

## NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Enter search words

[Search DEC](#)

[Home](#) » [Regulations and Enforcement](#) » [Regulations](#) » [Chapter I - Fish and Wildlife](#) » [Part 182: Endangered and Threatened Species of Fish and Wildlife; Species of Special Concern; Incidental Take Permits](#)

[Outdoor Activities](#)

[Animals, Plants, Aquatic Life](#)

[Chemical and Pollution Control](#)

[Energy and Climate](#)

[Lands and Waters](#)

[Education](#)

[Permit, License, Registration](#)

[Public Involvement and News](#)

[Regulations and Enforcement](#)

[Regulations](#)

[Chapter I - Fish and Wildlife](#)

[Part 182: Endangered and Threatened Species of Fish and Wildlife; Species of Special Concern; Incidental Take Permits](#)

[Publications, Forms, Maps](#)

[About DEC](#)

# Part 182: Endangered and Threatened Species of Fish and Wildlife; Species of Special Concern; Incidental Take Permits

Statutory authority: Environmental Conservation Law, § 11-0535

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## Contents:

### Sec.

[182.1 References](#)

[182.2 Definitions](#)

[182.3 Listing of endangered and threatened species](#)

[182.4 Listing of species of special concern](#)

[182.5 Endangered species, threatened species and species of special concern](#)

[182.6 Recovery plans and restoration plans](#)

[182.7 Licenses](#)

[182.8 Prohibition](#)

[182.9 Request for determination whether activity is subject to regulation](#)

[182.10 Procedural requirements for incidental take permit applications and related matters](#)

- 182.11 Incidental take permit; specific application requirements
- 182.12 Incidental take permit issuance standards; conditions
- 182.13 Exemptions from incidental take permit requirements
- 182.14 Special rules: alligator, caiman and crocodile (order Crocodylia)
- 182.15 Incidental take permit modifications, suspensions or revocations by the department; additional provisions to section 621.13 of Part 621
- 182.16 Penalties and enforcement

## §182.1 References

The following Federal regulations are incorporated in this Part by reference:

(a) Code of Federal Regulations (CFR).

(1) Endangered and threatened wildlife - 50 CFR - Wildlife and Fisheries - Part 17.11 - revised as of September 24, 2010.

(2) Endangered species convention 50 CFR - Wildlife and Fisheries - Part 23 - revised as of August 23, 2007.

(b) All of the above documents are available for inspection and copying from the Division of Fish, Wildlife and Marine Resources of the New York State Department of Environmental Conservation offices at 625 Broadway, Albany, NY 12233-4752, or can be directly obtained from: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

## §182.2 Definitions

The following words and phrases shall have the indicated meanings when used in this Part and/or in documents prepared or reviewed in conjunction with this Part.

(a) 'Activity' means any land use, construction or action.

(b) 'Adverse modification of habitat' means any alteration of the occupied habitat of any species listed as endangered or threatened in this Part that, as determined by the department, is likely to negatively affect one or more essential behaviors of such species.

(c) 'Commissioner' means the Commissioner of the Department of Environmental Conservation.

(d) 'Department' means the Department of Environmental Conservation.

(e) 'Endangered species' are species that:

(1) are native species in imminent danger of extirpation or extinction in New York based on the criteria for listing in section 182.3(b) of this Part and that are listed as endangered in subdivision (a) of section 182.5 of this Part; or

(2) are species listed as endangered by the United States Department of the Interior in the Code of Federal Regulations (50 CFR part 17).

(f) 'Essential behavior' means any of the behaviors exhibited by a species listed as endangered or threatened in this Part that are a part of its normal or traditional life cycle and that are essential to its survival and perpetuation. Essential behavior includes behaviors associated with breeding, hibernation, reproduction, feeding, sheltering, migration and overwintering.

(g) 'Experimental population' means a group of individual members of an extirpated species listed in this Part that is being re-introduced into suitable habitat within its historic range in New York.

(h) 'Extinct' means species no longer living or existing.

(i) 'Extirpated' or 'Extirpation' means not extinct, but no longer occurring in a wild state within New York, or no longer exhibiting patterns of use traditional for that species in New York (e.g., historical breeders no longer breeding here).

(j) 'Incidental take' means any taking of a species listed as endangered or threatened in section 182.5 of this Part and otherwise prohibited by section 11-0535 of the Environmental Conservation Law that is incidental to, and not the intended purpose of, an otherwise lawful activity.

(k) 'Incidental Take Permit' means a document issued by the department pursuant to section 11-0535 of the Environmental Conservation Law and this Part allowing the incidental take of any species listed as endangered or threatened in this Part.

(l) 'Lesser acts' means, for the purposes of this Part, harassing, harming, maiming, wounding or collecting any species listed as endangered or threatened in section 182.5 of this Part, any act which is likely to cause the death of or injury to any individual member(s) of a species listed as endangered or threatened in section 182.5 of this Part, any adverse modification of habitat of any species listed as endangered or threatened in section 182.5 of this Part, and any interference with or impairment of an essential behavior of a species listed as endangered or threatened in section 182.5 of this Part.

(m) 'Native' means any species that spends some portion of its life cycle within New York State, has occurred here on a regular basis for many years, and was not intentionally or accidentally released into New York. A species is also considered native if it formerly met the conditions of this definition.

(n) 'Net conservation benefit' means a successful enhancement of the species' subject population, successful enhancement of the species' overall population or a contribution to the recovery of the species within New York. To be classified as a net conservation benefit, the enhancement or contribution must benefit the affected species listed as endangered or threatened in this Part or its habitat to a greater degree than if the applicant's proposed activity were not undertaken.

(o) 'Occupied habitat' means a geographic area in New York within which a species listed as endangered or threatened in this Part has been determined by the department to exhibit one or more essential behaviors. Once identified as occupied habitat, the Department will continue to consider that area as occupied habitat until the area is no longer suitable habitat for that species or monitoring has indicated that reoccupation by that species is unlikely.

(p) 'Person' means any federal or state department, agency, board, public benefit corporation, public authority or commission, a county, municipal corporation, or any other political subdivision of the state, and any individual, corporation, partnership, firm or any other legal entity whatsoever.

(q) 'Population' means members of the same species occupying a defined geographic area of limited extent.

(r) 'Regional Permit Administrator' means an employee of the department located in one of the nine regional offices of the department and designated to act on the commissioner's behalf in carrying out the provisions of 6 NYCRR Part 621 (Uniform Procedures).

(s) 'Self-sustaining' means a species or population whose abundance and distribution throughout the state is maintained by natural recruitment at a level sufficient to allow for its continued existence such that there is not a need for ongoing, intensive management or intervention.

(t) 'Species' means any subspecies, distinct group or any distinct population segment of any such group of fish or wildlife which interbreeds when mature. The term species refers not only to independent or adult individuals, but also to any life form, stage, or part of the species, including but not limited to eggs, larvae or pupae. The term species does not include fish or wildlife produced as a result of artificial hybridization.

(u) 'Species of special concern' are native species of fish and wildlife found by the department to be at risk of becoming threatened in New York based on the criteria for listing in section 182.4(a) of this Part and that are listed species of special concern in subdivision (c) of section 182.5 of this Part. Species of special concern do not qualify as either endangered or threatened, as defined in subdivisions (e) and (y) of this section, but have been determined by the department to require some measure of protection to ensure that the species does not become threatened. Species of special concern are listed in subdivision (c) of section 182.5 of this Part and are protected

wildlife pursuant to Environmental Conservation Law section 11-0103(5)(c).

(v) 'Subject population' means any individual member(s) of any species listed as endangered or threatened in this Part utilizing occupied habitat within or adjacent to the geographic area of an activity subject to this Part.

(w) 'Subspecies' means a taxonomic group that is a division of a species and usually, but not always, arises as a consequence of geographical isolation within a species. The term subspecies does not include fish or wildlife produced as a result of artificial hybridization.

(x) 'Take' or 'Taking' means the pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting of any species listed as endangered or threatened in this Part, and all lesser acts such as disturbing, harrying or worrying.

(y) 'Threatened species' are any species that:

(1) are native species likely to become an endangered species within the foreseeable future in New York based on the criteria for listing in section 182.3(b) of this Part and that are listed as threatened in subdivision (b) of section 182.5 of this Part; or

(2) are species listed as threatened by the United States Department of the Interior in the Code of Federal Regulations (50 CFR part 17).

### **§182.3 Listing of endangered and threatened species**

(a) Coordinated listing. All native species present or formerly present in New York listed as endangered or threatened by the United States Department of the Interior in the Code of Federal Regulations (50 CFR part 17) will be included on New York's list of endangered or threatened species in this Part.

(b) General criteria for listing. The department will consider one or more of the following factors when determining whether a

species should be listed as endangered or threatened in New York:

(1) Whether the current number of viable and self-sustaining populations of the species statewide is sufficient to ensure continued survival of the species in the state;

(2) Whether the total number of reproducing individuals is currently sufficient to ensure continued survival of the species in the state;

(3) Whether the species is designated as a federal candidate species under the Federal Endangered Species Act or is listed as endangered or threatened in any adjacent state or province;

(4) Whether the species has declined non-cyclically throughout a significant portion of its range in New York or in the United States;

(5) Whether the present or threatened destruction, modification, or curtailment of the species' habitat or range within the state threatens the continued survival of the species in New York;

(6) Whether the overuse of the species for commercial, sporting, scientific, educational, or other purpose threatens the continued survival of the species in New York;

(7) Whether disease, pollution, contaminants, predation, or interspecific competition threatens the continued survival of the species in New York;

(8) The adequacy of existing regulatory mechanisms to protect the species or its habitat;

(9) Other natural or human-made factors affecting the species' continued survival within the state;

(10) Whether the species is restricted geographically in New York; and

(11) Whether the species' biology makes it highly susceptible to changes in its environment.

(c) Additional criteria for listing. Only species native to New York and existing in the wild within the state with some regularity during a portion of its annual life cycle will be considered for listing by the department as endangered or threatened. Species that are exotic, or were deliberately or accidentally introduced into New York, the United States, or North America by humans, or are vagrant or an accidental visitor will not be considered for listing. Currently extirpated species are eligible for listing by the department as endangered or threatened if the species is documented to have been native in New York, and if suitable habitat for the species remains or could be created.

(d) Criteria for de-listing. A species will be removed from the list of endangered species and added to the list of threatened species in New York when, after applying the factors set forth in subdivision (b) of this section, the department determines that the species no longer qualifies for listing as endangered. A species will be removed from the list of threatened species and added to the list of species of special concern in New York when, after applying the factors set forth in subdivision (b) of this section, the department determines that the species no longer qualifies for listing as threatened.

## **§182.4 Listing of species of special concern**

(a) Criteria for listing. The department will consider one or more of the following factors to determine whether a native species should be listed as a species of special concern in New York:

(1) The species is designated as a federal candidate species under the Federal Endangered Species Act or is listed as threatened or endangered in three or more adjacent states or provinces;

(2) The species is determined to be in some jeopardy due to adverse trends to which it is vulnerable, and if not monitored or ameliorated, could lead to more serious decline and listing as either an endangered or threatened species in New York;

(3) The species appears to have undergone a serious, non-cyclical decline or could do so if protection or proactive management steps are not undertaken; and

(4) The species is sufficiently uncommon or severely restricted in its range in New York that any reduction in its population or habitat may cause it to become threatened in the foreseeable future.

(b) Criteria for de-listing. A species will be removed from the list of species of special concern when, after applying the factors set forth in subdivision (a) of this section, the department determines that the species no longer qualifies as a species of special concern.

## §182.5 Endangered species, threatened species and species of special concern

(a) 'Endangered species'. Those endangered species that merit listing as endangered either based on the criteria for listing in sections 182.3(b) and (c) of this Part or because they are species listed as endangered by the United States Department of the Interior in the 50 Code of Federal Regulations part 17 (see section 182.1 of this Part) and are native to New York State include:

Common Name	Scientific Name
(1) Molluscs:	
(i) Dwarf wedgemussel	<i>Alasmidonta heterodon</i>
(ii) Pink mucket	<i>Lampsilis abrupta</i>
(iii) Clubshell	<i>Pleurobema clava</i>
(iv) Fat pocketbook	<i>Potamilus capax</i>
(v) Rayed bean	<i>Villosa fabalis</i>
(vi) Chittenango ovate amber snail	<i>Novisuccinea chittenangoensis</i>
(2) Insects:	
(i) Tomah mayfly	<i>Siphonisca aerodromia</i>
(ii) American burying beetle	<i>Nicrophorus americanus</i>
(iii) Hessel's hairstreak	<i>Callophrys hesseli</i>

(iv) Karner blue	<i>Lycaeides melissa samuelis</i>
(v) Regal fritillary	<i>Speyeria idalia</i>
(vi) Persius duskywing	<i>Erynnis persius</i>
(vii) Grizzled skipper	<i>Pyrgus centaureae wyandot</i>
(viii) Arogos skipper	<i>Atrytone arogos arogos</i>
(ix) Bog buckmoth	<i>Hemileuca' species 1</i>
(x) Pine pinion moth	<i>Lithophane lepida lepida</i>
(3) Fishes:	
(i) Shortnose sturgeon	<i>Acipenser brevirostrum</i>
(ii) Silver chub	<i>Macrhybopsis storeriana</i>
(iii) Pugnose shiner	<i>Notropis anogenus</i>
(iv) Round whitefish	<i>Prosopium cylindraceum</i>
(v) Bluebreast darter	<i>Etheostoma camurum</i>
(vi) Gilt darter	<i>Percina evides</i>
(vii) Spoonhead sculpin	<i>Cottus ricei</i>
(viii) Deepwater sculpin	<i>Myoxocephalus thompsoni</i>
(4) Amphibians:	
(i) Tiger salamander	<i>Ambystoma tigrinum</i>
(ii) Northern cricket frog	<i>Acris crepitans</i>
(5) Reptiles:	
(i) Mud turtle	<i>Kinosternon subrubrum</i>
(ii) Bog turtle	<i>Clemmys muhlenbergii</i>
(iii) Hawksbill sea turtle	<i>Eretmochelys imbricata</i>
(iv) Atlantic ridley sea turtle	<i>Lepidochelys kempii</i>
(v) Leatherback sea turtle	<i>Dermochelys coriacea</i>
(vi) Queen snake	<i>Regina septemvittata</i>
(vii) Massasauga	<i>Sistrurus catenatus</i>
(6) Birds:	
(i) Golden eagle	<i>Aquila chrysaetos</i>
(ii) Peregrine falcon	<i>Falco peregrinus</i>
(iii) Spruce grouse	<i>Falcapennis canadensis</i>
(iv) Black rail	<i>Laterallus jamaicensis</i>

(v) Piping plover	<i>Charadrius melodus</i>
(vi) Eskimo curlew	<i>Numenius borealis</i>
(vii) Roseate tern	<i>Sterna dougallii dougallii</i>
(viii) Black tern	<i>Chlidonias niger</i>
(ix) Short-eared owl	<i>Asio flammeus</i>
(x) Loggerhead shrike	<i>Lanius ludovicianus</i>
(7) Mammals:	
(i) Indiana bat	<i>Myotis sodalis</i>
(ii) Allegheny woodrat	<i>Neotoma magister</i>
(iii) Sperm whale	<i>Physeter catodon</i>
(iv) Sei whale	<i>Balaenoptera borealis</i>
(v) Blue whale	<i>Balaenoptera musculus</i>
(vi) Finback whale	<i>Balaenoptera physalus</i>
(vii) Humpback whale	<i>Megaptera novaeangliae</i>
(viii) Right whale	<i>Eubalaena glacialis</i>
(ix) Gray wolf	<i>Canis lupus</i>
(x) Cougar	<i>Felis concolor</i>

(b) 'Threatened species'. Those species that merit listing as threatened either based on the criteria for listing in sections 182.3(b) and (c) of this Part or because they are species listed as threatened by the United States Department of the Interior in 50 Code of Federal Regulations part 17 (see section 182.1 of this Part) and are native to New York State include:

Common Name	Scientific Name
(1) Molluscs:	
(i) Brook floater	<i>Alasmodonta varicosa</i>
(ii) Wavy-rayed lampmussel	<i>Lampsilis fasciola</i>
(iii) Green floater	<i>Lasmigona subviridis</i>
(2) Insects:	
(i) Pine barrens bluet	<i>Enallagma recurvatum</i>
(ii) Scarlet bluet	<i>Enallagma pictum</i>
(iii) Little bluet	<i>Enallagma minisculum</i>

(iv) Northeastern beach tiger beetle	<i>Cicindela dorsalis dorsalis</i>
(v) Frosted elfin	<i>Callophrys irus</i>
(3) Fishes:	
(i) Lake sturgeon	<i>Acipenser fulvescens</i>
(ii) Mooneye	<i>Hiodon tergisus</i>
(iii) Lake chubsucker	<i>Erimyzon sucetta</i>
(iv) Gravel chub	<i>Erimystax x-punctata</i>
(v) Mud sunfish	<i>Acantharchus pomotis</i>
(vi) Banded sunfish	<i>Enneacanthus obesus</i>
(vii) Longear sunfish	<i>Lepomis megalotis</i>
(viii) Eastern sand darter	<i>Ammocrypta pellucida</i>
(ix) Swamp darter	<i>Etheostoma fusiforme</i>
(x) Spotted darter	<i>Etheostoma maculatum</i>
(xi) Longhead darter	<i>Percina macrocephala</i>
(4) Amphibians:	
None	
(5) Reptiles:	
(i) Blanding's turtle	<i>Emydoidea blandingii</i>
(ii) Green sea turtle	<i>Chelonia mydas</i>
(iii) Loggerhead sea turtle	<i>Caretta caretta</i>
(iv) Fence lizard	<i>Sceloporus undulatus</i>
(v) Timber rattlesnake	<i>Crotalus horridus</i>
(6) Birds:	
(i) Pied-billed grebe	<i>Podilymbus podiceps</i>
(ii) Least bittern	<i>Ixobrychus exilis</i>
(iii) Bald eagle	<i>Haliaeetus leucocephalus</i>
(iv) Northern harrier	<i>Circus cyaneus</i>
(v) King rail	<i>Rallus elegans</i>
(vi) Upland sandpiper	<i>Bartramia longicauda</i>
(vii) Common tern	<i>Sterna hirundo</i>
(viii) Least tern	<i>Sterna antillarum</i>

(ix) Sedge wren	<i>Cistothorus platensis</i>
(x) Henslow's sparrow	<i>Ammodramus henslowii</i>
(7) Mammals:	
None	

(c) 'Species of special concern'. Those species that merit listing as species of special concern based on the criteria in section 182.4 of this Part and that are native to New York State include:

Common Name	Scientific Name
(1) Molluscs:	
(i) Buffalo pebble snail	<i>Gillia altilis</i>
(ii) Fringed valvata	<i>Valvata lewisi</i>
(iii) Mossy valvata	<i>Valvata sincera</i>
(2) Insects:	
(i) Unnamed dragonfly species	<i>Gomphus' spec. nov.</i>
(ii) Southern sprite	<i>Nehalennia integricollis</i>
(iii) Extra striped snaketail	<i>Ophiogomphus anomalus</i>
(iv) Pygmy snaketail	<i>Ophiogomphus howei</i>
(v) Common sanddragon	<i>Progomphus obscurus</i>
(vi) Gray petaltail	<i>Tachopteryx thoreyi</i>
(vii) Checkered white	<i>Pontia protodice</i>
(viii) Olympia marble	<i>Euchloe olympia</i>
(ix) Henry's elfin	<i>Callophrys henrici</i>
(x) Tawny crescent	<i>Phyciodes batesii</i>
(xi) Mottled duskywing	<i>Erynnis martialis</i>
(xii) Barrens buckmoth	<i>Hemileuca maia</i>
(xiii) Herodias underwing	<i>Catocala herodias gerhardi</i>
(xiv) Jair underwing	<i>Catocala jair</i>
(xv) A noctuid moth	<i>Heterocampa varia</i>
(3) Fishes:	
(i) Mountain brook lamprey	<i>Ichthyomyzon greeleyi</i>
(ii) Black redhorse	<i>Moxostoma duquesnei</i>

(iii) Streamline chub	<i>Erimystax dissimilis</i>
(iv) Redfin shiner	<i>Lythrurus umbratilis</i>
(v) Ironcolor shiner	<i>Notropis chalybaeus</i>
(4) Amphibians:	
(i) Hellbender	<i>Cryptobranchus alleganiensis</i>
(ii) Marbled salamander	<i>Ambystoma opacum</i>
(iii) Jefferson salamander	<i>Ambystoma jeffersonianum</i>
(iv) Blue-spotted salamander	<i>Ambystoma laterale</i>
(v) Longtail salamander	<i>Eurycea longicauda</i>
(vi) Eastern spadefoot toad	<i>Scaphiopus holbrookii</i>
(vii) Southern leopard frog	<i>Rana sphenoccephala utricularius</i>
(5) Reptiles:	
(i) Spotted turtle	<i>Clemmys guttata</i>
(ii) Wood turtle	<i>Clemmys insculpta</i>
(iii) Eastern box turtle	<i>Terrapene carolina</i>
(iv) Eastern spiny softshell	<i>Apalone spinifera</i>
(v) Eastern hognose snake	<i>Heterodon platyrhinos</i>
(vi) Worm snake	<i>Carphophis amoenus</i>
(6) Birds:	
(i) Common loon	<i>Gavia immer</i>
(ii) American bittern	<i>Botaurus lentiginosus</i>
(iii) Osprey	<i>Pandion haliaetus</i>
(iv) Sharp-shinned hawk	<i>Accipiter striatus</i>
(v) Cooper's hawk	<i>Accipiter cooperii</i>
(vi) Northern goshawk	<i>Accipiter gentilis</i>
(vii) Red-shouldered hawk	<i>Buteo lineatus</i>
(viii) Black skimmer	<i>Rynchops niger</i>
(ix) Common nighthawk	<i>Chordeiles minor</i>
(x) Whip-poor-will	<i>Caprimulgus vociferus</i>
(xi) Red-headed woodpecker	<i>Melanerpes erythrocephalus</i>
(xii) Horned lark	<i>Eremophila alpestris</i>
(xiii) Bicknell's thrush	<i>Catharus bicknelli</i>

(xiv) Golden-winged warbler	<i>Vermivora chrysoptera</i>
(xv) Cerulean warbler	<i>Dendroica cerulea</i>
(xvi) Yellow-breasted chat	<i>Icteria virens</i>
(xvii) Vesper sparrow	<i>Poocetes gramineis</i>
(xviii) Grasshopper sparrow	<i>Ammodramus savannarum</i>
(xix) Seaside sparrow	<i>Ammodramus maritimus</i>
(7) Mammals:	
(i) Small-footed bat	<i>Myotis leibii</i>
(ii) New England cottontail	<i>Sylvilagus transitionalis</i>
(iii) Harbor porpoise	<i>Phocaena phocaena</i>

## §182.6 Recovery plans and restoration plans

(a) Recovery plans. The department may, at its discretion, prepare and adopt a recovery plan for any species listed in this Part. A recovery plan will set forth goals and objectives to foster the continued survival, recovery, and eventual de-listing of the species, and will also include the most current information on the biology, needs, management of and threats to the species. Recovery plans are not required, but may be adopted by the department when sufficient information is available on any particular listed species, especially when such information might be helpful in identifying and recommending conservation measures that will aid in the recovery of the species.

(b) Restoration plans. The department may, at its discretion, prepare and adopt a restoration plan for any extirpated species. A restoration plan will include current biological information on the species, a discussion of its historical status in New York, an analysis of past, present and future threats and habitat conditions, response to management, and steps necessary for reestablishment of the species in the state.

## §182.7 Licenses

The department may, pursuant to Part 175, issue a license to a person to transport, sell, import and/or possess any species

listed as endangered, threatened or species of special concern in this Part for purposes it deems legitimate. Such license shall state the species to which it applies and any other conditions the department may deem appropriate.

## **§182.8 Prohibition**

(a) No person shall take or engage in any activity that is likely to result in a take of any species listed as endangered or threatened in this Part, except as authorized by an incidental take permit issued by the department pursuant to this Part or as otherwise authorized as an exempt activity in section 182.13 of this Part.

(b) No person shall, except under permit or license from the department issued pursuant to Part 175 of this Title (Special Licenses) or as provided in section 182.14 of this Part with respect to alligator, caiman or crocodile, import, transport, possess or sell any endangered or threatened species of fish or wildlife, or any hide or part thereof, or sell or possess with intent to sell any article made in whole or in part from the skin, hide or other part of such species unless such species, hide or part thereof was in the possession of such person on or before the date such species was designated as endangered or threatened by the Secretary of the Interior or the department, and such possession must be evidenced by such legal proof as may be required by the commissioner. The transfer or sale of any skin, hide or part of such species lawfully possessed may be continued under permit from the department, provided the person or concern holding such inventory for transfer or sale submits to the department an affidavit unequivocally stating that such inventory was acquired prior to the date such species was designated as endangered or threatened by the Secretary of the Interior or the department, the inventory is listed in sufficient detail to permit its identification, and the inventory is labeled in accordance with procedures established by the department.

(c) No person shall fail to comply with the terms or conditions contained in any permit issued pursuant to this Part or Part 175 of this Title (Special Licenses).

## **§182.9 Request for determination whether activity is subject to regulation**

(a) Any person proposing an activity or any entity with regulatory oversight over a proposed activity may request a determination from the department as to whether the proposed activity is likely to result in the take or taking of any species listed as endangered or threatened in this Part and is therefore subject to regulation under this Part. Failure to ask the department for such a determination does not remove the subject activity from the potential for regulation under this Part.

(b) A request for a determination under subdivision (a) of this section shall be directed to the appropriate regional permit administrator, shall be in writing and shall, at a minimum, contain a description of the activity being proposed and the location of the proposed activity.

(c) Department response to request for determination.

(1) Within 30 days of receipt of a request for determination, the department shall provide a written answer to the person making the request stating whether the proposed activity is subject to regulation under this Part, requesting additional information necessary to make such a determination, or advising that one or more of the factors cited in subsection (3) require an extension of the 30-day time period.

(2) If the department determines that the proposed activity is subject to regulation under this Part, the department's response must describe the take or taking that may result from the proposed activity.

(3) In the event that weather, the subject species' essential behavior, habitat conditions or other environmental factors prevent the department from making a determination within 30 days, it may extend such time period until a determination can be made.

(d) All determinations made under this section will be kept on file at the appropriate regional office.

## **§182.10 Procedural requirements for incidental take permit applications and related matters**

Notwithstanding the provisions of Part 175 of this Title, the application for incidental take permits and related matters including: departmental action on permit applications; public notice and comment procedures; final decisions on applications; renewals, modifications, suspensions or revocations of incidental take permits by the department; and special provisions relating to incidental take permits shall utilize the procedures found in Part 621 of this Title (Uniform Procedures). Copies of forms and regulations referred to in this Part are available from the department's regional permit administrators at the locations listed in section 621.19 of Part 621 of this Title and on the department's internet site.

## **§182.11 Incidental take permit; specific application requirements**

A permit under this section is required for any activity that is likely to result in the take or a taking of any species listed as endangered or threatened in this Part as determined by the department and that is not otherwise exempt under section 182.13 of this Part.

(a) Incidental take permit. The department may, at its discretion, issue a permit that authorizes the incidental take of a species listed as endangered or threatened in this Part. An incidental take permit shall include an endangered or threatened species mitigation plan as described in subdivision (d) of this section that the department has determined will result in a net conservation benefit to the listed species and which has been approved by the department.

(b) Eligible applicants. Generally, the person implementing the proposed action or the person most involved in the proposed action that is subject to this Part.

(c) Permit application requirements. A complete application for an incidental take permit must include a properly completed

application for the permit and any supplemental forms. In addition to the general requirements for permit applications, an applicant must provide to the department's appropriate regional permit administrator:

(1) The applicant's full name, mailing address and telephone numbers. If the applicant is a corporation, firm, partnership, association, institution, or public or private agency, the name and address of the person responsible for the proposed activity or project requesting the permit, the president or principal officer, and the registered agent (if any) for the service of process;

(2) A detailed description of the proposed activity and its location, the species listed as endangered or threatened in this Part for which a take or taking is likely to occur in connection with the activity, the nature and expected extent of the take or taking, and the impacts on the species that are likely to occur as a result of the proposed activity including but not limited to effects on essential behaviors and occupied habitat;

(3) An analysis of whether issuance of an incidental take permit would jeopardize the continued existence of the subject population of the species in question. The analysis shall include any studies of current or past use of the occupied habitat by the species, maps or descriptions of any occupied habitat, consideration of the species' capability to survive and reproduce, and a discussion of any adverse impacts of the taking on those capabilities based upon known population trends and known threats to the species;

(4) A description of any efforts to modify the proposed activity in order to minimize or avoid entirely any take or taking of the species;

(5) An endangered or threatened species mitigation plan as described in subdivision (d) of this section;

(6) An implementation agreement as described in subdivision (e) of this section; and

(7) An executed certification statement as follows: "I certify that the information submitted in this application is complete and accurate to the best of my knowledge and belief. I understand that any false statement herein may subject me to denial, suspension or revocation of this permit, and to civil and criminal penalties under the laws of the State of New York."

(d) Endangered or threatened species mitigation plan. The endangered or threatened species mitigation plan required by this section shall include:

(1) The measures the applicant will undertake to minimize and fully mitigate impacts to any species listed as endangered or threatened in this Part for which the incidental take permit application is being submitted. All proposed measures shall be capable of successful implementation, and shall be legally, technologically, economically and biologically practicable;

(2) Data and information to ensure that the taking sought to be authorized by the incidental take permit will not reduce the likelihood of the survival or recovery of the species in New York;

(3) A proposed method for monitoring the effectiveness of the plan; and

(4) A description of the funding source, the level of funding, and the guarantee or assurance of funding that the applicant will provide to implement the endangered or threatened species mitigation plan including but not limited to bonds, insurance, or escrow.

(e) Implementation agreement. The implementation agreement required by this section must:

(1) Identify all persons that will be involved in implementing the endangered and threatened species mitigation plan, with individuals responsible for funding and implementing the plan clearly identified;

(2) Specifically identify the timeline for implementation of measures required by the plan;

(3) Specify the funding available for, and dedicated to, implementation of the plan and describe the method of assurance or guarantee that the funds will be available as necessary; and

(4) Be signed by all involved persons identified pursuant to subsection (1) herein.

(f) Federal requirements. In the event that a proposed activity is also subject to regulation under the federal Endangered Species Act, the department will work cooperatively with federal agencies in the review and processing of any associated federal habitat conservation plan, safe harbor agreement, and incidental take license issued, approved, or adopted pursuant to the federal Endangered Species Act. In all such cases, compliance with federal requirements shall not relieve a person from compliance with this Part for any proposed activity occurring in New York State that is likely to result in the take or taking of a species listed as endangered or threatened in this Part. In the discretion of the department, a federal habitat conservation plan or safe harbor agreement may be substituted in whole or in part for the application, endangered and threatened species mitigation plan and implementation agreement required by this Part.

(g) Additional requirements and information. The department may, at its discretion, require the applicant to provide reasonable access to the project site by department personnel or their designee for the purpose of assessing the effects of the proposed activity, determine compliance with permit conditions and the endangered and threatened species mitigation plan, and monitoring the effectiveness of any permit conditions or measures required by an endangered and threatened species mitigation plan. Supplemental information that the department determines is necessary to review the permit application may be requested at any time.

## **§182.12 Incidental take permit issuance standards; conditions**

(a) Before an incidental take permit is issued, the department must determine that:

(1) The proposed activity is an otherwise lawful activity, and the taking of a species listed as endangered or threatened in this Part is incidental to, and not the purpose of, the activity;

(2) The applicant has submitted to the department an endangered and threatened species mitigation plan and an implementation agreement that have been approved by the department in writing;

(3) The implementation of the conditions in the incidental take permit and the measures set forth in the endangered and threatened species mitigation plan will result in a net conservation benefit to the species in question. This determination will be based upon the best scientific and other information that is reasonably available to the department, and shall include the following:

(i) consideration of the species' capability to survive and reproduce, and any adverse impacts of the taking on those abilities based upon:

(a) Known population trends;

(b) Known threats to the species; and

(c) Reasonably foreseeable impacts on the species from other related projects or activities.

(b) Permit denial. An application for an incidental take permit will be denied when the department determines that the proposed activity is likely to result in the loss of occupied habitat, loss of individuals, or interference with essential behavior of a species listed as endangered or threatened in this Part such that a net conservation benefit cannot be achieved.

(c) Permit term. The permit term of an incidental take permit issued pursuant to this Part will run concurrently with the duration of an implementation agreement approved by the department pursuant to section 182.11(e) of this Part.

(d) Renewal. A permittee whose activity may result in an incidental take beyond the period of time covered in the applicable incidental take permit or implementation agreement must file for renewal of the permit at least 60 days prior to its expiration. Filing for renewal shall be made by the permittee on forms provided by the department. A filing for renewal shall be subject to the procedures and standards for review of an application for a new incidental take permit.

(e) Transfer. An incidental take permit issued by the department pursuant to this Part may be transferred at the discretion of the department, provided that the approved implementation agreement and mitigation plan are adopted by the new permittee in their entirety.

### **§182.13 Exemptions from incidental take permit requirements**

(a) A permit under section 182.11 of this Part is not required for the following:

(1) Activities authorized and approved by the department in writing and undertaken either by the department or an approved agent or contractor directly related to the management, recovery or restoration of any species listed as endangered or threatened in this Part.

(2) An accidental and unforeseeable incidental take of any species listed as endangered or threatened in this Part. The misidentification of a species will not be grounds for a claim that a take was accidental and unforeseeable.

(3) A taking of any species listed as endangered or threatened in this Part resulting from existing, routine and ongoing agricultural activities. For purposes of this section, routine and ongoing agricultural activities include but are not limited to cultivation and tillage of soil, crop rotation, fallowing, grazing and watering of livestock, making reasonable use of water resources, planting or harvesting natural or agricultural products, and otherwise engaging in the use of land for growing agricultural products. For purposes of this section, routine and

ongoing agricultural activities do not include forest management activities or the conversion of agricultural land to non-agricultural use.

(4) Public health declarations, orders, and regulations of the department of health. Copies of all such public health orders and regulations affecting any activity subject to this Part shall be filed with the department of environmental conservation. The commissioner may request modification of such orders or regulations deemed necessary to implement the policy of section 11-0535 of the environmental conservation law and this Part.

(5) An activity carried out in response to an emergency authorized by the department in accordance with section 70-0116 of Article 70 of the environmental conservation law and section 621.12 of Part 621 of this Title (Uniform Procedures).

(b) The department may, in its discretion, allow a person to take, without the necessity of a permit issued pursuant to this Part, individual members of an experimental population when the department determines, upon information collected by the department, that allowance of such take is necessary to protect public health or safety, or to protect public or private property. In such instance, the department shall specify the terms, conditions and circumstances under which the take may occur, shall identify the public health or safety, or public or private property concerns that make allowance of such take necessary, and shall include a finding that allowance of the take will not jeopardize the continued survival of the experimental population.

### **§182.14 Special rules: alligator, caiman and crocodile (order Crocodylia)**

(a) Definitions. As used in this section, the following shall mean:

(1) Person shall mean any individual, corporation, partnership, firm or any other legal entity whatsoever.

(2) Registration shall mean the document issued by the department entitling the holder to import or possess alligator,

caiman or crocodile, or the parts thereof or products made therefrom.

(3) Permit shall mean the document issued by the department to an individual retail establishment, store or outlet authorizing retail sale of alligator, caiman or crocodile, or the parts thereof or products made therefrom, at such individual retail establishment, store or outlet.

(4) Federal permit shall mean a permit to import or possess alligator, caiman or crocodile, or parts thereof or products made therefrom, issued by the United States Department of the Interior.

(5) Possession shall mean possession with the intention of future sale, except retail sale. It shall include possession for the purposes of tanning or processing hides, or fabricating or finishing products made therefrom.

(6) Retail sale shall mean sale or offering to sell by an individual retail establishment, store or outlet to the ultimate consumer.

(7) Import shall mean to bring into, or introduce into, the State of New York any alligator, caiman or crocodile or the parts thereof or products made therefrom.

(8) CITES shall mean the Convention of International Trade in Endangered Species of Wild Fauna and Flora, and any amendments thereto.

(9) Record shall mean invoices, bills of sale, bills of lading, shipping manifests or such other documents as are maintained in the ordinary course of the business of a person to whom a registration or permit has been issued pursuant to this section, in the form of which such documents are ordinarily maintained by such person, as are necessary in order that the department may be adequately, and without unreasonable inconvenience, informed of the date of any transaction by which alligator, caiman or crocodile parts or products were acquired and the name and address of the person from whom such parts or products were acquired.

(b) Prohibitions. It shall be unlawful for any person to:

(1) import or possess alligator, caiman or crocodile, or the parts thereof or products made therefrom, without a registration issued by the department. Where a Federal permit is required, such registration shall be issued only to a person holding a valid Federal permit. Possession by an applicant of a valid Federal permit shall entitle the applicant to registration pursuant thereto;

(2) sell or offer to sell at retail alligator, caiman or crocodile, or the parts thereof or products made therefrom, without a permit issued by the department;

(3) import, possess, sell or offer to sell any alligator, caiman or crocodile, or the parts thereof or products made therefrom, in violation of the Code of Federal Regulations, 50 CFR parts 17 and 23;

(4) import, possess, sell or offer for sale any live alligator, caiman or crocodile, except for scientific or educational purposes as authorized by the department; or

(5) violate the terms of provisions of any registration or permit issued pursuant to this section.

(c) Application for registration or permit; interim registration or permit. Until April 1, 1981, an application for registration or a permit, on the form provided by the department and accompanied by the proper fee, shall be deemed to be an interim registration or permit and shall satisfy the registration and permit requirements of this section, provided such application has actually been received by the department. Registrations and permits, and renewals thereof, issued after April 1, 1981 shall be valid through the following March 31st.

(d) Fees. The annual fee for the registration required by this section shall be \$150. The annual fee for a permit shall be \$25.

(e) Maintenance of records; inspection. A person to whom a registration or permit has been issued pursuant to this section shall maintain complete and accurate records concerning

importation and possession of alligator, caiman or crocodile parts or products. Such records shall be maintained for a minimum of five years, and shall be available for inspection by an officer of the department at any reasonable hour.

### **§182.15 Incidental take permit modifications, suspensions or revocations by the department; additional provisions to section 621.13 of Part 621**

(a) An incidental take permit issued pursuant to this Part may be modified, suspended or revoked at any time by the department if the permittee fails to comply with the terms and conditions of an endangered and threatened species mitigation plan or an implementation agreement.

(b) Where an incidental take permit issued pursuant to this Part has been revoked by the department, the person holding such permit shall not be eligible to reapply for another such permit until the expiration of two years from the date of revocation.

(c) Nothing in this Part shall preclude or affect the commissioner's authority to issue summary abatement orders under section 71-0301 of the Environmental Conservation Law, or to take emergency actions summarily suspending a license or permit under section 401(3) of the State Administrative Procedure Act.

### **§182.16 Penalties and enforcement**

Any person who violates this Part or any license, permit or order issued by the department pursuant to section 11-0535 of the Environmental Conservation Law or pursuant to the provisions of this Part may be liable for all penalties and other remedies provided for in the Environmental Conservation Law. Such penalties and remedies may be in addition to any other penalty or remedy available under any other law.

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