of New York State. For this reason, this alternative was rejected.

Hickory shad are managed under the ASMFC FMP for Shad and River Herring. Regulations for recreational take limits in the Hudson River are necessary to comply with the interstate FMP and to be consistent with limits existing in New York's Marine District. The "no action" alternative would leave New York with no regulation in place for recreational take of hickory shad in the Hudson River, and out of compliance with the ASMFC FMP. For this reason, this alternative was rejected.

9. Federal standards:

The amendments to Parts 10, 35, 36, and 40 are in compliance with the ASMFC Fishery Management Plan for American shad and hickory shad.

10. Compliance schedule:

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

**Revised Regulatory Flexibility Analysis**

1. Effect of the regulations:

These amendments to 6 NYCRR Parts 10, 35, 36 and 40 limit harvest from the recreational fisheries for American shad in the Hudson River and the Marine District, limit recreational fishing for hickory shad in the Hudson River, and significantly restrict commercial harvest of American shad in the Hudson River. Because this rule making addresses recreational and commercial fishing, the businesses that will be directly affected are commercial shad fishers. These regulations do not apply directly to local governments, and will not have any direct effects on local governments.

In the last five years, an average of 25 Hudson River commercial fishermen targeted American shad. Although the season March 15th to June 15th spans 13 weeks, shad are only harvested for approximately eight weeks prior to fish spawning, as the market is for female shad roe (eggs). Because shad are only in the river for a limited time in harvestable quantities, all commercial shad operations are part-time operations of short duration. New York will implement measures which will achieve a reduction in the harvest of 50 percent in total landings, relative to the base years of 2004 through 2006. In order to accomplish this reduction, the Department is: 1) increasing the escapement (non-fishing) period for shad to 84 hours, allowing commercial shad fishing to occur three days per week instead of five; 2) allowing fishing to occur only during daylight hours only for drift fishers; 3) implementing gear restrictions of a maximum of 600 feet with mesh restricted to 5.5 inch stretched mesh; and 4) closed areas to fishing in certain spawning reaches. The reduction in the number of fishing days is designed to reduce harvest by about 40 percent. The additional gear limits and area closures will make up the needed additional 10 percent and restrain fishing effort so that fishers may not compensate by fishing more within the limited time allowed.

The American shad commercial fishery has provided only part-time employment for fishers since the 1970's. The number of weeks of fishing activity and the number of participants in the commercial fishery in the Hudson River has dwindled as the stock abundance has declined. Over the last five years, an average of 25 commercial fishermen targeted American shad. This industry has probably reached a level where the costs associated with fishing are high in relation to profit, or even meeting costs, for most fishers. The proposed rule lessens the ability of licensed fishers to harvest American shad and because of this, some individuals may stop fishing.

It is unknown how many fishing charter vessels operate in the Hudson River, New York for American shad. While the proposal reduces harvest for the recreational fishery, it allows continued use of the resource for recreational purposes. Creel surveys indicate that few fishers retain their catch; 93 percent of all American shad caught are released. Thus, the reduced daily limit is not expected to change charter boat activities. No reduction in fishing days is planned for the recreational fishery.

So that regulations for recreational take of American shad are consistent, the daily limit for American shad was reduced to one fish per day in New York's Marine District.

In the long-term, the maintenance of sustainable shad fisheries will have a positive effect on small businesses in the fisheries in question. Any

short-term losses in participation and sales will be offset by the restoration of fishery stocks and an increase in yield from well-managed resources. These regulations are designed to protect the stock while allowing appropriate harvest, to prevent over-harvest, and to continue to rebuild stocks for future utilization.

The hickory shad recreational fishery is seasonal in the lower Hudson River only occurring in late summer through fall. There are no charter fisheries that target hickory shad. The daily limit is not expected to change recreational fishing activities. Adults of both hickory shad and American shad are very similar in appearance, but do not overlap in their seasonal use of the Hudson River. The season for hickory shad will allow use of this recreational resource while protecting adult American shad, which are present only during the spring.

2. Compliance requirements:

The Atlantic States Marine Fisheries Commission Interstate Fisheries Management Plan (ISFMP) for Shad and River Herring requires the recreational harvest of American shad and hickory shad be limited. No daily limit was in place for hickory shad in the Hudson River, although hickory shad are increasingly being caught in the lower river in late summer. The daily limit of five fish per day was selected to be in compliance to the ISFMP and consistent with regulations already in place for New York's Marine District.

3. Professional services:

None.

4. Compliance costs:

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

5. Economic and technological feasibility:

The proposed regulations do not require any expenditures on the part of affected businesses in order to comply with the changes. The restriction will reduce harvest and may reduce income from commercial fishing activities. However, American shad are in short supply coast-wide and reduced harvest may lead to higher prices and some recoupment of income. The hickory shad fishery is a growing recreational fishery for the lower Hudson River and continued management of this species may have a positive economic effect for local businesses.

There is no additional technology required for small businesses, and this action does not apply to local governments.

6. Minimizing adverse impact:

The promulgation of this regulation is necessary in order for the Department to protect and restore the Hudson River American shad stock. The regulations are intended to protect the resource and avoid the adverse impacts that would be associated with closure of the fishery.

Ultimately, the maintenance of long-term sustainable fisheries will have a positive effect on employment for the fisheries in question, as well as wholesale and retail outlets and other support industries. Failure to take actions to protect the fishery could cause the collapse of the stock and have a more severe adverse impact on the commercial and recreational fisheries, as well as the supporting industries for those fisheries. These regulations are being adopted in order to provide the appropriate level of protection and allow for harvest consistent with the capacity of the resource to sustain such effort.

7. Small business and local government participation:

The Department consulted the Hudson River Estuary Management Advisory Committee regarding the proposed action. The Committee is comprised of representatives from recreational and commercial fishing interests, local government, educational and research institutions. The Committee supported the need to reduce or eliminate fishing mortality on the Hudson shad stock and encouraged the Department to complete a recovery plan for American shad. The Department has also met with several potentially affected commercial fishermen to explain the need for harvest reduction and to discuss potential fishing restrictions. The Department has maintained a regular dialogue with several of these fishermen by phone and email regarding the issue. The Department has and will provide a notice of the revised emergency rule making to affected fishers through mailings, newspapers and other media outlets. Local governments were not contacted because the rule does not affect them.

**Rural Area Flexibility Analysis**

Although substantial revisions were made to the proposed rule, such revisions do not necessitate that the previously published Rural Area Flexibility Analysis be modified.

**Job Impact Statement**

Although substantial revisions were made to the proposed rule, such revisions do not necessitate that the previously published Job Impact Statement be modified.

**Assessment of Public Comment**

The proposed emergency rule making, which amends New York's regulations for recreational and commercial fishing for American shad in the Hudson River, was published in the *New York State Register* on April 2, 2008. The proposed amendments reduce harvest of American shad by creating a catch-and-release recreational fishery and implementing gear, area and time restrictions for commercial fishing operations.

The Department received written comment from a total of 15 recreational fishers, two commercial fishers, two non-governmental/environmental non-profit organizations and one power generating company. The Department also received comment from the Hudson River Estuary Management Advisory Committee (HREMAC). Comment ranged from full support of the proposed regulations to opposition to some or all segments (recreational or commercial) of the fishery.

A group of 90 emails, consisting of various versions of a form letter generated by a recreational fishing organization, commented on the proposed regulations. All emails contained the same wording and were either addressed to the Governor of New York, a New York State legislator or the DEC Commissioner. Of the 90 emails, 68 were received from out-of-state (CA, CT, DE, FL, MA, ME, MD, MT, NH, NJ, PA, RI, and VA).

Comments were grouped to avoid repetitive remarks and are addressed below.

Comment 1: Banning recreational harvest [by catch-and-release only] while allowing commercial harvest creates an unfair inequity among resource users.

DEC Response: The recreational option for catch-and-release was suggested and strongly supported by a group of shad recreational anglers at a public meeting held by the Department prior to the proposed rule making. Several anglers were concerned that shad, harvested by recreational fishers, were increasingly being used as bait. The Department's decision to propose the catch-and-release fishery was based on these comments and on data from two creel surveys that estimated a minimal level (7 percent) of harvest by recreational anglers. The catch-and-release option, although still allowing recreational users access to the resource, was viewed by most recreational anglers as being unfair as commercial fishers, although restricted, could continue to harvest fish.

Changes Made in Response to Comments: Department staff re-examined the impact of mortality of limited harvest by recreational anglers. It was determined that the mortality impact could be minimized if anglers were restricted to one fish per day. As a good faith effort toward the recreational fishing community, the Department will revise the Express Terms of Part 10 from "catch-and-release only" to a one fish per day limit. A separate rule making package [Parts 10, 18, 19, 35, and 180 Sportfishing Regulations, Taking Bait, Use of Bait, Licenses, and Miscellaneous Regulations], already in progress, does not allow recreational take of American shad for use as bait.

Comment 2: The fishery needs to close entirely.

DEC Response: The full fishery closure option was examined and rejected during the emergency and proposed rule making. The recently developed recreational fishery provides unparalleled opportunity for urban anglers to participate in a healthy outdoor activity. Complete closure (stopping the act of recreational fishing for American shad) would not appreciably lower harvest, but would deny New Yorkers the ability to enjoy the use of this resource. The commercial fishery has existed in the Hudson Valley for over 400 years (and most likely longer); the historic and social values are worth preserving. The intent of the proposed regulations is to reduce mortality by implementing allowed fishing time, gear and area restrictions. Annual stock monitoring will continue and indicate if further management actions are warranted.

Changes Made in Response to Comments: None.

Comment 3: Ban all gill nets from New York Waters, end commercial fishing.

DEC Response: Various restrictions on use of gill nets in New York waters have proven effective in maintaining mortality of harvested species at acceptable levels. Banning gill nets will also affect much of the commercial fishing industry in New York waters. These fisheries include the river herring gill net fishery in the Hudson, the major bait used for striped bass fishing, as well as a number of New York's marine fisheries. Time, area, and gear restrictions are in place for the gill net fishery for American shad in the Hudson. The restrictions were designed to reduce mortality of Hudson shad by 50 percent. Results of these restrictions will be evaluated annually and further management actions will be taken if warranted.

Changes Made in Response to Comments: None.

Comment 4: Although the proposed commercial regulation are the most restrictive ever put in place, it is understood that the Department is

doing its job to protect the resource and balancing that with maintaining the traditional commercial fishery. Requested to “keep up the good job”.

DEC Response: Balancing the stock protection with resource users is not simple nor easy. We acknowledge and appreciate the support.

Changes Made in Response to Comments: None.

Comment 5: The Department should move toward multi-species management.

DEC Response: Although multi-species management is a laudable goal, it is beyond the nature of the proposed regulations. However, the Department is beginning to institute changes to implement an eco-system approach to management.

Changes Made in Response to Comments: None.

Comment 6: The Department should finalize a state management plan for American shad in the Hudson River before finalizing the proposed regulations.

DEC Response: The rule making administrative time line was initiated in March 2008 to change fishing regulations for American shad in time to provide protection to this year’s spring spawning run. To let these proposed regulations lapse would decrease protection for the stock and would have the potential to create an administrative burden of promulgating repetitive emergency regulations on an annual basis until if, and when, a state management plan is finalized for American shad.

Changes Made in Response to Comments: None.

Comment 7: The Department should include a sunset clause in the proposed regulations to ensure that reassessment of stock condition and management restrictions are reviewed, and changed if necessary, every five years.

DEC Response: The Department will do its best to develop and implement a recovery plan for Hudson River American shad. New York is a member of the Atlantic States Marine Fisheries Commission (ASMFC) which requires annual monitoring and reporting of American shad stock status in the Shad and River Herring Interstate Fisheries Management Plan (ISFMP). As partner to ASMFC and in the interest protecting New York’s resources, the Department will continue annual stock status monitoring for Hudson River American shad. Any new management actions will be based on changes to the American shad stock when changes in measured indices occur. Changes on fishing restrictions should be dictated by stock condition rather than on a fixed time interval.

Changes Made in Response to Comments: None.

Comment 8: The Department must mandate the installation of closed cycle cooling at every Hudson River power plant.

DEC Response: Power generating station impacts are being dealt with under the State Pollution Discharge Elimination System (SPDES) permit issued by the Department’s Environmental Permits Division. Power plant operation is beyond the scope of the proposed regulations.

Changes Made in Response to Comments: None.

Comment 9: The Department must lead the fight through the ASMFC to regulate directed fisheries for American shad [in Delaware Bay]; lower by-catch limits; mandate member states find funding for observers to enforce by-catch limits.

DEC Response: New York State, as a member of ASMFC, will fully participate in the development of Amendment 3 to the Shad and River Herring Interstate Fisheries Management Plan which may attempt to address by-catch issues. New York staff plan to meet with the National Marine Fisheries Service in early summer 2008 to begin to identify fisheries where by-catch occurs.

Changes Made in Response to Comments: None.

Comment 10: The Department must dedicate funding to further study the reason(s) for decline, monitor and restore lost shad spawning grounds and continue the Hudson River Estuary Monitoring Program.

DEC Response: The Department is working on a recovery plan for American shad, which will identify specific research needs. These include identifying spawning and nursery habitat to facilitate habitat protection, and hopefully restoration; food habits of young-of-the-year shad and the possible interaction with zebra mussel; and a predator-prey study to understand the role of American shad as a prey species. Many of these studies will be conducted in partnership with other research organizations. The Hudson River Estuary Monitoring Program, a long-term monitoring program which collects data used to track abundance of adult and young shad, is conducted by contractors of Hudson River power generating plants. The Program is tied to the SPDES permitting process now ongoing with Hudson Valley power generating plants. Continuation of the program will require substantial annual funding (greater than two million dollars per year); the future of the program is uncertain.

Changes Made in Response to Comments: None.

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

**Hunting Seasons for Black Bear**

**I.D. No.** ENV-26-08-00017-P

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

**Proposed action:** Amendment of section 1.31 of Title 6 NYCRR.

**Statutory authority:** Environmental Conservation Law, sections 11-0303, 11-0903 and 11-0907

**Subject:** Hunting seasons for black bear.

**Purpose:** To expand the areas open to bear hunting.

**Text of proposed rule:** Subdivisions (a), (b), and (c) of 6 NYCRR section 1.31 are amended as follows:

Existing subdivisions 6 NYCRR 1.31 (a) and (b) are repealed and new subdivisions 6 NYCRR 1.31 (a) and (b) are adopted as follows:

(a) *Definitions. For the purpose of this section, the following terms have the indicated meanings:*

- (1) “Bear” means any bear existing in a wild state.
- (2) “Cub” means any bear less than one year old.
- (3) “Northern bear range” means WMUs (as defined in section 4.1 of this Title) within the Northern Zone (as defined by Environmental Conservation Law section 11-0103).
- (4) “Southern bear range” means WMUs (as defined in section 4.1 of this Title) within the Southern Zone (as defined by Environmental Conservation Law section 11-0103).

(b) “Bear hunting seasons.” Bears may be taken only during the open seasons and areas listed below:

(1) *Regular bear seasons:*

<p><i>Bear range</i> <i>Northern</i></p>	<p><i>Open Season</i> WMUs 5A, 5C, 5F, 5G, 5H, 5J, 6C, 6F, 6H, 6J, and that part of WMU 6K east of Route 26: Next to last Saturday in October through the first Sunday in December.</p>
<p><i>Southern</i></p>	<p>WMUs 7M, 7R, 7S, 8H, 8J, 8M, 8N, 8P, 8R, 8S, 8T, 8W, 8X, 8Y, 9G, 9H, 9J, 9K, 9M, 9N, 9P, 9R, 9S, 9T, 9W, 9X and 9Y: First Saturday after the opening of the Southern Zone regular deer season through the end of the Southern Zone regular deer season. WMUs 3A, 3C, 3H, 3J, 3K, 3M, 3P, 4F, 4G, 4H, 4N, 4O, 4P, 4R, 4S, 4W and 4X: The opening of the Southern Zone regular deer season through the end of the Southern Zone regular deer season.</p>
<p><i>Rest of State</i></p>	<p>Closed</p>

(2) *Early bear season*

<p><i>Bear range</i> <i>Northern</i></p>	<p><i>Open Season</i> WMUs 5A, 5C, 5F, 5G, 5H, 5J, 6C, 6F, 6H, 6J, and that part of WMU 6K east of Route 26: First Saturday after the second Monday in September through the Friday 15 days preceding the last Saturday in October.</p>
<p><i>Rest of State</i></p>	<p>Closed</p>

(3) *Bowhunting bear seasons:*

<p><i>Bear range</i> <i>Northern</i></p>	<p><i>Open Season</i> WMUs 5A, 5C, 5F, 5G, 5H, 5J, 6C, 6F, 6H, 6J, and that part of WMU 6K east of Route 26: September 27th through Friday immediately preceding the next to last Saturday in October.</p>
<p><i>Southern</i></p>	<p>WMUs 3A, 3C, 3H, 3J, 3K, 3M, 3P, 4F, 4G, 4H, 4N, 4O, 4P, 4R, 4S, 4W, 4X, 7M, 7R, 7S, 8H, 8J, 8M, 8N, 8P, 8R, 8S, 8T, 8W, 8X, 8Y, 9G, 9H, 9J, 9K, 9M, 9N, 9P, 9R, 9S, 9T, 9W, 9X and 9Y: The Saturday following the second Monday in October (Columbus Day) through the day before the opening of the Southern Zone regular deer season and the nine-day period immediately following the Southern Zone regular deer season.</p>
<p><i>Rest of State</i></p>	<p>Closed</p>

(i) *Any person participating in the bowhunting bear hunting season may not have in his or her possession, or be accompanied by a person who has in his or her possession, any hunting implement other than a legal longbow.*

(4) *Muzzleloading bear seasons:*

<i>Bear range</i>	<i>Open Season</i>
<i>Northern</i>	WMUs 5A, 5C, 5F, 5G, 5H, 5J, 6C, 6F, 6H, 6J, and that part of WMU 6K east of Route 26: The seven day period immediately preceding the next to the last Saturday in October.
<i>Southern</i>	WMUs 3A, 3C, 3H, 3J, 3K, 3M, 3P, 4F, 4G, 4H, 4N, 4O, 4P, 4R, 4S, 4W, 4X, 7M, 7R, 7S, 8H, 8J, 8M, 8N, 8P, 8R, 8S, 8T, 8W, 8X, 8Y, 9G, 9H, 9J, 9K, 9M, 9N, 9P, 9R, 9S, 9T, 9W, 9X and 9Y: The nine day period immediately following the Southern Zone regular deer season.
<i>Rest of State</i>	Closed

(i) Any person participating in the muzzleloading bear hunting season may not have in his or her possession, or be accompanied by a person who has in his or her possession, a firearm other than a muzzle-loading firearm which is lawful for taking big game.

Existing subdivision 6 NYCRR 1.31 (c) is amended as follows:

Paragraphs (9) and (10) are amended as follows:

(9) In the [Allegany and Catskill bear ranges] *Southern bear range*, it is unlawful for any person to shoot or take a bear from any group of bears.

(10) In the [Allegany and Catskill bear ranges] *Southern bear range*, it is unlawful for any person to shoot a bear in a den or take bear from a den.

**Text of proposed rule and any required statements and analyses may be obtained from:** Gordon R. Batcheller, Department of Environmental Conservation, 625 Broadway, Albany, NY 12233, (518) 402-8885, e-mail: grbatc@dec.state.ny.us

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

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

**Additional matter required by statute:** A programmatic Environmental Impact Statement has been prepared and is on file with the Department of Environmental Conservation.

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

#### **Regulatory Impact Statement**

##### 1. Statutory Authority:

Section 11-0303 of the Environmental Conservation Law directs the Department of Environmental Conservation to develop and carry out programs that will maintain desirable species in ecological balance, and to observe sound management practices. This directive is to be met with regard to ecological factors, the compatibility of production and harvest of wildlife with other land uses, the importance of wildlife for recreational purposes, public safety, and protection of private premises. Section 11-0903(8) provides the authority to set open seasons, open areas, bag limit, manner of taking, possession and disposition of bear and parts of bears, and the intentional and incidental feeding of bears. Section 11-0907 governs open seasons and bag limits for deer and bear.

##### 2. Legislative Objectives:

The legislative objective behind the statutory provisions listed above is to establish, or authorize the department to establish by regulation, certain basic wildlife management tools, including the setting of open areas, and restrictions on methods of take and possession. These tools are used by the department to maintain desirable wildlife species in ecological balance, while observing sound management practices.

##### 3. Needs and Benefits:

The department proposes a proactive strategy to reduce conflicts between black bears and people before those conflicts grow to unacceptable numbers. In the past, black bear hunting areas have been expanded when conflicts became numerous. This proposal seeks to slow or end the expansion of black bear numbers before these conditions become the norm. The proposal expands hunting in areas of Central and Western New York considered to have high potential for exceeding human tolerance for problems associated with bears occupying densely settled areas of New York.

Specifically, the department proposes an amendment to the department's black bear hunting regulations that would:

1. Open WMUs 7M, 7R, 7S, 8H, 8J, 8M, 8N, 8P, 8R, 8S, 9G and 9H to black bear hunting for the archery, regular and muzzleloading seasons. Season dates for these units will be the same as those in place for adjacent units already open to bear hunting, and

2. Open WMU 4N to black bear hunting for the archery, regular and muzzleloading seasons. The season dates for this unit will be the same as adjacent areas to the east (the firearms season for bear is the same as the firearms season for deer).

Black bears have been thriving in New York in recent years and have expanded their range considerably. This has led to a growing number of interactions between bears and people. Predictably in areas with high agricultural activity or human densities these interactions have been numerous, including some serious conflicts, including bears that have entered homes or cabins. Not only does this pose a threat to human safety and property, it also has required a higher commitment of department staff time and resources.

In 2001, the Division developed a Statewide Black Bear Management Plan. Two documents were released in the fall of 2003 which comprise a management plan using the Adaptive Impact Management (AIM) model. AIM uses public input to identify and prioritize the impacts caused by bears. A statewide mail survey of residents throughout the state was completed by the Human Dimensions Research Unit of Cornell University in 2002 to better define and more fully understand the importance of these impacts. This study found that while a majority enjoy having black bears in New York, about a third worry about the problems bears may cause (See: <http://www.dec.ny.gov/animals/7215.html>). The survey also found that about two-thirds of respondents approve of regulated hunting in general and about half supported the use of hunting as a means to address problems by reducing bear numbers.

A key component of the Black Bear Management Plan is the creation and use of Stakeholder Input Groups (SIGs) that are tasked to identify and prioritize bear impacts and to help department staff articulate black bear management objectives that would enhance positive impacts and lessen negative impacts. Since 2003, five SIGs have been convened and have consistently expressed interest in the state maintaining healthy bear populations and have encouraged education efforts to boost understanding and tolerance of bears. In areas where bears have a long-standing presence, with associated bear-human interactions and conflicts, SIGs have routinely supported the expansion of hunting as a means to control bear populations.

In the fall and winter of 2007-2008, the department held a series of about 30 public meetings, attended by approximately 750 people, throughout upstate New York to provide an overview of the natural history and current status of black bears, including recent range expansion, and to seek public input on future management. Much like the findings of the above noted survey and recommendations provided by SIGs, attendees at these meetings expressed interest in maintaining a healthy bear population; where bears have a noticeable presence, they asked for and supported management, including hunting, to control bear numbers and problems.

Bear hunting remains the only viable and cost-effective tool for controlling bear numbers on a landscape scale. Providing bear hunting opportunity in the proposed units is intended as a continuation of efforts to manage population growth and range expansion. In central and western New York, it is an important first step in an effort to slow or stop growth into the Lake Plains where agricultural activity and human population densities are high as is the probability of conflict between bears and human interests. In addition to addressing the bear population through hunting, the department remains committed to provide educational outreach to increase the public's awareness of bears and inform the public on techniques to avoid conflicts with bears. The recently produced "Living with New York Black Bears" DVD, recent public meetings, and information available on the department's website ([www.dec.ny.gov/animals/6960.html](http://www.dec.ny.gov/animals/6960.html)) are examples of this outreach.

A minor reorganization of the regulation is also proposed in recognition that the former "Catskill bear range" and "Allegany bear range" have blended into one conterminous bear range in New York's Southern Zone. In view of this, the bear ranges are renamed simply "Southern range" (combining the former Catskill and Allegany bear ranges) and "Northern range" (the former Adirondack bear range).

##### 4. Costs:

This change will not effect the costs for either the department or for hunters.

##### 5. Local Government Mandates:

This regulation does not impose any program, service, duty or responsibility upon any county, city, town, village, school district or fire district.

##### 6. Paperwork:

This amendment does not require any additional paperwork by any regulated entity.

##### 7. Duplication:

None.

##### 8. Alternatives:

Failure to implement actions to control the number and distribution of bears could result in further increase in bear nuisance and damage problems and consequently result in an increase in the number of destruc-

tion permits issued outside of the normal seasons. Therefore, the department does not consider a “no action” alternative to be viable.

#### 9. Federal Standards:

There are no federal standards associated or applicable to the proposed rule.

#### 10. Compliance Schedule:

Hunters will be required to comply with the new regulations beginning with the start of the archery deer and bear hunting seasons in the Southern Zone during the 2008-2009 license year, which begins October 1, 2008.

#### **Regulatory Flexibility Analysis**

The proposed rule making will increase the number of wildlife management units open to bear hunting in portions of New York’s Southern Zone. The Department of Environmental Conservation (department) has historically made regular revisions to its hunting regulations in New York. Based on the department’s experience in promulgating those revisions and the familiarity of the department’s regional personnel with the Southern Zone, the department has determined that this rule making will not have an adverse economic effect on small businesses or local governments.

Few, if any, small businesses directly participate in hunting activities. Such a business (e.g., professional hunting guides) will not suffer any substantial adverse impact as a result of this proposed rule making because it increases the number of wildlife management units open to bear hunting and could increase the number of participants or the frequency of participation in the bear hunting season.

The department has also determined that these amendments will not impose any reporting, record-keeping, or other compliance requirements on small businesses or local governments. All reporting or record-keeping requirements associated with black bear hunting are administered by the department.

Therefore, the department has concluded that a regulatory flexibility analysis is not required.

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

The proposed rule making will increase the number of wildlife management units open to bear hunting in the Southern Zone. The Department of Environmental Conservation (department) has historically made regular revisions to hunting regulations in an effort to maintain long-term black bear population viability while observing sound management practices, and improving hunter satisfaction. Based on the department’s experience in promulgating those revisions and the familiarity of the department’s regional personnel with the Southern Zone, the department has determined that this rule making will not impose an adverse economic impact on rural areas.

The proposed rule making will increase the number of wildlife management units open to bear hunting and could increase the number of participants or the frequency of participation in the bear hunting season. The proposed rule making is expected to reduce negative bear human interactions and to reduce the levels of bear nuisance activity, thereby reducing property damage in the Southern Zone. The proposed changes will continue management actions recommended by the public and enhance bear hunter satisfaction, thereby having a positive effect on rural areas.

The department has also determined that this rule will not impose any reporting, record-keeping, or other compliance requirements on public or private entities in rural areas. All reporting or record-keeping requirements associated with hunting are administered by the department.

Therefore, the department has concluded that a rural area flexibility analysis is not required.

#### **Job Impact Statement**

The proposed rule making will increase the number of wildlife management units open to bear hunting in New York’s Southern Zone. The Department of Environmental Conservation (department) has historically made regular revisions to hunting regulations in an effort to maintain long-term black bear population viability while observing sound management practices, and improving hunter satisfaction. Based on the department’s experience in promulgating those revisions and the familiarity of the department’s regional personnel with the Southern Zone, the department has determined that this rule making will not impose a substantial adverse impact on jobs and employment opportunities.

Few, if any, persons actually hunt as a means of employment. Such a person, for whom hunting is an income source (e.g., professional guides), will not suffer any substantial adverse impact as a result of this proposed rule making because it increases the number of wildlife management units open to bear hunting and could increase the number of participants or the frequency of participation in the bear hunting season. For this reason, the

department anticipates that this rule making will have no impact on jobs and employment opportunities.

Therefore, the department has concluded that a job impact statement is not required.

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## Department of Health

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### EMERGENCY RULE MAKING

#### **Payment for FQHC Psychotherapy and Offsite Services**

**I.D. No.** HLT-26-08-00014-E

**Filing No.** 567

**Filing date:** June 9, 2008

**Effective date:** June 9, 2008

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

**Action taken:** Amendment of section 86-4.9 of Title 10 NYCRR.

**Statutory authority:** Public Health Law, section 201.1(v)

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

**Specific reasons underlying the finding of necessity:** The amendment to 10 NYCRR 86-4.9 will permit Medicaid billing for individual psychotherapy services provided by certified social workers in Article 28 Federally Qualified Health Centers (FQHCs). In conjunction with this change, DOH is also amending regulations to prohibit Article 28 clinics from billing for group visits and to prohibit such services from being provided by part-time clinics.

Based upon the Department’s interpretation of 10 NYCRR 86-4.9(c), social work services have not been considered billable threshold visits in Article 28 clinic settings despite the fact that certified social workers have been an integral part of the mental health delivery system in community health centers. New federal statute and regulation require States to provide and pay for each FQHC’s baseline costs, which include costs which are reasonable and related to the cost of furnishing such services. Reimbursement for individual psychotherapy services provided by certified social workers in the FQHC setting is specifically mandated by federal law. Failure to comply with these mandates could lead to federal sanctions and the loss of federal dollars. Additionally, allowing Medicaid reimbursement for clinical social worker services is expected to increase access to needed mental health services.

**Subject:** Payment for FQHC psychotherapy and offsite services.

**Purpose:** To permit psychotherapy by certified social workers as a billable service under certain circumstances.

**Text of emergency rule:** Pursuant to the authority vested in the State Hospital Review and Planning Council, and subject to the approval of the Commissioner of Health by Section 2803(2)(a) of the Public Health Law, section 86-4.9 of Subpart 86-4 of Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York, is amended to be effective upon filing with the Secretary of State, to read as follows:

Section 86-4.9 is amended to read as follows:

86-4.9 Units of service. (a) The unit of service used to establish rates of payment shall be the threshold visit, except for dialysis, abortion, sterilization services and free-standing ambulatory surgery, for which rates of payment shall be established for each procedure. For methadone maintenance treatment services, the rate of payment shall be established on a fixed weekly basis per recipient.

(b) A threshold visit, including all part-time clinic visits, shall occur each time a patient crosses the threshold of a facility to receive medical care without regard to the number of services provided during that visit. Only one threshold visit per patient per day shall be allowable for reimbursement purposes, except for transfusion services to hemophiliacs, in which case each transfusion visit shall constitute an allowable threshold visit.

(c) Offsite services and group services, (except in relation to Federally Qualified Health Center (FQHC) clinics, as defined in subdivision (h) of this section), visits related to the provision of offsite services, visits for ordered ambulatory services, and patient visits solely for the purpose of the

following services shall not constitute threshold visits: pharmacy, nutrition, medical social services *with the exception of clinical social services in FQHC clinics as defined in subdivision (g) of this section*, respiratory therapy, recreation therapy. Offsite services are medical services provided by a facility's clinic staff at locations other than those operated by and under the licensure of the facility.

(d) A procedure shall include the total service, including the initial visit, preparatory visits, the actual procedure and follow-up visits related to the procedure. All visits related to a procedure, regardless of number, shall be part of one procedure and shall not be reported as a threshold visit.

(e) Rates for separate components of a procedure may be established when patients are unable to utilize all of the services covered by a procedure rate. No separate component rates shall be established unless the facility includes in its annual financial and statistical reports the statistical and cost apportionments necessary to determine the component rates.

(f) Ordered ambulatory services may be covered and reimbursed on a fee for service basis in accordance with the State medical fee schedule. Ordered ambulatory services are specific services provided to nonregistered clinic patients at the facility, upon the order and referral of a physician, physician's assistant, dentist or podiatrist who is not employed by or under contract with the clinic, to test, diagnose or treat the patient. Ordered ambulatory services include laboratory services, diagnostic radiology services, pharmacy services, ultrasound services, rehabilitation therapy, diagnostic services and psychological evaluation services.

(g) *For purposes of this section clinical social services are defined as individual psychotherapy services provided in a Federally Qualified Health Center, by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status by the New York State Education Department.*

(h) *Clinical group psychotherapy services provided in a Federally Qualified Health Center, are defined as services performed by a clinician qualified as in subdivision (g) of this section, or by a licensed psychiatrist or psychologist to groups of patients ranging in size from two to eight patients. Clinical group psychotherapy shall not include case management services. Reimbursement for these services shall be made on the basis of a FQHC group rate which will be calculated by the Department for this specific purpose, payable for each individual up to the limits set forth herein, using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS), and approved by the State Division of Budget. Psychotherapy, including clinical social services and clinical group psychotherapy services, may not exceed 15 percent of a clinic's total annual threshold visits.*

(i) *Federally Qualified Health Centers will be reimbursed for the provision of offsite primary care services to existing FQHC patients in need of professional services available at the FQHC, but, due to the individual's medical condition, is unable to receive the services on the premises of the center.*

(1) *FQHC offsite services must:*

(i) *consist of services normally rendered at the FQHC site.*

(ii) *be rendered to an FQHC patient with a pre-existing relationship with the FQHC (i.e., the patient was previously registered as a patient with the FQHC) in order to allow the FQHC to render continuous care when their patient is too ill to receive on-site services, and only to patients expected to recover and return to become an on-site patient again. Off-site services may not be billed for patients whose health status is expected to permanently preclude return to on-site status.*

(iii) *be rendered only for the duration of the limiting illness, with the intent that the patient return to regular treatment as an on-site patient as soon as their medical condition allows.*

(iv) *be an individual medical service rendered to an FQHC patient by a physician, physician assistant, midwife or nurse practitioner.*

(v) *not be rendered in a nursing facility or long term care facility, to any patient expected to remain a patient in that facility or at that level of care.*

(vi) *not be billed in conjunction with any other professional fee for that service, or on the same day as a threshold visit.*

(2) *Reimbursement for these services shall be made on the basis of an FQHC offsite professional rate, which will be calculated by the Department using elements of the Relative Based Relative Value System (RBRVS) promulgated by the Centers For Medicare And Medicaid Services (CMS) and approved by the State Division of Budget.*

**This notice is intended** to serve only as a notice of emergency adoption. This agency intends to adopt this emergency rule as a permanent rule and

will publish a notice of proposed rule making in the *State Register* at some future date. The emergency rule will expire September 6, 2008.

**Text of emergency rule and any required statements and analyses may be obtained from:** Katherine E. Ceroalo, Department of Health, Office of Regulatory Affairs, Corning Tower, Rm. 2438, Empire State Plaza, Albany, NY 12237-0097, (518) 473-7488, fax: (518) 473-2019, e-mail: regsqa@health.state.ny.us

#### **Regulatory Impact Statement**

Statutory Authority:

The authority for the promulgation of these regulations is contained in section 2803(2)(a) of the Public Health Law which authorizes the State Hospital Review and Planning Council to adopt and amend rules and regulations, subject to the approval of the Commissioner. Section 702 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 made changes to the Social Security Act affecting how prices are set for Federally Qualified Health Centers and rural health centers. Section 1902(a)(10) of the federal Social Security Act (42 USC 1396a(a)(10)) and 1905(a)(2) of the Social Security Act (42 USC 1396d(a)(2)) require the State to cover the services of Federally Qualified Health Centers. Additionally, section 1861(aa) of the Social Security Act (42 USC 1395x(aa)) defines the services that a Federally Qualified Health Center provides, including the services of a clinical social worker.

Legislative Objective:

The regulatory objective of this authority is to bring the State into compliance with Federal Law regarding payments to Federally Qualified Health Centers (FQHCs). Based on the Federal Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act (BIPA) of 2000 we will allow payments for group psychotherapy provided by social workers and limited off-site services at special rates developed for these services. Individual psychotherapy remains allowed at the threshold visit rate.

This amendment will allow individual psychotherapy by licensed clinical social workers (LCSWs) as a billable visit in FQHCs under the following circumstances:

Services are provided by a licensed clinical social worker or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status.

Psychotherapy services only will be permitted, not case management and related services.

Group psychotherapy as a clinical social service will be allowed in FQHCs in accordance with the following:

Services are provided to a group of patients by a licensed clinical social worker, or by a licensed master social worker who is working in a clinic under qualifying supervision in pursuit of licensed clinical social worker status or a licensed psychiatrist or psychologist.

Payment will be made on the basis of a FQHC group rate.

Payment will only be made for services that occur in FQHCs.

Payment for individual or group psychotherapy will not be allowed for services rendered off-site.

Both individual and group psychotherapy in FQHCs is limited to a total of 15 percent of all billings.

Off-site primary care services by FQHCs will be reimbursable under the following provisions:

Individuals given care must be existing FQHC patients who are temporarily unable to receive services on-site due to their medical condition but are expected to return to the FQHC as an on-site patient.

Services must be rendered by a physician, physician assistant, midwife or nurse practitioner and reimbursed at the FQHC offsite professional rate.

Services are not billable with any other professional fee for that service or on the same day as a threshold visit.

Needs and Benefits:

Recent Federal changes related to Medicaid reimbursement for FQHCs mandate that group psychotherapy services provided by a social worker and off-site primary care services be considered a billable service.

This approach will ensure access to social work services in the most underserved areas and increase consistency with the policies of other state agencies.

Costs:

Costs for the Implementation of, and Continuing Compliance with this Regulation to Regulated Entity:

We estimate this change will increase Medicaid costs by about 7.4 million dollars gross, annually. Of this amount, about 1.2 million dollars is attributable to allowing FQHCs to bill for limited off-site visits. 6.2 million dollars is attributable to allowing FQHCs to bill for group therapy services. These changes are being made in order to comply with Federal requirements.

Pricing & Volume Data	Cost Estimates		
	Downstate	Upstate	Statewide Average
Offsite Visits			
Subsequent Hospital Care	\$62.73	\$55.19	\$58.96
Psychotherapy Services			
Group Psychotherapy	\$34.86	\$30.81	\$32.84
2004 FQHC Visit Volume	1,894,864		
Volume Increase Assumptions			
Group Therapy Increase = 10%			
2004 FQHC Volume.			
Off-site Visit Increase = 1%			
Increase Over 2004 FQHC Volume			
Cost to the Department of Health:			
Total			\$7,339,945

This represents a permanent filing of regulations already in effect. There will be no additional costs to the Department.

**Local Government Mandates:**  
This amendment will not impose any program service, duty or responsibility upon any county, city, town, village school district, fire district or other special district.

**Paperwork:**  
This amendment will increase the paperwork for providers only to the extent that providers will bill for social work services.

**Duplication:**  
This regulation does not duplicate, overlap or conflict with any other state or federal law or regulations.

**Alternatives:**  
Recent changes to federal law make it clear that states must reimburse FQHCs under Medicaid for off-site primary care services and the services of certified social workers for both individual and group psychotherapy. In light of this federal requirement, no alternatives were considered.

**Federal Standards:**  
This amendment does not exceed any minimum standards of the federal government for the same or similar subject areas.

**Compliance Schedule:**  
The proposed amendment will become effective upon filing with the Secretary of State.

**Regulatory Flexibility Analysis**

**Effect on Small Businesses and Local Governments:**  
No impact on small businesses or local governments is expected.

**Compliance Requirements:**  
This amendment does not impose new reporting, record keeping or other compliance requirements on small businesses or local governments.

**Professional Services:**  
No new professional services are required as a result of this proposed action. These changes will bring our regulations into compliance with the State Education Department’s (SED) new standards for social worker licensure.

**Compliance Costs:**  
This amendment does not impose new reporting, recordkeeping or other compliance requirements on small businesses or local governments.

**Economic & Technological Feasibility:**  
DOH staff has had conversations with the National Association of Social Workers (NASW), UCP, and CHCANYS concerning the interpretation of the current regulation as well as proposed changes to the existing regulation. Although some systems changes will be necessary to ensure that payment is made only to FQHCs, the proposed regulation will not change the way providers bill for services, and thus there should be no concern about technical difficulties associated with compliance.

**Minimizing Adverse Impact:**  
There is no adverse impact.

**Opportunity for Small Business Participation:**  
Participation is open to any FQHC that is certified under Article 28 of the Public Health Law, regardless of size, to provide individual psychotherapy services by certified social workers. Any FQHC, regardless of size, may participate in providing off-site primary care services as well as on-site group psychotherapy services by certified social workers, a licensed psychiatrist or psychologist.

**Rural Area Flexibility Analysis**

**Types and Estimated Number of Rural Areas:**  
This rule will apply to all Article 28 clinic sites in New York that have been designated by the Centers for Medicare and Medicaid Services (CMS) as Federally Qualified Health Centers. These businesses are located in rural, as well as suburban and metropolitan areas of the State.

**Reporting, Recordkeeping and Other Compliance Requirements and Professional Services:**

No new reporting, recordkeeping or other compliance requirements and professional are needed in a rural area to comply with the proposed rule.

**Compliance Costs:**  
There are no direct costs associated with compliance.

**Minimizing Adverse Impact:**  
There is no adverse impact.

**Opportunity for Rural Area Participation:**  
The Department has had conversations with the National Association of Social Workers Association (NASW), UCP, and CHCANYS to discuss Medicaid reimbursement for social work services and the impact of this new rule on their constituents. These groups and associations represent social workers and clinic providers from across the State, including rural areas.

**Job Impact Statement**

**Nature of Impact:**  
It is not anticipated that there will be any impact of this rule on jobs or employment opportunities.

**Categories and Numbers Affected:**  
There are almost 1000 Article 28 clinics of which approximately 58 are FQHCs, FQHC look-alikes, and rural health clinics.

**Regions of Adverse Impact:**  
This rule will affect all regions within the State and businesses out of New York State that are enrolled in the Medicaid Program as an Article 28 clinic and that has been designated by the Centers for Medicare and Medicaid Services (CMS) as a Federally Qualified Health Center.

**Minimizing Adverse Impact:**  
The Department is required by federal rules to reimburse FQHCs for the provision of primary care services, including clinical social work services, based upon the Center’s reasonable costs for delivering covered services.

**Self-Employment Opportunities:**  
The rule is expected to have no impact on self-employment opportunities since the change affects only services provided in a clinic setting.

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## Division of Housing and Community Renewal

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### PROPOSED RULE MAKING HEARING(S) SCHEDULED

**Rent Stabilization Code (RSC) and Emergency Tenant Protections Regulations (TPR)**

**I.D. No.** HCR-26-08-00015-P

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

**Proposed action:** Amendment of Parts 2504 and 2524 of Title 9 NYCRR.

**Statutory authority:** Rent Stabilization Law, section 26-511(b); and Emergency Tenant Protection Act, section 10

**Subject:** Rent Stabilization Code (RSC) and Emergency Tenant Protection Regulations (TPR).

**Purpose:** To clarify demolition standards and to revise the stipend methodology.

**Public hearing(s) will be held at:** 10:00 a.m. on Aug. 12, 2008 at 22 Reade St., 1st Fl., New York, NY; 10:00 a.m. on Aug. 12, 2008 at 1550 Franklin Ave., Mineola, NY; and 10:00 a.m. on Aug. 12, 2008 at 75 S. Broadway, White Plains, NY.

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

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

**Text of proposed rule:** The Rent Stabilization Code, as amended and adopted pursuant to the powers granted to the Division of Housing and Community Renewal by section 26-511(b) of the Administrative Code of the City of New York, as recodified by Laws of 1985, Chap. 907, section 1 (formerly section YY51-6.0[b]), as amended by Laws of 1985, Chap. 888, section 2), and section 26-518(a) of such Code, as recodified by Laws of 1985, Chap. 907, section 1 (formerly section YY51-6.1[a], as added by Laws of 1985, Chap. 888, section 8), is amended to read as follows:

#### PART 2524 EVICTIONS

##### Section 1

Subparagraph (i) of paragraph (2) of subdivision (a) of Section 2524.5 of this Part is amended to read as follows:

(i) The owner seeks to demolish the building. Until the owner has submitted proof of [it's] its financial ability to complete such undertaking to the DHCR, and plans for the undertaking have been approved by the appropriate City agency, an order approving such application shall not be issued. *For purposes of this subparagraph, demolition shall mean, at a minimum, the complete gutting of all interior space in the building from the ground floor and above and including the removal of the building's roofs and of all internal building systems. However, a demolition under this subparagraph shall not require the removal of the outer walls and structural supports of a building.*

##### Section 2

Clause (a) of subparagraph (ii) of paragraph (2) of subdivision (a) of Section 2524.5 of this Part is amended to read as follows:

(a) The DHCR shall require an owner to pay all reasonable moving expenses and afford the tenant a reasonable period of time within which to vacate the housing accommodation. If the tenant vacates the housing accommodation on or before the date provided in the DHCR's final order, such tenant shall be entitled to receive all stipend benefits pursuant to clause (b) of this subparagraph. In addition, if the tenant vacates the housing accommodation prior to the required vacate date, the owner may also pay a stipend to the tenant that is larger than the stipend designated in [a demolition stipend chart to be issued pursuant to an operational bulletin authorized by section 2527.11 of this Title] *subclause (3) of clause (b) of this subparagraph*. However, at no time shall an owner be required to pay a stipend in excess of the stipend set forth in [such schedule] *subclause (3) of clause (b) of this subparagraph*. If the tenant does not vacate the housing accommodation on or before the required vacate date, the stipend shall be reduced by one sixth of the total stipend for each month the tenant remains in occupancy after such vacate date.

##### Section 3

Subclause (3) of clause (b) of subparagraph (ii) of paragraph (2) of subdivision (a) of Section 2524.5 of this Part is amended to read as follows:

(3) pay the tenant a stipend which shall be the difference between the tenant's current rent and [an amount calculated using the demolition stipend chart, at a set sum per room per month multiplied by the actual number of rooms in the tenant's current housing accommodation, but no less than three rooms. This difference is to be multiplied by 72 months] *the mean per room rent registered pursuant to Part 2528 of this Code for housing accommodations in the zip code in which the tenant currently resides, plus twenty percent, with said difference multiplied by 72 months.*

The Emergency Tenant Protection Regulations, as promulgated and adopted by the Division of Housing and Community Renewal pursuant to the Emergency Tenant Protection Act of Nineteen Seventy-four, section 4 of Chap. 576, Laws of 1974, section 10(a), as amended, are amended to read as follows:

#### PART 2504 EVICTIONS

##### Section 1

Paragraph (1) of subdivision (f) of Section 2504.4 of this Part is amended to read as follows:

(1) The owner seeks to demolish the building. Until the owner has submitted proof of its financial ability to complete such undertaking to the division, and plans for the undertaking have been approved by the appropriate governmental agency, an order approving such application shall not be issued. *For purposes of this paragraph, demolition shall mean, at a minimum, the complete gutting of all interior space in the building from the ground floor and above and including the removal of the building's roofs and of all internal building systems. However, a demolition under this subparagraph shall not require the removal of the outer walls and structural supports of a building.*

##### Section 2

Subparagraph (i) of paragraph (2) of subdivision (f) of Section 2504.4 of this Part is amended to read as follows:

(i) The division shall require an owner to pay all reasonable moving expenses and afford the tenant a reasonable period of time within which to vacate the housing accommodation. If the tenant vacates the housing accommodation on or before the date provided in the division's final order, such tenant shall be entitled to receive all stipend benefits pursuant to subparagraph (ii) of this paragraph. In addition, if the tenant vacates the housing accommodation prior to the required vacate date, the owner may also pay a stipend to the tenant that is larger than the stipend designated in [a demolition stipend chart to be issued pursuant to an operational bulletin authorized by section 2507.11 of this Title] *clause (c) of subparagraph (ii) of paragraph (2) of this subdivision*. However, at no time shall an owner be required to pay a stipend in excess of the stipend set forth in [such schedule] *clause (c) of subparagraph (ii) of paragraph (2) of this subdivision*. If the tenant does not vacate the housing accommodation on or before the required vacate date, the stipend shall be reduced by one sixth of the total stipend for each month the tenant remains in occupancy after such vacate date.

##### Section 3

Clause (c) of subparagraph (ii) of paragraph (2) of subdivision (f) of Section 2504.4 of this Part is amended to read as follows:

(c) pay the tenant a stipend which shall be the difference between the tenant's current rent and [an amount calculated using the demolition stipend chart, at a set sum per room per month multiplied by the actual number of rooms in the tenant's current housing accommodation, but no less than three rooms. This difference is to be multiplied by 72 months] *the mean per room rent registered pursuant to Part 2509 of these regulations for housing accommodations in the zip code wherein the tenant currently resides, plus twenty percent, with said difference multiplied by 72 months.*

**Text of proposed rule and any required statements and analyses may be obtained from:** Maurice Jamison, Special Assistant to the Deputy Commissioner, Division of Housing and Community Renewal, Office of Rent Administration, 92-31 Union Hall St., Jamaica, NY 11433, (718) 262-4816, e-mail: mjamison@dhcr.state.ny.us

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

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

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

#### Regulatory Impact Statement

##### 1. STATUTORY AUTHORITY

Section 26-511(b) of the Administrative Code of the City of New York, as recodified by the Laws of 1985, Chap. 907, section 1 (formerly section YY51-6.0[b]), as amended by Laws of 1985, Chap. 888, section 2) and section 26-518(a) of such Code, as recodified by the Laws of 1985, Chap. 907, section 1 (formerly section YY51-6.1[a], as added by the Laws of 1985, Chap. 888, section 8), provides authority to the Division of Housing and Community Renewal (DHCR) to amend Section 2524.5 of the Rent Stabilization Code (RSC).

The Emergency Tenant Protection Act (ETPA), Laws of 1974, Chap. 576, section 10a, provides authority to DHCR to amend the Tenant Protection Regulations (TPR).

##### 2. LEGISLATIVE OBJECTIVES

The proposed rule making is necessary to: (1) clarify the standards used to determine whether a proposed project constitutes a "demolition" within the meaning of RSC Section 2524.5(a)(2) and TPR Section 2504.4(f)(1); and (2) revise the methodology for the calculation of the stipend to be paid to a tenant evicted pursuant to RSC Section 2524.5(a)(2) and TPR Section 2504.4(f)(2) so that the amount of the stipend more accurately reflects the additional rent expenses that will be incurred by such tenant.

##### 3. NEEDS AND BENEFITS

Section 26-511c(9)(a) of the Administrative Code of the City of New York, RSC Section 2524.5 and TPR Section 2504.4 vest exclusive juris-

diction with DHCR over an application by an owner who wishes to evict rent stabilized tenants based on the owner's stated intention to "demolish" the building. DHCR, as well as its predecessor agency, the Conciliation and Appeals Board, have consistently ruled that a demolition may be something less than a razing of a building to the ground. In numerous administrative decisions and orders, and in its stated policy, the agency has granted demolition applications where the outer walls and structural supports of a building remain intact, with only the entire interior being gutted, including the removal of all internal building systems and the removal of the building's roof. This long-standing standard that DHCR currently utilizes has also been well established by case law precedent.

However, neither the statute nor any provision of the RSC or TPR includes a definition of the term, "demolition". The absence of a codified demolition definition or standard was brought to the forefront in recent litigation before the New York State Supreme Court (*Peckham v. Calogero*). In that matter, the Supreme Court stated:

[T]here is no statutory definition of the term in the RSC, and apparently no printed and circulated definition offered by the DHCR . . . While the legislature may have intended the agency involved in overseeing and administering the provisions of the Rent Stabilization and Rent Control Laws to determine what constitutes a demolition, the DHCR has not set forth sufficient criteria to inform parties involved or the courts. Therefore, this proceeding must be remanded to the DHCR so that it may set forth a more precise explanation of the term and its applicability to the facts.

In addition to the *Peckham* case, there are 45 other "demolition" applications pending before DHCR.

In order to comply with the *Peckham* court's demand for a "bright line" codification of the agency's demolition standards, to prevent incorrect interpretations of the agency standard, and to eliminate any uncertainty among the parties as to the agency's standard, DHCR is proposing these amendments which mirror the decades-long policy of the agency. To adopt a standard which materially differs from the long-standing agency policy and case law precedent would be unfair as it would result in significant financial losses to owners who initiated their demolition projects and filed DHCR applications in total reliance upon said long-standing agency policy.

It should be noted that even if no agency policy existed to which the owners had relied, and the agency had the freedom to create a brand new demolition standard, it would not adopt a standard that requires an owner to raze the building to the ground. Firstly, such an absolute standard would automatically disqualify owners of landmarked buildings from obtaining this statutory remedy. Secondly, requiring an owner to knock down the entire exterior shell of a building, in areas as densely populated as New York City and its neighboring counties, could create extremely unsafe conditions to pedestrians and the occupants of neighboring buildings, and could even cause significant structural damage to neighboring and/or attached edifices. For these reasons, the agency has rejected the "razing" standard as impractical and unnecessary.

The purpose of the stipend required by RSC Section 2524.5(a)(2) and TPR Section 2504.4(f)(2), which is to be paid to a tenant who is evicted under the authority of one of these sections and who has not been relocated by the owner to a suitable housing accommodation in close proximity to the building to be demolished, is intended to provide assistance to tenants who will be required to find new housing at rents that will, in virtually all circumstances, exceed the rents they are paying for their current apartments. Under the present methodology, the amount of the demolition stipends is based on city-wide data for apartments available for rental and is intended to compensate the affected tenants for increased rent payments for a seven-year period (*i.e.*, the amount of the stipend is equal to the difference between the tenant's current rent and the city-wide mean asking rent for a similarly-sized apartment, as reflected in the data of the Housing Vacancy Survey (HVS), with the latter figure intended to serve as an estimate of the increased rent the tenant will have to pay; the difference in rent is then multiplied by 72 months).

Since the HVS mean asking rent is a city-wide figure, it does not take into account the significant differences in rental rates among the various neighborhoods within the five boroughs of New York City. For example, according to data from the 2005 HVS, the mean asking rents for apartments in each of the boroughs of New York City (excluding Staten Island, for which available sample data was statistically insufficient) varies significantly from a high of \$1914 for Manhattan to a low \$949 for the Bronx, with Queens and Brooklyn falling in between these two extremes at \$1059 and \$998, respectively. (This data cannot be further broken down by apartment size because the even smaller sample size will not generate a statistically reliable result.) Similarly, the counties of Westchester, Rock-

land and Nassau calculate stipends by using county-wide data. Because the current agency methodology does not take into account the often wide disparity in rents from neighborhood to neighborhood within New York City or within each of the counties of Westchester, Rockland and Nassau, the resulting stipends awarded to tenants are in most instances quite inadequate to enable tenants to land on their feet and find another apartment in their localities. Accordingly, in the interests of fairness and justice, and to prevent the displacement of tenants from their neighborhoods, the current stipend calculation methodology must be changed to be based on zip code data, rather than the current city-wide or County-wide average in order to provide a more equitable form of relief to tenants who are evicted.

The available source that provides the most reliable neighborhood-level data on apartment rentals, which can be broken down by apartment size, is DHCR's rent registration database, which is updated annually, as opposed to every three years, as is the case with the HVS. Further, since the rent registration database, for the most part, includes rental information for occupied apartments, an upward adjustment by 20% (the statutory vacancy increase for rent stabilized apartments) of the rent amount obtained from the rent registration data base is required because the tenant who is being evicted will obviously be moving into an apartment that has been vacated by the prior tenant.

#### 4. COSTS

a. The regulated parties are residential tenants and the owners of the rent stabilized buildings in which such tenants reside.

Neither tenants nor owners are expected to experience any undue burdensome increase in costs associated with implementing these regulations. The revised stipend calculation methodology is intended and will result in a modest increase in stipend amounts paid by owners to tenants who are evicted due to the agency's approval of the owner's demolition applications.

b. DHCR costs are expected to be negligible. Otherwise, no additional costs are expected to be incurred by State or local governments as a result of adopting the proposed amendments.

c. Existing laws, regulations, agency policies and procedures form the basis upon which the above analysis is based.

#### 5. LOCAL GOVERNMENT MANDATES

The proposed rule making will not impose any new program, service, duty, or responsibility upon any level of local government.

#### 6. PAPERWORK

It is anticipated that the proposed amendments will not result in any increase in paperwork.

#### 7. DUPLICATION

The proposed amendments do not duplicate any known State or Federal requirements.

#### 8. ALTERNATIVES

The proposed amendments clarify the definitional parameters of a demolition not yet reflected in the regulations and provide for a more effective and workable stipend calculation methodology. Additionally, the proposed amendments preserve the housing stock, serve the interests of equal treatment, equity, and do not violate due process rights. As indicated and discussed in the "NEEDS AND BENEFITS" section, absent these proposed modifications, there are no other significant viable alternatives.

#### 9. FEDERAL STANDARDS

The proposed amendments do not exceed any known minimum Federal standards.

#### 10. COMPLIANCE SCHEDULE

It is not anticipated that regulated parties will require any significant additional time to comply with the proposed rules. If the parties need to amend or supplement their submissions in pending administrative proceedings before DHCR based on these regulations, applications may be made in those administrative proceedings. Should the DHCR determine that delayed implementation is appropriate, section 2527.11 of the RSC and section 2507.11 of the TPR authorize the agency to take such action.

#### **Regulatory Flexibility Analysis**

##### 1. EFFECT OF RULE

The Rent Stabilization Code (RSC) and the Emergency Tenant Protection Regulations (TPR) apply only to rent stabilized housing units in New York City and in those communities in Westchester, Rockland and Nassau Counties. The class of small businesses affected by these proposed amendments would be limited to small building owners, those who own limited numbers of rent stabilized units. The amended regulations are expected to have no burdensome impact on such small businesses.

These amendments to the RSC and TPR, which apply exclusively in New York City and in the aforementioned communities in Westchester,

Rockland and Nassau Counties, are expected to have no impact on the local governments thereof.

## 2. COMPLIANCE REQUIREMENTS

The Emergency Tenant Protection Act (ETPA) and the Rent Stabilization Law (RSL) both contain a provision which permits owners to apply to the Division of Housing and Community Renewal (DHCR) for approval to refuse to renew a tenant's lease and to commence a court proceeding to recover possession based on the demolition of the building. To support a demolition application, an owner must submit proof to DHCR of its financial ability to complete such an undertaking, and that plans for the undertaking have been approved by the appropriate governmental agency. It is expected that existing forms will be satisfactory. However, in any event, existing forms can be updated and amended where necessary.

The proposed amendments do not otherwise require regulated parties to perform any additional recordkeeping, reporting, or any other acts. There are no new compliance requirements placed on local governments.

## 3. PROFESSIONAL SERVICES

The proposed amendments do not require small businesses to obtain any new or additional professional services.

## 4. COMPLIANCE COSTS

There is no indication that this action will impose any significant costs upon small businesses or upon local governments. It is anticipated that stipend amounts, which are paid by owners to tenants who are evicted based on a building demolition, will increase modestly.

## 5. ECONOMIC AND TECHNOLOGICAL FEASIBILITY

Compliance is not anticipated to require any unusual new or burdensome technological applications.

## 6. MINIMIZING ADVERSE IMPACT

These proposed amendments do not impair the rights of small business owners, and therefore, have no adverse economic impact on such parties or the local governments. Consequently, it was not necessary to consider the approaches suggested in SAPA section 202-b(1).

## 7. SMALL BUSINESS AND LOCAL GOVERNMENT PARTICIPATION

In order to comply with a judicial directive of the Supreme Court of the State of New York, DHCR is proposing a more explanatory regulatory standard for demolitions, to wit: the gutting of the entire interior of the building, including the removal of all internal building systems and the removal of the building's roof. This standard has been the long-standing policy of the DHCR and has sanctioned by the courts.

There are currently 45 demolition applications pending with DHCR. Since this proposed standard merely codifies a long-standing agency policy, it is anticipated that the proposed rule's impact on small business and local government will be negligible.

In addition, a Regulatory Agenda has been placed on DHCR's website, reflecting these proposed rules, thereby providing all interested parties with an opportunity to comment. All issues raised by concerned parties will be carefully reviewed and considered by DHCR.

Finally, prior to the final adoption of any permanent rules, a public hearing will be held during which all interested parties will have an opportunity to comment. Comments will be reviewed for possible inclusion where appropriate.

### **Rural Area Flexibility Analysis**

The Rent Stabilization Code applies exclusively to New York City, and therefore, the proposed rules will not impose any reporting, recordkeeping, or other compliance requirements on public or private entities located in any rural area pursuant to Subdivision 10 of SAPA Section 102.

### **Job Impact Statement**

It is apparent from the text of the rule that there will be no adverse impacts on jobs and employment opportunities.

# Insurance Department

## NOTICE OF ADOPTION

### Market Stabilization Mechanisms for Individual and Small Group Market

**I.D. No.** INS-41-07-00005-A

**Filing No.** 568

**Filing date:** June 6, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of sections 361.5 and 361.7(a), renumbering of sections 361.6-361.7 to sections 361.7-361.8 and addition of new section 361.6 to Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201, 301, 1109, 3233; and L. 1992, ch. 501; L. 1995, ch. 504

**Subject:** Market stabilization mechanisms for individual and small group health insurance market.

**Purpose:** To create a new market stabilization process in the individual and small group market, to share among plans substantive cost variations attributable to high cost medical claims.

**Text of final rule:** The title of Section 361.5 is amended to read as follows:

Section 361.5 Pooling of variations in costs attributable to variations in specified medical conditions (SMC) beginning in 1999 through 2006.

Section 361.5 is hereby amended to add a new subdivision (k) to read as follows:

(k) Reporting requirements, payments to the pools, or collections from the pools under this section shall not be required in 2005 or 2006.

Sections 361.6 and 361.7 are hereby renumbered 361.7 and 361.8 and a new section 361.6 is added to read as follows:

361.6 Pooling of variations of costs attributable to high cost claims beginning in 2006 for individual and small group policies, other than Medicare supplement and Healthy New York policies.

(a) In each pool area a risk adjustment pool is established in connection with individual and small group health insurance policies, other than Medicare supplement insurance policies and Healthy New York health insurance policies. Each pool shall operate independently; that is, all calculations and payments described below are made for each pool independently of any other pool.

(b) The annual funding amount for all pool areas combined is as follows:

(1) \$80,000,000 for 2007;

(2) \$120,000,000 for 2008; and

(3) \$160,000,000 for 2009 and each calendar year thereafter.

(c) The annual funding amount for each pool area is in proportion to the annualized premiums in that pool area. For 2007 and each calendar year thereafter, each pool participant shall provide to the superintendent annualized premium information on or before February 28. The superintendent shall advise carriers of the funding amount for each pool area within sixty days of receipt of annualized premium information from all carriers.

(d)(1) Each carrier's share of the total funding payable to or from the pools shall be determined based on the carrier's high cost claims in its areas of operation.

(2) In order to implement the phase in of the new specified medical condition pooling process, on or before November 10, 2006 each carrier shall report to the superintendent its annualized premium amount as of December 31, 2005 and its cumulative calendar year claims paid in 2005 for individual standardized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, using the form in subdivision (h) of this section for each pool area. The superintendent will provide carriers with an estimate of potential pool receivables or liabilities using this 2005 data for advisory purposes only.

(3) Each following year, beginning in 2007, on or before February 28, each carrier shall report to the superintendent its annualized premium amount as of December 31 of the preceding year and its cumulative calendar year claims paid in the preceding year for individual standard-

ized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, using the form in subdivision (h) of this section for each pool area. In 2007, the superintendent provided carriers with a second estimate of potential pool receivables or liabilities using 2006 data, for advisory purposes. Payments to the pools, or collections from the pools, shall be required beginning in 2008 and shall be based upon the data from the preceding calendar year.

(4) Cumulative calendar year claims paid shall include the total of all claim payments on behalf of an insured individual from January 1 through December 31 of the preceding year, regardless of when the services were provided.

(5) Cumulative calendar year claims paid shall include payments for hospital and medical services, prescription drug payments, capitation payments, and regional covered lives assessments paid pursuant to section 2807-t of the Public Health Law or percentage surcharges paid pursuant to section 2807-j or section 2807-s of the Public Health Law. Carriers that include the covered lives assessments shall convert the family covered lives assessment into a per member assessment component in order to be included with claims expenses attributable to any one member.

(6) Cumulative calendar year claims paid shall not include amounts paid in satisfaction of the percentage surcharge requirement set forth in section 2807-j(2)(b)(i)(B) of the Public Health Law or interest paid out by a carrier pursuant to section 3224-a(c) of the Insurance Law.

(7) Each carrier's submission shall be signed by an officer of the carrier certifying that the information is accurate.

(8) If a carrier makes a submission after February 28 and the carrier is a pool payer, the carrier's payment into the pool will be increased by one percent interest per month. If a carrier makes a submission after February 28 and the carrier is a pool receiver, the carrier's distribution will be reduced by one percent per month.

(e) The superintendent shall calculate each carrier's share of the total funding payable to or from the pools pursuant to the example in subdivision (i) of this section for each pool area as follows:

(1) Identify the total claims paid by each carrier for the following types of policies: individual standardized direct payment health maintenance organization policies, individual standardized direct payment point of service policies, all other individual health insurance policies, and small group health insurance policies, other than Medicare supplement and Healthy New York insurance policies.

(2) Identify the total claims paid in excess of \$20,000 for each insured by type of policy.

(3) For each carrier for each type of policy, divide the claims paid in excess of \$20,000 by the total claims paid (the amount specified in paragraph (2) of this subdivision divided by the amount specified in paragraph (1) of this subdivision) to determine the high cost claim ratio.

(4) Calculate the average high cost claim ratio for all carriers for all types of policies combined and multiply that ratio by the total claims paid for each carrier for each type of policy (a carrier's amount specified in paragraph (1) of this subdivision multiplied by the average high cost claim amount specified in paragraph (3) of this subdivision.)

(5) Subtract the amount calculated in paragraph (4) of this subdivision from the amount in paragraph (2) of this subdivision for each carrier for each type of policy to determine the adjustment needed to equalize high cost claims and determine if the carrier is a net contributor or receiver.

(6) Sum the net contributions of all carriers who are net contributors in the pool area to determine the total net contribution.

(7) Divide the pool area funding amount by the total of paragraph (6) of this subdivision and multiply by the amount identified for each carrier for each type of policy in paragraph (5) of this subdivision to determine the carrier's net pool contribution or distribution.

(f) Billings will be done by the superintendent beginning in 2008 within thirty days of receipt of submissions from all carriers, and payments will be due from carriers within five business days from the date billed. Payments made after the due date shall include interest at a rate of one percent per month. Subsequent to the billing date, but within the calendar year, carrier data that formed the basis of the billing will be audited. In the event audits necessitate post-billing adjustments, the adjustments will be charged or credited in the next year's billing or distribution. Additional payments due from any carrier whose data errors caused it to underpay, or

refunds due back from any carrier whose data errors caused it to be overpaid, shall include a one percent interest charge per month from the original due date or payment date.

(g) A carrier shall, with respect to distributions from the pools attributable to each type of policy, as determined in paragraph (7) of subdivision (e) of this section, without reduction for contributions owed on other types of policies:

(1) refund the distributions directly to insureds based upon the type of policy that caused the payments to be received without consideration of minimum loss ratio provisions; or

(2) submit a detailed plan to the superintendent for approval:

(i) demonstrating how the distribution will be applied to reduce future premium rates for the type of policy whose insureds caused the payments to be received, or

(ii) providing a detailed explanation as to how the distribution was considered in the development of premium rates for that year.

(h) Claim Submission Form.

Claims Paid From January 1 – December 31, ( )

Carrier: \_\_\_\_\_

Pool Area: \_\_\_\_\_

Total annualized premium for individual standardized direct payment health maintenance organization (HMO) policies, individual standardized direct payment point of service (POS) policies, other individual health insurance policies, and small group policies: \_\_\_\_\_

Cumulative	Direct	Direct	Direct	Small	Total
Total claims	Payment	Payment	Payment	Group	
Paid Above	HMO	POS	Other		
Listed					
Amounts					
(Attachment					
Point)					
ZERO					
\$ 10,000					
\$ 15,000					
\$ 20,000					
\$ 25,000					
\$ 30,000					
\$ 35,000					
\$ 40,000					
\$ 45,000					
\$ 50,000					
\$ 60,000					
\$ 70,000					
\$ 80,000					
\$ 90,000					
\$100,000					

Instructions:

\* Do not include Medicare Supplement Policies or Healthy New York Policies.

\*\* For each insured determine the cumulative claims paid from January 1 through December 31 and report the total claims paid for all insureds for each type of policy listed above.

\*\*\*At each dollar level (Attachment Point), report all claims paid over that attachment point level amount from January 1 through December 31 for any insured. Cumulative total claims paid above the ZERO attachment point level would equal the total claims paid by the carrier for all insureds for the period.

(i) Chart for calculation of pool amounts.

	1	2	3	4	5	6
Albany Region	Total	Claims Paid	High Cost	Claims Paid	Adjustment	Pool Amount
	Claims	in Excess of	Claim Ratio	Multiplied by	to Equalize	Owed or
	Paid	\$20,000	(Column 2	Average	High Cost	Receivable
			Divided by	High Cost	Claims	(Predetermined
			Column 1)	Claim Ratio	(Column 2	Total Pool
			(Column 1	Column 1	Minus	Amount
			Column 3	Multiplied by	Column 4)	Divided by
			Average)	Column 3	Average)	Column 5 Total
						Net
						Contributions
						Multiplied by
						Column 5)

Carrier A  
 Dir Pay HMO  
 Dir Pay POS  
 Dir Pay Other  
 Small Group  
 Carrier A  
 Net  
 Contribution or  
 Distribution  
 Carrier B  
 Dir Pay HMO  
 Dir Pay POS  
 Dir Pay Other  
 Small Group  
 Carrier B  
 Net  
 Contribution or  
 Distribution  
 Total Net  
 Contributions  
 All Net  
 Contributions  
 Total Net  
 Distributions  
 All Net  
 Receivers

Section 361.6 is renumbered to be 361.7 and the opening paragraph of subdivision (a) is amended to read as follows:

361.7(a) The pools shall be administered *either directly* by the superintendent, *or in conjunction with a firm*, performing at least the following functions:

**Final rule as compared with last published rule:** Nonsubstantive changes were made in section 361.6(c), (d)(3), (8).

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

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

Non-substantive changes were made to sections 361.6(c), 361.6(d)(3), and 361.6(d)(8) of the regulation. These changes do not require revision of the Regulatory Impact Statement, Regulatory Flexibility Analysis for Small Businesses and Local Government, Rural Area Flexibility Analysis, and Job Impact Statement.

The non-substantive changes made in sections 361.6(c), 361.6(d)(3), and 361.6(d)(8) of the regulation changed the date for health plans to submit to the Department annualized premium amount and cumulative calendar year claims paid. The submission date was changed from January 31 to February 28. The Department changed this date in response to comments received from an interested party representing health plans. The party indicated that the January 31st date could be difficult for some health plans to meet. In addition, the party stated that some health plans may not be able to accurately calculate claims data by January 31 because claims from October, November, and December may not have even been submitted yet by providers. In order to accommodate these concerns, the submission due date was changed to February 28. This non-substantive change was made in the three sections listed above because all of the sections contained references to the submission date.

**Assessment of Public Comment**

The regulation amends Section 361.5 and adds a new Section 361.6 to 11 NYCRR to establish a new market stabilization mechanism as required by Section 3233 of the Insurance Law.

The Department received comments from an interested party representing health plans. These comments duplicate comments received in 2006 and 2007 about the regulation, and are addressed below.

**Comment:**

The proposed regulation will result in a substantial cross-subsidy flowing from the small group market to the individual market. The statutory intent of Section 3233 is to stabilize risks within each market, not by pooling the two markets together.

**Response:**

The Department disagrees with the interested party's interpretation of Section 3233 of the Insurance Law. The legislature enacted Section 3233 of the Insurance Law to assure the orderly implementation and ongoing operation of open enrollment and community rating in the individual and small group markets. The Department has consistently interpreted Section 3233 to require pooling of the individual and small group markets together, as evidenced by the fact that under all prior pooling methodologies the individual and small group markets were pooled together. Moreover, Section 3233(c)(2) specifically contemplates the pooling of individual and small group health insurance and provides that the funds received by an insurer or health maintenance organization (HMO) pursuant to such regu-

lations be applied to reduce the premiums of the particular class of contracts issued pursuant to Sections 4321 and 4322 of the Insurance Law whose subscribers caused the payments to be received. Additionally, if the individual and small group business were not pooled, appropriate risk adjustment would not occur in the individual market, as that market contains a disproportionate number of the high-risk individuals.

**Comment:**

The proposed regulation will create a penalty for health plans with strong cost controls. The interested party suggested changing the formula to prevent this problem. The suggested change to the formula was to divide the number of members with high cost claims by total members instead of dividing the high cost claims by the total claims.

**Response:**

The Department has not reviewed any evidence showing that particular health plans have significantly better cost controls than their competitors. Nor has the Department received evidence showing that if health plans were to have better cost controls, those health plans would be penalized under the high cost claims pooling methodology. In fact, if a health plan were to maintain slightly superior controls, the superior controls would impact all of that plan's claims, not just those over the high cost claim threshold, so the denominator of the health plan's claim ratio would be reduced along with the numerator, and the reductions would tend to neutralize one another.

With regard to switching from a dollar claims ratio to a ratio based on the number of members with high cost claims, the original pools established in 1993 were based on estimated numbers of high cost members (determined based on member demographics). HMOs argued that they were unfairly penalized because their demographics tended to be more favorable than other health plans. HMOs also suggested that this form of pooling rewarded inefficient carriers who had inadequate cost controls. Consequently, those pools were phased out and, at the suggestion of health plans, replaced by pools based on average claim cost factors of members with specified medical conditions. The health plans then argued that the new pools were too complex. Recently, those pools were also phased out, and replaced by the currently proposed method, which uses a straight forward dollars-to-dollars high cost claim ratio. The interested party now suggests this mechanism, too, penalizes efficient health plans. However, the interested party's recommended change would return to a pooling methodology similar to the original 1993 methodology.

Regardless of the form of pooling, those health plans and classes of business with a lower proportion of sicker, higher cost insureds will be required to contribute funds to help stabilize the rates of health plans and classes of business covering a larger proportion of sicker, higher cost insureds. Each of the different forms of pooling arrive at approximately the same result, and accomplish essentially the same degree of risk adjustment, regardless of how a health plan's relative exposure is measured, or the efficiencies of a health plan's operations. The proposed methodology in the Fifth Amendment to Regulation 146 uses the same threshold for defining high cost claims as is used in the reimbursement calculations for the direct payment stop loss funds, which has been favorably received by health plans.

**Comment:**

The claim threshold used in the regulation is too low, and uncapped. The threshold should be set at \$100,000 in order to only adjust for unusually high cost claims. The higher threshold would reduce variations related to plans that are better able to manage care and costs. It was suggested to only reimburse a percentage of claims over \$100,000 (approximately 70%), instead of the calculation used under the proposed regulation. It was further suggested that the threshold be capped at \$500,000 because small health plans already purchase stop-loss protection.

**Response:**

When developing the regulation the Department modeled hypothetical pool results using various claim thresholds and actual industry claim experience. The Department found that thresholds of \$10,000 and \$15,000 would develop more immediate risk adjustment relief; that a \$20,000 claim threshold could develop adequate risk adjustment and market stabilization levels within a three year phase-in period; and that a \$100,000 threshold would produce no realistic or meaningful risk adjustment. With respect to only reimbursing a percentage of claims, such as 70%, this would cause the pooling to be further diminished. However, the Department will continue to review outcomes as 2007 claims data is tabulated to assess the adequacy of the \$20,000 level to determine whether more or less risk adjustment is needed.

With respect to capping claims at \$500,000, very few claims come in over \$500,000, and excluding those claims due to potential stop-loss

coverage that had been previously purchased would only have a nominal impact on pool results. Moreover, since carriers must pay premiums to purchase stop loss coverage, with reinsurers' pricing established at amounts sufficient to cover at least the amount of the expected claims in any year, factoring out recoveries would also require factoring in equivalent or greater reinsurance premium payments. This would add significant complexity to the process, which health plans have historically argued against.

**Comment:**

By using a high cost claim threshold of \$20,000, the individual direct payment HMO and point-of-service (POS) policies would be receiving duplicative benefits, as they are reimbursed for a percentage of claims from \$20,000 to \$100,000 from the Direct Payment Stop Loss Funds established pursuant to Sections 4321-a and 4322-a of the Insurance Law. The interested party suggested taking the stop loss recoveries into account when calculating amounts under the market stabilization pools.

**Response:**

The Direct Payment Stop Loss Funds were established in 1999 pursuant to Sections 4321-a and 4322-a of the Insurance Law, a separate statutory mandate from Section 3233 of the Insurance Law, which provided for the establishment of the market stabilization pools in 1992. The Direct Payment Stop Loss Funds were created to provide additional state subsidies to the individual direct payment market, and were not meant to replace the market stabilization pools. Although the previous market stabilization pools did not take the direct payment stop loss recoveries into consideration, the Department reviewed the suggestion of taking the payments from the Direct Payment Stop Loss Funds into consideration under this proposed amendment. The Department determined that if the stop loss recoveries were taken into consideration, the standardized individual direct payment HMO policies could become payors, which would undermine the intent of Section 3233 of the Insurance Law. Section 3233 is meant to equalize the risk of high cost persons throughout the individual and small group markets by encouraging each HMO and insurer to insure high cost persons (who are mostly found in the individual direct payment market). Even with the relief provided through the Stop Loss Funds, direct payment HMO policy premium rates still significantly exceed premium rates on other community rated business. If direct payment policies become payors, the direct payment market would be adversely impacted – a circumstance that would run counter to the statutory intent.

**Comment:**

An interested party stated that an example provided to health plans of high cost claim calculations under the pooling methodology is inconsistent with the proposed regulation.

**Response:**

The example is not inconsistent with the proposed regulation. The example refers to total net contributions of all net contributors, so it adjusts amounts down if the total contributions of net contributors exceed funding, as provided in Section 361.6(e)(7).

**Comment:**

Section 361.6(c) and (d) of the regulation require data submissions by January 31st of each year. The interested party expressed concern that while plans may know their premium income by that date, plans may not accurately know their claims data because claims from October, November, and December may not even have been submitted by providers. The interested party also stated that the proposed regulation fails to provide advance notice of payment or receipt from the pools needed for rate setting. The interested party stated that the amount due each March (or April, if the January 31st date is changed) will not be known when the plans are setting their rates in the end of the prior year.

**Response:**

To address the submission deadline concern raised by the interested party, the Department changed the January 31st date to February 28th. In addition, the Department has extensively discussed the prospective nature of the regulation with interested parties. To address concerns that the regulation operate prospectively, the proposed regulation went into effect October 4, 2006 but does not require payments to the pools until 2008. Moreover, the Department collected 2005 and 2006 claims data from health plans, as required under Sections 361.6(d)(2) and (3), and provided plans with model year estimates of pool receivables or liabilities. These estimates gave the health plans adequate notice of their responsibilities under the proposed regulation so that health plans may consider the amounts when developing premium rates. Moreover, under the new methodology health plans should be able to predict contributions and distributions from year to year.

**Comment:**

The approach to distributions found in Section 361.6(g) is too vague, subjective, and potentially unfair. It was suggested that 361.6(g) be modified so that as long as the health plan reasonably considered distributions from the pools when developing rates, the health plan would not be required to provide refunds because the results differed from pricing assumptions. The interested party also stated that Section 361.6(g)(2), which allows for a submission of a detailed plan for the Superintendent's approval, will not be transparent, and will purposely steer subsidies to particular markets.

**Response:**

According to Section 361.6(g) of the proposed regulation, when health plans receive monies from the pools, they have options. Health plans may refund the monies to subscribers based on the type of policies that caused the money to be received; health plans may submit a detailed plan to the Superintendent, demonstrating how the distribution will be applied to reduce future premium rates for the type of policy whose insureds caused the payments to be received; and/or health plans may provide a detailed explanation as to how the distribution was considered in the development of premium rates for that year. Thus, health plans have options as to how they handle pool distributions. Further, since Section 361.6(g) specifies what must be included in the detailed plan that must be submitted to the Superintendent, the Department is not subjectively determining how the monies must be applied in each case. The purpose of the regulation is to stabilize risk in the individual and small group markets, so that the money will be distributed in the areas where the high risk is concentrated.

## NOTICE OF ADOPTION

### Establishment of the Industry Standard Rate for Use in Conjunction with Payments to the Aggregate Trust Fund

**I.D. No.** INS-16-08-00007-A

**Filing No.** 570

**Filing date:** June 10, 2008

**Effective date:** June 25, 2008

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

**Action taken:** Amendment of Part 151 (Regulation 119) of Title 11 NYCRR.

**Statutory authority:** Insurance Law, sections 201 and 301; and Workers' Compensation Law, section 27

**Subject:** Industry standard rate for use in conjunction with payments made by workers' compensation insurers to the aggregate trust fund.

**Purpose:** To establish the interest rate applicable when workers' compensation insurers are required to deposit the present value of unpaid benefits for permanent partial disability and death benefit cases into the aggregate trust fund.

**Text or summary was published** in the notice of proposed rule making, I.D. No. INS-16-08-00007-P, Issue of April 16 2008.

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

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

**Assessment of Public Comment**

The agency received no public comment.

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## Niagara Frontier Transportation Authority

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

#### Freedom of Information Regulations

**I.D. No.** NFT-26-08-00012-P

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

**Proposed action:** This is a consensus rule making to amend Part 1156 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, section 1299-e (5)

**Subject:** Freedom of information regulations.

**Purpose:** To conform to changes in State law.

**Text of proposed rule:** Subdivision (a) of section 1156.5 is amended to read as follows:

1156.5 Requests for access to records.

(a) Requests for access to records of the Niagara Frontier Transportation Authority and/or any subsidiary corporations shall be in writing and address[es]d to:

Records Access Officer

Niagara Frontier Transportation Authority

Buffalo, N.Y. 14203

or made by e-mail in the format provided at [www.nfta.com](http://www.nfta.com)

Requests shall reasonably describe the record or records sought. Whenever possible a person requesting records should supply information regarding dates, file designations or other information that may help to describe the records sought.

Subdivision (a) of section 1156.7 is amended to read as follows:

1156.7 (a) The authority and each subsidiary corporation shall, within five business days of the receipt of a written request for access to records which reasonably describes the records sought, respond to such request. If the authority and each subsidiary corporation do not provide or deny access to the records sought within five business days of receipt of a request, the authority or the subsidiary corporation shall furnish a written acknowledgement of receipt of the request and a statement of the approximate date, which shall be reasonable under the circumstances of the request, when the request will be granted or denied. If the authority fails to respond to a request within five business days of receipt of a request with a written acknowledgment such failure shall be deemed a denial of access by the authority. If the Authority determines to grant a request in whole or in part, and if circumstances prevent disclosure within twenty business days from the date of the acknowledgment of the receipt of the request, the Authority shall state in writing both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part. If the Authority fails to comply with this requirement, such failure shall be deemed a denial of access by the Authority. Denial of access to the records, in whole or in part, shall be in writing, stating the reason therefore and advising the person denied access of his or her right to appeal to the chairman of the authority or subsidiary corporation, who shall be further identified by name, business address and business telephone number.

**Text of proposed rule and any required statements and analyses may be obtained from:** Ruth Keating, Niagara Frontier Transportation Authority, 181 Ellicott St., Buffalo, NY 14203, (716) 855-7398, e-mail: [Ruth\\_Keating@nfta.com](mailto:Ruth_Keating@nfta.com)

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

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

#### Consensus Rule Making Determination

The Niagara Frontier Transportation Authority has determined that no person is likely to object to the rule being repealed or the rule as written for the following reasons:

1. The rule being repealed is not necessary because the statute the rule was meant to implement is binding upon the NFTA.
2. The rule being adopted implements the requirements of the Personal Privacy Protection Law, a non-discretionary statutory provision.
3. None of the changes are controversial.

#### Job Impact Statement

The Niagara Frontier Transportation Authority has determined adoption of the proposed rule will have no impact on jobs or employment opportunities for the following reasons:

1. The subject of the proposed rule is the regulation of the NFTA's compliance with the Freedom of Information Law. The proposed rule does not regulate the activities or practices of any other parties.

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

#### Procurement Guidelines

I.D. No. NFTA-26-08-00013-P

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

**Proposed action:** This is a consensus rule making to amend sections 1159.4 and 1159.5 of Title 21 NYCRR.

**Statutory authority:** Public Authorities Law, sections 1299-e(5) and 1299-t

**Subject:** Procurement guidelines.

**Purpose:** To make technical changes and conform to Federal and State law.

**Text of proposed rule:** Subsection (1) of subdivision (d) of section 1159.4 is amended to read as follows:

(1) Bid security. All public work contracts equal to or in excess of \$50,000 shall require bid security equal to 10 percent of the bid price. Bid security may be in the form of a bid bond, certified check or other guaranteed negotiable instrument, or letter of credit. The bid security of the [successful bidder] bidders submitting the three lowest bids will be retained until execution of the contract or a maximum of 180 calendar days after bid opening, whichever is sooner. Bid security of the [unsuccessful] remaining bidders will be returned [upon execution of the contract with the successful bidder but in no event in excess of 90] within 10 calendar days after the bid opening date. In the event of neglect or refusal on the part of the successful bidder to execute the contract and furnish [the performance security and] evidence of insurances within 10 days after written notification of notice of intent to award the contract, and furnish the Performance Security and Labor and Material Payment Bond within 3 days after receipt of the executed contract, the entire bid security shall be forfeited to and retained by the authority as liquidated damages for such neglect or refusal. Bid security is not mandated for product contracts.

Subsection (ii) to subsection (6) of subdivision (d) of section 1159.4 is amended to read as follows:

(ii) Performance security and labor and material payment bonds may be waived by the executive director or his designee, prior to the bid date, in accordance with State Finance Law, section 137(1), provided that the aggregate amount of the contract is under \$[50,000] 100,000 and that the authority retains 20 percent from each progress payment or estimate until the entire contract work has been completed and accepted, at which time the executive director or his designee may authorize, pending the payment of the final estimate, the release of up to 75 percent of the retained percentage.

Subdivision (o) of section 1159.4 is amended to read as follows:

(o) Federal, State and county contract lists. The State Office of General Services contract prices and county contract prices are deemed competitive prices. Contracts may be awarded based on the State or county contract price without additional competitive procedures. The United States General Services Administration (GSA) has identified specific contracts that the NFTA is authorized to use. Contracts may be awarded based on the federal contract price when allowed by the GSA. If the contract price available through the Federal, State or county price lists is lower than the lowest bid price after sealed bidding, formal bidding, or informal bidding, the bids shall be rejected and a contract awarded based upon the Federal, State or county contract price.

Subsections (3), (4) and (5) to subdivision (b) of section 1159.5 are renumbered to be subsections (4), (5) and (6).

A new subsection (3) is added to read as follows:

3. In the event the protestor alleges that the Executive Director or the representative appointed by the Executive Director to serve as Decision-Maker for the particular protest, engaged in improper conduct during the subject procurement, the General Counsel shall serve as the Decision-Maker. In the event it has been alleged that the General Counsel has engaged in improper conduct during the subject procurement, either the Executive Director or the Director of Engineering shall serve as the Decision-Maker.

**Text of proposed rule and any required statements and analyses may be obtained from:** Ruth Keating, Niagara Frontier Transportation Authority, 181 Ellicott St., Buffalo, NY 14203, (716) 855-7398, e-mail: [Ruth\\_Keating@nfta.com](mailto:Ruth_Keating@nfta.com)

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

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

#### Consensus Rule Making Determination

The Niagara Frontier Transportation Authority has determined that no person is likely to object to the rule being amended for the following reasons:

1. The major change is to clarify internal review requirements.

2. The changes are not controversial.

**Job Impact Statement**

The Niagara Frontier Transportation Authority has determined adoption of the proposed rule will have no impact on jobs or employment opportunities for the following reasons:

1. The subject of the proposed rule is to clarify internal reporting requirements contained in the NFTA's Procurement Guidelines. Changes to the rules will not impact the level of procurements made by the NFTA, and therefore will not impact jobs or employment opportunities.

## Public Service Commission

### NOTICE OF ADOPTION

**Waiver of Provisions by Consolidated Edison Company of New York, Inc.**

**I.D. No.** PSC-11-08-00015-A  
**Filing date:** June 9, 2008  
**Effective date:** June 9, 2008

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

**Action taken:** On May 21, 2008, the Public Service Commission adopted an order temporarily approving the petition of Consolidated Edison Company of New York, Inc. for a waiver of its rate schedule, P.S.C. No. 9—Electricity and the commission's non-residential service regulations.

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

**Subject:** Waiver of P.S.C. No. 9—Electricity and 16 NYCRR Part 13 to permit credits to certain electric customers.

**Purpose:** To approve petition for waivers of rate schedule and regulations to allow for credits to certain electric customers.

**Substance of final rule:** The Commission, on May 21, 2008, adopted an order temporarily approving the petition of Consolidated Edison Company of New York, Inc. for a waiver of its rate schedule PSC No. 9—Electricity and 16 NYCRR Part 13, and the order is limited to customers located in the 11 buildings that were evacuated in the affected area bounded by Park and Third Avenues and East 40th and East 42nd Streets during all of part of the period due to the July 18, 2007 steam incident disruption, subject to the terms and conditions set forth in the order.

**Final rule compared with proposed rule:** No changes.

**Text of rule may be obtained from:** Central Operations, Public Service Commission, Bldg. 3, 14th Fl., Empire State Plaza, Albany, NY 12223-1350, by fax to (518) 474-9842, by calling (518) 474-2500. An IRS employer ID no. or social security no. is required from firms or persons to be billed 25 cents per page. Please use tracking number found on last line of notice in requests.

**Assessment of Public Comment**

An assessment of public comment is not submitted with this notice because the rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (08-S-0153SA1)

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

**To Defer and Recover Excess Water Charges**

**I.D. No.** PSC-26-08-00018-P

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

**Proposed action:** The commission is considering the petition of United Water New Rochelle, Inc. to defer and recover certain excess water charges by the New York City Water Board and to recover prospective excess water charges and related relief.

**Statutory authority:** Public Service Law, section 89-c

**Subject:** To defer and recover excess water charges.

**Purpose:** To consider the deferral and recovery of certain excess water charges and the recovery of prospective excess water charges.

**Substance of proposed rule:** The Commission is considering whether to approve, reject or modify the petition of United Water New Rochelle Inc. for the deferral and recovery of excess water charges associated with the settlement of litigation with the New York City Water Board in connection with such charges. The petition also requests authorization to establish a new surcharge mechanism for the recovery of prospective excess water charges. Deferred water charges from September 24, 1994 through April 30, 2008 amount to approximately \$6 million.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (04-W-1221SA3)

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

**Request by NYRI for a Waiver of the Application Requirement Contained in 16 NYCRR §§ 86.8(b) and 88.4(a)(4)**

**I.D. No.** PSC-26-08-00019-P

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

**Proposed action:** The Public Service Commission is considering whether to grant or deny (in whole or in part) a motion by New York Regional Interconnect Inc. (NYRI) for a waiver of the application requirement contained in 16 NYCRR §§ 86.8(b) and 88.4(a)(4).

**Statutory authority:** Public Service Law, sections 41 and 122(1)(f)

**Subject:** Request by NYRI for a waiver of the application requirement contained in 16 NYCRR §§ 86.8(b) and 88.4(a)(4).

**Purpose:** To consider NYRI's motion in connection with its application for an electric transmission line.

**Substance of proposed rule:** In connection with the filing of a supplement to its application, New York Regional Interconnect Inc. (NYRI) moved for an amendment of two requirements contained in a March 24, 2008 letter from the Secretary to the Commission or in the alternative for a waiver of the two filing requirements. One requirement, reflected in the Secretary's letter and in 16 NYCRR § 86.8(b), is that NYRI provide copies of the local ordinances of the Town of Marshall. The second requirement, reflected in the Secretary's letter and in 16 NYCRR 88.4(a)(4), is that NYRI provide the system reliability impact study forwarded by the Transmission Planning Advisory Subcommittee for approval by the Operating Committee of the New York Independent System Operator.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act. (06-T-0650SA2)

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

**Water Rates and Charges**

**I.D. No.** PSC-26-08-00020-P

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

**Proposed action:** The Public Service Commission is considering a request filed by JD Water Company, Inc. to increase its annual revenues by \$60,036 or approximately 54 percent, to become effective Sept. 1, 2008.

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

**Subject:** Water rates and charges.

**Purpose:** To increase JD Water Company, Inc.'s annual revenues by \$60,036 or approximately 54 percent.

**Substance of proposed rule:** On June 9, 2008, JD Water Company, Inc. (JD Water or the company) electronically filed Leaf 12, Revision 3, to its tariff schedule P.S.C. No. 1—Water, to become effective September 1, 2008. The company proposes to increase its annual operating revenues by \$60,036 or approximately 54%. JD's tariff is available on the Commission's Home Page on the World Wide Web ([www.dps.state.ny.us](http://www.dps.state.ny.us) located under File Room then Tariffs). The company provides flat rate water service to approximately 415 customers in the Town of Bethel, Sullivan County. The Commission may approve or reject, in whole or in part, or modify the company's request.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(08-W-0654SA1)

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

**To Modify Rates and Charges**

**I.D. No.** PSC-26-08-00021-P

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

**Proposed action:** The commission is considering the petition of Saratoga Glen Hollow Water Supply Corporation (the company) to amend its order in Cases 02-W-0142 and 02-W-0472 that approved an extension of its service territory on New York State Rte. 9P.

**Statutory authority:** Public Service Law, section 89-c(1)(10)

**Subject:** To modify rates and charges.

**Purpose:** To allow the company to charge developers \$10,000 for each new home attached to the water system.

**Substance of proposed rule:** The Commission is considering whether to approve, reject, or modify the petition of Saratoga Glen Hollow Water Supply Corporation (the Company) to amend its Order in Cases 02-W-0142 and 02-W-0472, which approved the extension of the company's service territory and authorized the company to charge each new customer \$2,290. The Company has experienced significantly higher costs to complete the extension and it now wishes to charge developers along NYS Route 9P \$10,000 for each new home added to the system instead of the \$2,290.

**Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.state.ny.us/f96dir.htm>. For questions, contact:** Central Operations, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-2500

**Data, views or arguments may be submitted to:** Jaclyn A. Brillling, Secretary, Public Service Commission, Bldg. 3, Empire State Plaza, Albany, NY 12223-1350, (518) 474-6530

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

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

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

(08-W-0549SA1)