

Regulatory Impact Statement

1. Statutory authority:

Section 3-0301 of the Environmental Conservation Law (ECL) directs the Department of Environmental Conservation (DEC or department) to provide for the propagation, protection, and management wildlife.

Section 11-0535 of the ECL directs DEC 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 proposed regulatory amendment to the Endangered Species regulations would reduce the scope of what can be identified as occupied habitat by providing exemptions for most man-made structures, extends the time frame for agricultural exemption to 5 years since a use last occurred and creates an exemption for incidental take of experimental populations. 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 DEC 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 DEC 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 adopt all changes as proposed in the draft text. This alternative would reduce the number of projects subject to review under the regulations, would improve the process for the regulated community to determine if they had any regulatory concerns under these regulations, and would improve the ability of DEC to implement successful species restoration programs.

A second alternative is to amend the regulations to improve the review and jurisdiction process only, leaving out the additional exemptions as proposed in the draft terms. Not including an exemption for human structures would result in continued regulatory authority over situations where there is no true habitat for listed species and where DEC has historically allowed projects to go ahead without the need for permits. This would continue to be an unnecessary burden on landowners and drain on DEC resources to respond to these situations where no long-term impact to listed species is anticipated. There would be continuing uncertainty over the time frame for applying an exemption for ongoing agricultural activities. Not including “safe harbor” exemptions for experimental populations would remove an incentive for landowners to voluntarily participate in species restorations, therein diminishing the State’s ability to recover and delist species.

A third option would be to amend the regulations to include the additional exemptions proposed in the draft text but not include the process improvement component. This would enable DEC to move forward with species restoration projects on or adjacent to private lands without creating additional regulatory burdens

on landowners. The changes would clarify the time frame for the exemption for ongoing agricultural activities. This would also save DEC time by removing projects within or upon human structures from the regulatory review process. However, the regulatory review process would continue as is, without providing needed clarification to the public on how jurisdiction is determined. The amount of time project applicants would have to wait for determinations by DEC would likely remain the same. The regulated community would continue to be burdened by the process for making determinations of jurisdiction under Part 182 and would continue to experience potential delays in project approval without the process improvement component proposed in these regulations.

Another alternative is to take no action and leave the regulations as they are. This alternative would still require DEC review and involvement in cases where bats and other species occur within human structures and would not clarify the time frame for the exemption for ongoing agricultural activities. This alternative would also continue to hamper efforts of DEC to restore, and hence delist, endangered species due to concerns over additional regulatory burdens being placed upon landowners through successful restoration projects. This is not desirable because it is poor government service and does not provide any meaningful additional protection for the species the DEC is charged to protect.

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.

10. Compliance schedule:

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