

## Express Terms – Summary

The purpose of this rule making is to repromulgate Part 182 of 6 NYCRR, the regulations governing endangered, threatened and special concern species. This action is necessary to address a legal decision that found that a public hearing was required when these rules were first adopted in 2010. With the exception of updated references to the relevant federal statutes, all of the language in this rule was previously provided for public comment and review when Section 182 was previously revised in 2010 and as amended in 2021. The following is a summary of each section of the rule.

182.1 References: This section cites the relevant sources for the federal list of endangered and threatened species protected under the federal Endangered Species Act.

182.2 Definitions: This section provides definitions for the terms used throughout the rest of the regulation. Terms defined include: activity; adverse modification of habitat; commissioner; department; endangered species; essential behavior; experimental population; experimental population area; extinct; extirpated; incidental take; incidental take permit; lesser acts; native; net conservation benefit; occupied habitat; person; population; regional permit administrator; self-sustaining; species; species of special concern; subject population; subspecies; take; and threatened species.

182.3 Listing of endangered and threatened species: This section provides the criteria for listing and delisting endangered and threatened species. All species must be native to New York State. In addition, criteria include listing under the federal endangered species act and an additional 11 criteria to be evaluated to make a

determination. Delisting requires a determination that the species no longer meets the criteria for its listing.

182.4 Listing of species of special concern: This section provides the criteria for listing a species of special concern. Four criteria are identified for consideration, with delisting possible when the species no longer meets those criteria.

182.5 Endangered, Threatened, and Species of Special Concern lists: This section provides the common name and scientific name of each species identified as endangered, threatened, and special concern. There are no changes to the species in these lists from what was previously in this section prior to this rule making.

182.6 Recovery plans: This section establishes the expectation for the content of plans that may be adopted that outline the recovery of listed species or restoration plans for extirpated species. Plans may be developed at the discretion of the department.

182.7 Licenses: This section clarifies that the department may issue licenses under Part 175 of 6 NYCRR for certain legitimate purposes where the possession of species listed in Part 182 is justified.

182.8 Prohibitions: This section clarifies that the incidental taking of endangered and threatened species is prohibited without an incidental take permit issued pursuant to this part. In addition, it is prohibited to import, transport, possess or sell endangered and threatened species and certain other species as identified by law (Environmental Conservation Law 11-0535a and 11-0536) without a permit from the department.

182.9 Request for regulatory determination: This section lays out the procedures for making requests to the department for a determination of regulatory jurisdiction under these rules. Applicants are directed to submit their request to the appropriate

department regional permit administrator and must contain a description of the activity, the proposed site plan and a map clearly identifying the location of the activity. This section also clarifies how the department will respond to these requests, with a response provided within 30 calendar days of a complete request.

182.10 Procedural requirements for incidental take permit applications: This section specifies that, except as specified elsewhere in this Part, all procedures regarding incidental take permit applications and decisions will follow the procedures found in Part 621 of 6 NYCRR (Uniform Procedures).

182.11 Incidental take permit application requirements: This section lays out the application process specific to incidental take permits. It establishes that these permits authorize the incidental take of endangered and threatened species and delineates the application requirements. Application requirements include: detailed information on the applicant; a detailed description of the proposed activity and its likely effect on listed threatened and endangered species that necessitates the need for an incidental take permit; an assessment of whether the project would result in adverse impacts to the species that would jeopardize the population of the species affected; a description of efforts to minimize and avoid any take of protected species; an endangered or threatened species mitigation plan; an implementation agreement and a certification that all materials submitted are as accurate as possible. Mitigation plans must include the measures the applicant proposes to minimize impacts and fully mitigate impacts, the amount of take requested for authorization, a monitoring plan to assess plan effectiveness, and a description (including the source) of the funding required to implement the plan. Implementation agreements must identify who is responsible for

implementation of the plan and funding, the timeline for implementation, a guarantee that funding is available for implementation and be signed by all parties involved in implementation. There is a provision allowing the use of mitigation undertaken under permit for federally listed species to meet some or all of these requirements.

182.12 Incidental take permit issuance standards: This section establishes the criteria for the department to review and issue an incidental take permit. To issue a permit, the department must determine that the proposed activity is otherwise lawful, the applicant has submitted a complete application including an approved mitigation plan and implementation agreement and that the implementation of the permit and the proposed mitigation plan will result in a net conservation benefit to the species being taken. Permits may be denied if a net conservation benefit cannot be achieved. Permit term is determined by the timeline indicated in the implementation agreement. If incidental take is expected to occur after the permit term, it may be renewed if applied for at least 60 days before expiration. Transfer of issued permits may be allowed if the implementation agreement and mitigation plan are adopted by the new permittee.

182.13 Exemptions from incidental take permit requirements: This section provides exemptions from the need for a permit under certain conditions. These situations include: activities authorized by the department that are directly related to the recovery of threatened or endangered species; accidental and unforeseeable incidental take; take that results from existing routine and ongoing agricultural activities; activities required under a public health declaration of the Department of Health; activities carried out in response to an emergency authorized by the department; activities that would result in incidental take to members of an experimental population with designated

experimental population areas; and activities that adversely impact habitat that located within or upon manufactured structures (not including caves and mines used as hibernacula by listed bats).

182.14 Special rules for alligator, caiman and crocodile: This section lays out the process for obtaining permits to allow for the sale and possession of these non-native species.

182.15 Incidental take permit modifications: This section lays out the process for the department to modify, suspend or revoke permits for noncompliance with the terms of the mitigation and implementation plans.

182.16 Penalties and enforcement: This section asserts that violations of this Part may be liable for all penalties as provided for in the Environmental Conservation Law.

182.17 Experimental Population Designation: This section describes the process for the department to designate an experimental population. Full proposals must: identify the species and geographic area to be covered; demonstrate that the new population would be geographically distinct from existing occupied habitat; provide evidence that the geographic area contains enough suitable habitat such that likelihood of successful establishment is reasonably assured. The designation process requires the department to publish the proposal and notify the communities within the geographic area identified, allowing 30 days for public comment. Final decisions will be published in the Environmental Notice Bulletin. Once designated, the population remains experimental unless the species is removed from the list of threatened and endangered

species. Members of an experimental population are still protected wildlife and may not be intentionally taken, but their presence cannot be used to require incidental take permits for adverse impacts to habitat.

## Regulatory Flexibility Analysis for Small Businesses and Local Governments

### 1. Effect of rule:

Local governments and small businesses should not be affected by this proposed rule. This rulemaking is required to address a 2022 court decision that found that the Department of Environmental Conservation (Department) failed to hold a required public hearing when previous amendments were adopted in 2010. This rule does not change anything regarding projects subject to jurisdiction of Environmental Conservation Law (ECL) Section 11-0535 and is limited to the repromulgation of existing regulations previously adopted in 2010 and 2021. Compared to the regulations in effect prior to the 2010 amendments, this rule making will provide businesses and local governments with a better understanding of the types of projects that fall under the jurisdiction of ECL Section 11-0535 and the requirements and procedures for projects to follow once such jurisdiction has been determined. The 2021 amendments reduced the number of projects subject to the regulation by the creation of new exemptions from the permitting requirements of the regulation.

### 2. Compliance requirements:

Compliance requirements are not altered by this proposed rulemaking. As already required under the State Environmental Quality Review Act and ECL Section 11-0535, listed species impacts must already be addressed. Compliance with this requirement is made easier through the issuance of better guidance including additional exemptions that reduce the types of projects that need to

be reviewed for compliance with existing regulatory requirements. The adoption of these rules creates a predictable, transparent process for evaluating the need for permits and the regulatory requirements necessary for the issuance of said permits.

3. Professional services:

No new services would be required by local governments or small businesses to comply with this proposed rulemaking. As is the case under the existing regulations, environmental consultant services will continue to be necessary for projects subject to the jurisdiction of this rule making.

4. Compliance costs:

This proposed regulation does not impose any additional burden on affected local governments and small businesses. Those entities that pursue projects subject to the jurisdiction of this rulemaking will continue to either adjust their projects to avoid the taking of listed species, or if necessary, prepare an application supported by an effective listed species mitigation plan to obtain a permit to authorize the planned activity. This rulemaking makes the process for obtaining a permit explicit, creating an opportunity for project proponents that cannot achieve avoidance to proceed by preparing and implementing an effective listed species mitigation plan and obtaining a permit to authorize the planned activity.

5. Economic and technological feasibility:



Since this proposal does not place any additional requirements on local governments or small businesses, the implementation of this rulemaking is both economically and technologically feasible. No new costs or actions are required.

6. Minimizing adverse impact:

This proposal repromulgates the existing regulations that were previously adopted in 2010 and 2021, due to a court decision that determined the 2010 amendment process failed to incorporate a required public hearing. The regulations as proposed in 2010 were clarifications of the existing law and regulation based on over 30 years of program implementation (now over 40 years), supplemented with legal decisions relevant to this regulation. As such, this rule making is not anticipated to create any new or additional impacts on local government or small business, as the existing statute and rule already established the prohibitions and permit needs that are clarified in this rule making. Projects that can achieve avoidance of impacts do not require permits at all. Minimization of adverse environmental impacts is accomplished through permitting standards. Permits will only be issued when projects achieve a net conservation benefit, which requires that status of impacted listed species and/or their occupied habitats are improved over pre-project conditions. Minimization of adverse economic impacts is accomplished through exemptions for projects under certain circumstances which reduce the number of projects subject to the existing regulations. In addition, improved, publicly accessible online screening tools that allow local governments and small businesses to quickly identify any potential jurisdiction under these regulations also minimize adverse impact by

providing rapid information that can be used during project development to avoid jurisdiction and the time and expense that may be required to obtain a permit. As such, this proposed rulemaking does not create any new or additional impacts on local government or small business.

7. Small business and local government participation:

The State Administrative Procedure Act requires agencies to provide public and private interests the opportunity to participate in the rulemaking process through public comments periods. There will also be a public hearing for any interested party to voice their concerns or suggestions. In the initial development stage of the 2010 rules, the Department met with the New York Farm Bureau, the New York Association of Counties, the New York Association of Towns and the New York Conference of Mayors to discuss the intent of these regulations. The Department will send the press release announcing the proposal and the opportunities for public participation during the public comment period to all parties that met with the agency in the development of the 2010 proposal. The Department will also continue to meet with any concerned entity to discuss their concerns. Listed species issues will also still primarily be addressed through the State Environmental Quality Review process, with local governments continuing to frequently take on the role of lead agency.

8. The proposed revisions to 6 NYCRR Part 182 do not require the imposition of a cure period because there are no changes to any existing violations or penalties, and no new violations or penalties are established.

## Rural Area Flexibility Analysis

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

This rulemaking is limited to the repromulgation of regulations previously adopted in 2010 and 2021 and will not change any requirements in rural areas. This rulemaking is required to address a 2022 court decision that found that the Department of Environmental Conservation (Department) failed to hold a required public hearing when previous amendments were adopted in 2010.

6 NYCRR Part 182 applies statewide and this proposed rulemaking will not alter that. This rule does not change anything regarding projects subject to jurisdiction of Environmental Conservation Law (ECL) Section 11-0535 and is limited to the repromulgation of existing regulations previously adopted in 2010 and 2021.

Compared to the regulations in effect prior to the 2010 amendments, this rule making will clarify the types of projects that fall under the jurisdiction of ECL Section 11-0535 and the requirements and procedures for projects to follow once such jurisdiction has been determined. The 2021 amendments reduced the number of projects subject to the regulation by the creation of new exemptions from the permitting requirements of the regulation. For example, compared to the regulations in place prior the 2010 proposal, this rule includes an exemption for routine and ongoing agricultural activities that reduces the extent of application of this regulation in some rural areas.

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

Existing law and regulation require permits for activities that result in harm to

listed species. This rule provides guidance and procedures to assist project proponents to assess and avoid impacts to listed species. Permit procedures are established for those projects that cannot avoid such impacts. These regulations codify the existing process utilized by the Department and make that process open and accessible to the public. This rule also establishes the time frame for which agricultural exemptions can apply to a parcel to five years and creates a new exemption for existing structures and dwellings. It also creates a procedure that allows the Department to expand the range of listed species under certain conditions without creating new regulatory burdens for landowners.

Consequently, this proposed rulemaking imposes no new reporting, record keeping or other compliance requirements.

3. Costs:

The proposed rule does not create any new requirement for landowners or municipalities. There will be no costs of this rulemaking on rural communities as no new requirements are created. The impact of this rule making on rural communities may actually reduce any costs associated with this rule as an exemption is provided for routine and ongoing agricultural activities, where none previously existed.

4. Minimizing adverse impact:

This rule is limited to repromulgation of existing regulations, as required by a court decision. The regulations as proposed in 2010 were clarifications of the existing law and regulation based on over 30 years of program implementation (now over 40 years), supplemented with legal decisions relevant to this

regulation. As such, this rulemaking will not create any new or additional impacts on rural communities, as the existing rule already established the prohibitions and permit needs present in this rulemaking. Moreover, in comparison to the regulations prior to 2010, there is also an expansion of the exemption for routine and ongoing agricultural activities and additional exemptions for existing structures that also mitigate the potential for adverse impacts in rural farming communities.

5. Rural area participation:

The State Administrative Procedure Act requires agencies to provide public and private interests in rural areas the opportunity to participate in the rulemaking process via the mandated 60-day public comment period. The Department will also hold a public hearing on this rule. In addition, the Department will continue to meet with any concerned entity to hear their concerns. When these rules were initially being developed, the Department met with the New York Farm Bureau, the New York Association of Counties, the New York Association of Towns and the New York Conference of Mayors to discuss the intent of these regulations. The Department will send the press release announcing the proposal and the opportunities for public participation during the public comment period to all parties that met with the agency in the development of the 2010 proposal. The Department will also continue to meet with any concerned entity to discuss their concerns. Listed species issues will also continue to be addressed through the State Environmental Quality Review process, with local governments continuing

to frequently take on the role of lead agency.

## Job Impact Statement

### 1. Nature of impact:

This rulemaking is required to address a 2022 court decision that found that the Department of Environmental Conservation (Department) failed to hold a required public hearing when previous amendments were adopted in 2010. This rule does not change anything regarding projects subject to jurisdiction of Environmental Conservation Law (ECL) Section 11-0535 and is limited to the repromulgation of existing regulations previously adopted in 2010 and 2021.

Compared to the regulations in effect prior to the 2010 amendments, this rule making will provide clarity on the types of projects that fall under the jurisdiction of ECL Section 11-0535 and the requirements and procedures for projects to follow once such jurisdiction has been determined. The 2021 amendments reduced the number of projects subject to the regulation by the creation of new exemptions from the permitting requirements of the regulation. These rules clarify the jurisdictional authority of the Department over endangered species, create standard procedures for the determination of jurisdiction, and establish the parameters for the application, review, and issuance of required permits. The actions outlined in the regulation have been undertaken by the Department under existing regulatory authority and supported through legal decisions relevant to the underlying law and regulations. Jurisdiction is refined in these regulations by establishing clear exemptions from permits. As a result of these exemptions, there will be fewer projects entering the review stream under these regulations and the time for projects to be reviewed is anticipated to be reduced as a result.

This rulemaking will not place new requirements on any entities. The impact on jobs is estimated to be neutral.

2. Categories and numbers affected:

As with the existing regulation, projects may not take listed species without a permit from the Department. This proposed rulemaking provides guidance and delineates exemptions that will enable project proponents to more effectively design their projects to avoid impacts and, if necessary, better assemble the information required by the Department for permit applications. The result will be an increase in the efficiency in which listed species issues are addressed, potentially resulting in more rapid project approvals. No net impact to jobs is expected.

3. Regions of adverse impact:

This proposed rulemaking makes no modification of the regions impacted by the existing regulation. However, exemptions identified in the regulations reduce the scope of projects impacted by the existing regulations.

4. Minimizing adverse impact:

This proposed rulemaking will have no adverse impact, as it is only repromulgating previously adopted regulatory changes that were made in 2010 and 2021. The regulations as proposed in 2010 were clarifications of the existing law and regulation based on over 30 years of program implementation (now over 40 years), supplemented with legal decisions relevant to this regulation.

Jurisdiction is refined in these regulations by establishing clear exemptions from permits. As a result of these exemptions, there will be fewer projects entering the



review stream under these regulations and the time for projects to be reviewed is anticipated to be reduced as a result. As such, this proposed rulemaking does not create any new or additional impacts on local government or small business. The proposed rules provide explicit exemptions for emergency situations, routine and ongoing agricultural activities and creates new exemptions for human structures, where no such exemptions formerly existed. In addition, improved, publicly accessible online screening tools that allow the public to quickly identify any potential jurisdiction under these regulations also minimize adverse impact by providing rapid information that can be used during project development to avoid jurisdiction and the time and expense that may be required to obtain a permit. Therefore, any adverse impacts of the existing regulation are reduced through this proposed rulemaking.