

Regulatory Impact Statement

1. Statutory authority:

Section 3-0301 of the Environmental Conservation Law (ECL) directs the Department of Environmental Conservation (Department) to provide for the propagation, protection, and management of fish and other aquatic life and wildlife and the preservation of endangered species.

Section 11-0535 of the ECL directs the Department to protect endangered, threatened, and special concern animals and prohibits the public from taking these animals without a permit from the Department.

2. Legislative objectives:

The legislative objectives behind the statutory provisions listed above are to authorize the Department to establish, by regulation, a list of endangered, threatened, and special concern fish and wildlife species, protect those species and develop rules for the application and issuance of permits that can authorize take or incidental take of such animals.

3. Needs and benefits:

This regulatory proposal to repromulgate 6 NYCRR Part 182 is necessary to fully restore the regulations following a court ruling that determined the adoption of revisions to the regulation in 2010 were legally deficient due to the Department's failure to hold a public hearing as part of the public comment process at the time. As a result, the Department proposes to restore the regulations by repealing Part 182 in its entirety and replacing it with the language originally proposed in 2010, along with the edits adopted in 2021. The Department will hold a public hearing

as part of the public review process. All of the language in this proposal was previously adopted in two separate rule makings made in 2010 and 2021, with the exception of language that updates the references for federal regulations incorporated by reference. These rules have been in effect since 2010, with modifications made in 2021.

These regulatory changes establish the process for implementing the State Endangered Species Act (ECL 11-0535). The regulations (6 NYCRR Part 182) list species that have been classified by the Department as endangered or threatened and provide for the prohibition against the “take” of listed species unless permitted by the Department. Prior to 2010, the regulations did not establish procedures or standards for review of such permit applications. Court decisions in relation to the enforcement of ECL 11-0535 have provided clarity on the situations where such permits are necessary and how the Department should proceed in such cases. These repromulgated regulations are based upon those decisions and provide a predictable regulatory framework for establishment of jurisdiction under ECL 11-0535 and the process for addressing listed species issues, including the review and issuance of relevant permits. In addition, the Department improved the implementation of this regulatory framework with amendments made in 2021 that reduced the scope of what can be identified as occupied habitat by providing exemptions for most man-made structures and extending the time frame for agricultural exemption to five years since a use last occurred. A new process for designating experimental populations was also created. This designation would allow the Department to establish new

populations of listed species outside of their existing range and exempt landowners within a specified geographic area around these populations from incidental take. This will reduce the number of projects subject to review under the regulations and will improve the process for the regulated community to determine if they have any requirements under these regulations. More importantly, these exemptions codify situations where the Department has not required permits under the existing regulations. By making these exemptions clear, it will avoid unnecessary delays caused by unnecessary reviews. These regulations will also redefine experimental populations to allow for the designation of specific geographic areas outside of the existing range of certain species where projects that result in incidental take may be exempt from permit requirements. This new tool would be used to improve the ability of the Department to implement successful species restoration programs without the need to subject unwilling landowners adjacent to areas where experimental populations are established with new regulatory responsibilities. Additional changes clarify that the Department will provide jurisdictional determinations within 30 calendar days, establishes that jurisdictional determinations are good for one year, and addresses a discrepancy between the listing criteria between Species of Special Concern and those that are listed as Endangered and Threatened.

4. Costs:
None beyond normal administrative costs.
5. Local government mandates:

These amendments do not impose any program, service, duty or responsibility upon any county, city, town village, school district or fire district.

6. Paperwork:

There is no additional paperwork required as a result of these changes.

7. Duplication:

There are no other regulations similar to this proposal.

8. Alternatives:

The first and preferred alternative would be to adopt all language as proposed in the draft text. This alternative would provide consistency in the review of projects subject to these regulations, maintain a predictable process for the regulated community, and maintain the ability of the Department to implement successful species restoration programs.

An alternative is to not undertake the repromulgation of the rules adopted in 2010 and 2021 and revert to the previous rules. Prior to 2010, the review process was unclear, with no standard process for the public to follow and no clear mechanism for the public to know how jurisdiction is determined. The amount of time project applicants would have to wait for determinations by the Department would increase and the regulated community would continue to be burdened by the process for making determinations of jurisdiction under 6 NYCRR Part 182 and would experience potential delays in project approval. Consistency in permit decisions would be lost, as the previous regulatory language provided the Department with the authority to simply make decisions based on what was deemed legitimate and include any conditions deemed necessary.

9. Federal standards:

The Federal Endangered Species Act is similar in intent but does not apply to most State listed species. Where there is overlap between the jurisdiction of the two species, the Department has a Cooperative Agreement in place with the United States Fish and Wildlife Service that requires the agencies to cooperate in the protection of those federally listed species. These proposed regulatory changes are compatible with that agreement and, through Department cooperation with the federal government, allow for a permit issued by the Department to satisfy federal standards in most cases and be compatible with federal permits if required.

10. Compliance schedule:

These regulations would be in force immediately upon adoption. As this proposed regulatory action does not expand the scope of regulation, there would be no new compliance requirements incurred by the public or local governments as a result.