ADIRONDACK PARK AGENCY

August 12, 2008

REGULATORY IMPACT STATEMENT
2008 Rulemaking

1. Statutory authority:

The Adirondack Park Agency Act, Executive Law Article 27, Section 804(9), authorizes the Agency "to adopt, amend and repeal...such rules and regulations...as it deems necessary to administer this article and to do any and all things necessary or convenient to carry out the purposes and policies of this article...." Similar authority is also found in the NYS Wild, Scenic and Recreational Rivers System Act (ECL Section 15-2709) and in the NYS Freshwater Wetlands Act (ECL Section 24-0801). The statutory authorities and procedures addressed in the revisions are: (1) Executive Law Article 27, Section 810(1)(a)(1); (1)(b)(1)(b); (1)(c)(1)(b); (1)(d)(1)(b); (1)(e)(1)(b) and ECL 24-0801 (subdivision "involving wetlands"); (2) Executive Law Article 27; Sections 806 and 811(5) (expansion of non-conforming shoreline structures); (3) Executive Law Article 27, Sections 805, 810 (subdivision of parcels of record with areas separated by rights-of-way owned in fee by another); (4) Executive Law Article 27, Section 810 ("floor space" and "hunting and fishing cabin").

2. Legislative objectives:

The legislative objectives are framed in Section 801 of the Adirondack Park Agency Act (APA Act). Section 801 refers to the Park's unique and special values, the constitutional safeguards over the public lands within the Park and the obligation on the part of the State, through the Adirondack Park Agency, "...to insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack Park...." The Adirondack Park Agency seeks to accomplish these objectives through the administration of its statutory

authority and the adoption of appropriate regulations to accomplish protection of the open space character of the Park, its natural resources and vigorous settlements.

In 1996, the Agency initiated a multi-phase, multi-year public process to comprehensively revise its regulations. The main focus has been to (1) clarify existing regulatory language; (2) expedite delivery of services to the public; (3) introduce improved consistency, uniformity, and predictability into Agency administration and decision making consistent with governing statutes; and (4) otherwise improve the Agency's regulatory, advisory, and educational functions. To date, four phases of regulatory revision have been completed, resulting in changes effective January 3, 2001, May 1, 2002, January 29, 2003 and September 15, 2005.

The following changes proposed by the Agency in this Fifth Rulemaking were arrived at after a lengthy process involving staff, the public and the Technical Advisory List group (TAL). The TAL is a multi-disciplinary, multi-interest volunteer group created to assist the Agency in reviewing proposed regulations. The proposed regulations more closely implement the statutes, intent, improve clarity and consistency of Agency practices, and ensure better environmental protections.

3. Needs and benefits:

The Agency's analysis of regulation revision needs and benefits is grounded in the initial analysis undertaken by the Task Force on Expediting Adirondack Park Agency Operations and Simplifying its Procedures in its 1994 Report updated through consultation with the TAL and Agency Legal Affairs Committee deliberations and assessment of public comment. The Adirondack Park Agency www site, which now generates an average of 8,000 visits or 25,000 page views per week, also has been a primary vehicle for communication about potentials and priorities for regulatory revision.

a. "Floor space." This definition is considered essential to consistent application and enforcement of Agency permit jurisdiction based on size of structure. "Floor space" will be added to provide a definition for

"square feet of floor space for a building." A new section 570.3(ah) will be added to define the "square footage of a structure other than a building."

The terms "floor space," "square feet of floor space" and "square footage" are all used in the Act to establish various jurisdictional thresholds; that is, the point at which an Agency permit is required for new land use and development in the Park. Definitions are required to ensure consistency.

Any measurement methodology adopted will be an advantage to landowners in some cases, and a disadvantage in other regards, depending on whether one is asserting rights of expansion based upon pre-existing size, or whether the square footage of a new structure meets a jurisdictional threshold. Any measurement methodology should fulfill the general intent of the Act, should provide for clarity so that the public may easily understand how it is done, and should be simple to apply to ensure administrative convenience. Using these criteria, staff recommended that building measurements be made using outside dimensions. Inside measurements are not readily available and are difficult to obtain for odd shapes. Outside measurements would be far easier and more consistent in application.

The proposed language also makes clear that the "square footage" of structures subject to the shoreline setbacks, other than buildings, is measured in either elevation (face) or plan (top) view, whichever is larger. This is consistent with the language used in the 2002 regulation for retaining walls.

b. "Hunting and fishing cabin". The definition will be revised with a new definition that focuses on physical attributes of the structure, but also retains the essential aspects of the existing definition relating to hunting and fishing use.

The Task Force recommended that the definition of "hunting and fishing cabin" be updated, a recommendation that was embraced by the Agency. The Agency, over the course of years since that time, has consulted with both environmental groups and the industrial forest landowners on the issue of updating the definition. The Agency believes the Legislature intended that "hunting and fishing cabins" be small and rustic

in nature, with only occasional occupancy. The radical difference in legal consequences between a "hunting and fishing cabin" and a "single family dwelling" with regard to jurisdictional thresholds and the application of the APA Act overall intensity guidelines is only justified if the two are functionally and physically different. Under the APA Act, most hunting and fishing cabins are exempt from project review and will not be considered a principal building. They are most commonly jurisdictional in the Resource Management land use area, and then, only if they involve 500 or more square feet of floor space. In contrast, seasonal dwellings are treated the same as any single family dwelling and utilize one principal building privilege under the APA Act intensity guidelines. In contrast to hunting and fishing cabins, permits are required for single family dwellings when a certain threshold number is proposed, or when small lot sizes are involved, and in all cases in Resource Management. Specific language has been discussed with stake holders on a number of occasions. This dialogue included the Empire State Forest Products Association; woodland managers from Finch, Pruyn and Company, International Paper Company and others; and, separately, representatives of the principal Adirondack Park environmental advocacy organizations. The proposed definition is a clarification of current Agency practice and is consistent with current jurisdictional determinations regarding hunting and fishing cabins. Existing jurisdictional determinations will stand as written if there has been detrimental reliance.

The proposed definition is also consistent with the NYS Building Code definition of Group U structures, as confirmed by advice given by the Department of State Codes Office. The Building Code creates a similar bright line between dwellings which require a range of safety and sanitary improvements and occasional use (Group U) structures.

The limited amenities and occasional occupancy aspect of the proposed hunting and fishing structures qualify them as Group U structures.

The new regulatory definition relies primarily on specific structural parameters which dictate that the structure cannot qualify as a dwelling under the State Building Code and provide a simple physical check for compliance.

The Agency continues to include in the definition of "hunting and fishing cabin" the requirement that "hunting and fishing" be the primary use, based on the statute. However, the Agency also recognizes that there may be "incidental" recreational uses associated with the hunting and fishing use.

The process has also taken into consideration issues in enforcement of Agency regulatory criteria. One enforcement matter has been held in abeyance since the early 1990's regarding very long-term leases for shorefront recreational parcels and multi-story structures characterized as "hunting and fishing cabins" and open space recreational leases. In a separate proceeding, hundreds of camps involved in the Champion land acquisitions by the State in the late 1990's were evaluated for regulatory compliance because they had never undergone regulatory review under the APA Act. Significant numbers were in obvious noncompliance of setback and other statutory standards; others raised questions about building design and use.

As a related matter, the APA Act defines "subdivision" as "any division of land into two or more lots, parcels or sites...for the purpose of sale, lease, license or any form of separate ownership or occupancy." (Executive Law Section 802[63]) However, the definition of "subdivision" exempts "the lease of land for hunting and fishing and other open space recreation uses".[1] This exemption for the lease of land for such uses does not encompass the construction of structures. The construction of more than one principal building on a site is considered a "subdivision into sites" (9 NYCRR 573.4[f]).

Historically, the Agency has allowed the construction of more than one "hunting and fishing cabin" (if the cabins are not also principal buildings) on one parcel of land, without considering their construction to be a

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[1]The Agency has only recognized this exemption for traditional short-term leases of the sort common among industrial forest land owners.

"subdivision into sites." Hunting and fishing cabins do not constitute principal buildings unless they exceed 1,250 square feet in size.

However, the construction of any two "seasonal dwellings," "single family dwellings" or "mobile homes" on one parcel of land constitutes a subdivision, and each seasonal dwelling, single family dwelling or mobile home constitutes one principal building, regardless of the size of such dwelling (or mobile home). These legal consequences are very significant. Therefore, all the studies leading to the Agency's regulatory revision effort gave high priority to clarifying the difference between hunting and fishing cabins and seasonal dwellings.

c. Subdivision "involving wetlands." A new definition for "involving wetlands," 9 NYCRR 570.3, and new wetland subdivision review criteria in sections 573.3 and 4, and 578.3 will conform jurisdiction under the two statutes in the Agency's wetland regulations resulting in more consistent application to different proposals on the ground, eliminating inadvertent incentives to "gerrymander" lot configurations to avoid Agency wetland subdivision jurisdiction, and minimizing spillover impacts to wetlands from immediately adjacent new subdivision lots.

Landowner representatives appearing before the Agency have long pointed out regulatory provisions that avoid Adirondack Park wetland subdivision regulation through the creation of one lot closely tracking wetland boundaries on a property to be retained by the subdivider. This "wetland gerrymander" issue was addressed in work sessions with the TAL and the Agency Legal Affairs Committee. The core problem that was identified is the failure of current Agency regulations to recognize that the creation and development of a lot containing a wetland and all proposed lots surrounding that lot (the "wetland subdivision cluster") may impact the wetland, a fundamental basis for jurisdiction under ECL Article 24.

The proposed regulation requires a permit for the "wetland subdivision cluster" unless specific criteria are met. The primary criterion for avoiding a permit is lot boundaries which at all points are 200 feet from the wetland. An additional criterion ensures that road or right-of-way access to lots does not involve impacts to

wetlands. The Agency has also identified a potential general permit for a "wetland subdivision cluster" that would provide standard criteria with more flexible design elements based on structure location rather than lot lines, to be assured in a recorded permit. Of course, if neither set of parameters can be met, the landowner still has the option of applying for a wetland subdivision permit under the full permit review processes of Section 809 of the APA Act, which involves a specific site plan for subdivision lots and wetland impact mitigation tailored to the proposal.

For the non-jurisdictional and general permit options, the parameters must be designed to protect the wetland values in the vast majority of cases where the design parameters are in fact met. The structure of this two-option design should create requirements for the non-jurisdictional option such that wetland protection is assured. However, the criteria for the general permit can be less strict, since it can be based on more detailed design parameters. Importantly, the parameters chosen involve simple measurements, readily understandable by the general public and easily administered by Agency staff based on standard documents prepared by design professionals – surveyors, engineers and architects.

This cluster of lots should be subject to Agency jurisdiction, unless the demonstrated design for these lots will eliminate potential for wetland impacts by adherence to specific lot design requirements.

The major goal to be addressed by the "involving wetlands" subdivision revisions is to tailor subdivision jurisdiction based on the presence of wetlands more closely to the potential for wetland impacts. A number of specific goals were identified by the Agency board based on advice and analysis from the TAL:

(1) Make the permit jurisdiction under the APA Act and the Freshwater Wetlands Act identical with regard to wetlands ("involving wetlands" to mean the same thing as "regulated activity").

(2) Assert the same jurisdiction over retained wetland lots as compared to wetland lots proposed for sale, to protect the wetland and remove incentive to gerrymander.

(3) Eliminate wetlands subdivision jurisdiction over large lots when certain criteria are met to avoid wetland impacts.

(4) Ensure wetland subdivision jurisdiction over wetland lots and lots adjacent to such lots, when standard criteria will not prevent wetland impacts.

(5) Encourage land developers to evaluate subdivision lot configurations as a whole in initial stages of design to create subdivisions that consider the long-term protection of wetlands.

(6) Reduce the enforcement workload from subdivisions recorded and undertaken involving lots with relatively small wetlands present, but not apparent to sellers or purchasers resulting in inadvertent violation of the present wetland subdivision rules where no significant wetland impact is involved.

The proposal to make identical APA wetlands jurisdiction and Freshwater Wetlands Act jurisdiction will eliminate confusion that now exists in the implementation of these two laws notwithstanding explicit reference in the ECL to APA Act decision criteria for Agency exercise of ECL Wetlands Act jurisdiction. This goal is easily satisfied by new section 570.3(o), which defines "involving wetlands" under the APA Act to be the same as "regulated activity" under the Agency Freshwater Wetlands Act regulations.

d. Expansion of non-conforming shoreline structures. The proposed change to shoreline variance criteria in section 575.5 is motivated by Legal Affairs Committee guidance indicating a concern that the section is beyond the authority created by Section 811 of the APA Act. The change will bring Agency regulations into conformance with Executive Law Sections 806 and 811(5). The existing regulation allows significant expansions of structures already located within the shoreline setback area for which no statutory authority exists. Thus, the existing rule creates an anomaly which allows a non-conforming structure to increase its non-conformance without a variance, yet does not allow any non-conforming addition to a conforming structure.

The Agency believes that this increase in non-conformance contravenes the statutory requirements. It is also inconsistent with municipal practice with respect to analogous local zoning requirements. Moreover, the

resulting anomalies are both unfair to neighbors and the public and not protective of shoreline values. Consistent with the stated intent to protect shorelines, the Executive Law requirements should be read strictly.

Section 811(5) of the APA Act provides that pre-existing structures may be expanded by less than 25 percent without a permit, and that dwellings may be expanded to any size without a permit (unless a CEA or other jurisdictional threshold is met). However, the language is careful to state: "provided, however, that no such increase or expansion shall violate, or increase any non-compliance with, the minimum setback requirements of the shoreline restrictions." In other words, the shoreline restrictions are deemed more important than the general rule allowing pre-existing structures to expand, and expansions may not violate the shoreline requirements. A literal reading of Section 811(5) would prohibit any expansion of a non-conforming use without a variance. This is the conventional approach in municipal law, as well.

The proposed language reflects the Agency and TAL discussions, during which it was the general consensus that existing 575.5(b)(2) should be removed and replaced with a regulation which better protects shorelines as intended by the statute. Under the proposed regulation, any expansion within the setback area of an existing non-conforming structure will require a variance. This is consistent with widely accepted municipal zoning practice.

Similarly, replacement of non-conforming on-site wastewater treatment systems is addressed by section 575.5 of the regulations. The present language allows non-jurisdictional replacement "in the immediate vicinity" of the non-conforming system provided the existing non-conformance is not increased. Under this regulation, the Agency has applied the same lateral expansion rule as we currently apply to dwellings: so long as the replacement is no closer to the water than the pre-existing system, it does not increase the non-conformance. However, there is no defensible reason to allow replacements in kind in the existing non-conforming location when other more conforming options are available. The proposed regulation does not create a mandate for replacement of a non-conforming system, but only requires use of the best option available

under the circumstances when the owner chooses to replace or update his system. The proposal, therefore, recognizes the landowner's statutory option to replace in kind in the same location. Finally, expansions of non-conforming wastewater treatment systems in conjunction with an actual or potential proposed increase in occupancy of the structure should not be allowed without a variance unless the system is brought into compliance with the shoreline setback requirements and Appendix Q4.

e. Subdivision of parcels of record with areas separated by rights-of-way owned in fee by another. Revisions to 9 NYCRR 573.4(b) which allow the lawful sale without an Agency permit of a portion of a merged[2] ownership, if the parcel being conveyed is the entirety of the landholding located on one side of a road or right-of-way owned in fee, typically a highway or power line right-of-way, is also motivated by direction from the Legal Affairs Committee and a number of jurisdictional inquiries to the Agency which pointed out anomalies in the allocation of principal building privileges under the APA Act intensity guidelines. The regulation provides that such conveyance is not a "subdivision" under the APA Act.

The existing regulation does not address the application of the APA Act intensity guidelines when either the conveyed or retained portions of the original ownership are substandard in size; that is, would violate the APA Act intensity guidelines. (The intensity guidelines dictate the total number of principal building privileges allowed on a given parcel based on total acreage.) The practice implemented with the existing regulation allows the creation of substandard sized lots without permits, and, therefore, also allows additional principal buildings that would not have been possible applying the APA Act intensity guidelines and the creation of potentially unbuildable lots as artifacts of road relocation or the separation of a residence from shoreline by a public road. A resulting problem is that in the case where the subsequent development requires a permit, the Agency cannot make the necessary findings regarding the APA Act overall intensity guidelines for the lot created by a road or

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[2]Pursuant to Section 811(1)(a) of the APA Act and 9 NYCRR 573.4(i) all adjacent lands owned by one party as of the May 22, 1973 Park Plan enactment date are "merged" as a matter of law, and each such merged lot is entitled to at least one single family dwelling or mobile home.

right-of-way (i.e., the lot is neither "pre-existing" nor of a sufficient size to meet the intensity criterion), so the development cannot be approved. In such cases, it would be better to review the creation of the substandard lots in the first instance to ensure all such lots have building potential.

4. Costs:

a. "Floor space." There are no costs associated with this proposed regulatory change. Measurements and calculations are required by the existing laws and have been made. This proposed regulation just ensures that the calculations are always done consistently.

b. "Hunting and fishing cabin." There are no costs associated with this proposed regulation. If anything, it clarifies what will qualify as a "hunting and fishing cabin," thereby reducing costs of planning for construction of such a cabin, and reducing enforcement costs to the Agency. The industrial forest landowners may argue that any limitation on uses and activities allowed with existing "hunting and fishing cabins" will reduce their income from hunting and fishing leases. Since the statute provides special exemptions for "hunting and fishing cabins" from requirements otherwise applicable to seasonal or year-round dwellings and tourist accommodations, the Agency is not inclined to broaden the exemption. Moreover, the proposed definition does allow incidental "open space recreational use" activity associated with hunting and fishing cabins, improving the current regulation in this regard, since it is unclear whether any such uses would be allowed. However, the regulatory provision is prospective and existing structures would be evaluated based on the statutory size and use language on a case-by-case basis based on date of first construction before or after the effective date of the APA Act, and then only when called into question by an otherwise jurisdictional transaction or evidence of environmental damage associated with wetland or shoreline resources.

The rulemaking has as a primary purpose clarity and consistency in administration. This should reduce time required to determine jurisdiction and/or obtain permission from the Agency, a cost savings to applicants; however, some aspects may require new information, at an increased cost to applicants. These would be

modest, with the primary benefit reduced uncertainty. All changes should increase the effectiveness of environmental protections, reducing the "external" costs of new development.

c. Subdivision "involving wetlands." The purpose of these changes is to establish clear design options for the regulated public so that wetland subdivision projects can be non-jurisdictional or authorized by a prompt general permit, and are prospective only. The professionally prepared application documents involve upfront design costs in order to meet the requirements, but design costs should be reduced as a result of the clear standards provided and most documents will also serve for other state and local permit requirements. Also, costs will be offset by the time efficiencies in gaining approval to proceed. Moreover, a jurisdictional project would require similar or greater design costs. Importantly, appropriate design at the outset should increase the landowner's ability to use all of the mathematical principal building potential. This is an overall cost savings: by smart design in the first instance, the development potential can be maximized in the long run.

With regard to government costs, the new non-jurisdictional and general permit options may result in fewer jurisdictional projects. The Agency believes this will create a modest cost savings in staff time.

d. "Expansion of non-conforming shoreline structures." There are no mandated costs imposed for landowners by these proposed regulations. The regulation will reduce expansion options allowed without a variance for non-conforming structures and on-site wastewater treatment systems. The regulation will, therefore, restrict building opportunities to be consistent with the rules that apply to neighboring conforming properties and will thereby reduce economic damages to neighbors that may result from unregulated expansion of non-conforming shoreline structures. This regulation may increase the costs of expansions for shoreline structures and wastewater treatment systems already located within the shoreline setback area, but since expansions are not mandated, there is no imposition of a cost that does not involve a voluntary choice on the part of the landowner. A properly designed replacement for a failing system on a small lot may cost $10,000 or more when a like kind in place replacement would be a fraction of this cost, but would not meet current health

and safety standards. However, for on-site wastewater treatment systems, the relocation required by new subsection (c) does not occur unless and until a replacement is about to occur by choice of the landowner.

e. Subdivision of parcels of record with areas separated by rights-of-way owned in fee by another. No mandated cost to landowners is created by this revision of the regulations. However, there may be costs associated with obtaining permits that previously were not required, and the loss of building potential that the current regulation creates by default in land use areas not requiring an Agency permit for the construction of a single family dwelling on a lawful lot (and in contravention of the APA Act intensity guidelines).

The proposed amendment will simplify jurisdiction in that all proposed undersized lots will be jurisdictional. This will result in more jurisdictional projects than currently would be jurisdictional, but will also reduce confusion and potential subsequent enforcement problems with regard to development of parcels in violation of the APA Act intensity guidelines.

5. Paperwork:

The proposals may reduce multiple filings with the Agency because of greater clarity and consistency, but in general are not expected to create any new filings or forms. The new wetland regulation will require replacement of existing forms consistent with the new criteria. During calendar 2005 and 2006 the Agency processed approximately 50 wetland subdivision permits each year.

6. Local government mandates:

These proposed changes will not impose any responsibility on local government entities.

7. Duplication:

The proposed changes do not duplicate requirements administered by state or local government.

8. Alternatives:

These proposals have their origin in the ongoing rule-making process of the Adirondack Park Agency. They began to take shape in public deliberations of the Agency Legal Affairs Committee in February, March

and August of 2003 during which alternatives were discussed and these topics, among many others were tentatively identified for revision. The list was pared and specific direction provided to staff in regular monthly public board meetings through the end of 2003.

At that point, specific issues were identified for further consultation and coordination. In early 2004, meetings were held with different constituencies, particularly forest landowners concerned with the definition of "hunting and fishing cabin" and Department of State which resolved questions involving the State Building Code and determined that the proposed definition did not describe a "dwelling" and would qualify for code compliance as a "group u" occasional occupancy structure. In May of 2004 the Board considered the proposals as they were ultimately framed, with a proposal addressing the definition of "campground" still part of the public dialogue.

In addition to the public meetings of the Agency Board, these proposals also were referred to the Technical Advisory List (TAL) as a sounding board during the summer of 2004. This broad-based group provided further technical comment. Late in that year, a set of technical revisions updating internal references, deleting statutory definitions from the regulations and other corrections were directed to SAPA hearing while the dialogue on alternative approaches to these more substantive proposals continued. In December, the proposal to address the definition of campground was deleted from the proposals under consideration for substantive change.

In 2005 and 2006 there was repeated discussion of these proposals before the Agency, but no action by GORR to release them for SAPA review. In 2007, the present proposals were withdrawn and resubmitted with new documentation for review with GORR. In December, 2007, the TAL met and was briefed on the Agency's regulatory revision activities, and at their December monthly meeting, the Adirondack Park Local Government Review Board was also briefed on the present proposals. The Review Board is a statutory oversight body

created in the Adirondack Park Agency Act "for the purpose of advising and assisting the Adirondack park agency in carrying out its functions, powers and duties. . . ."

Comments and concerns regarding alternatives are summarized for each proposal.

a. "Floor space." The "no-action" alternative was rejected since it would fail to achieve the Agency's overall intended goals of clarification, consistency, predictability, and uniformity. A definition is important for the regulated community and will facilitate the planning of projects.

Current practice includes the area of uncovered decks in the measurement of floor space; mainly because a deck does have an impact on the land, especially if it creates an impervious surface, and because it creates disturbed and shaded soils. This alternative was discussed and rejected because of the impact it would have on the measurement of certain structures, such as hunting and fishing cabins.

The exclusion of all "outside" or unheated porches from the measurement of "floor space" was also considered. This alternative was rejected because any porch with a roof creates impervious surfaces and would, therefore, impact water quality, a major reason for the measurement criteria. Also, such attached facilities are important visual elements and contribute to the useable space of the structure, and hence should be included in the measurement of the floor space of the structure.

The exclusion of storage areas under 4 feet in height was discussed but eliminated. This alternative would have required various internal structural measurements which are complicated, a complexity the Agency was trying to avoid.

b. "Hunting and fishing cabin." The "no-action" alternative perpetuates ambiguity that makes statutory compliance difficult and creates confusion for landowners coping with the NYS Building Code and seasonal dwelling regulations before the Agency. The proposed definition implements specific enforceable criteria which will ensure that hunting and fishing cabins are in fact rustic, limited use structures, and not dwellings. The Agency has for years supplemented the existing regulatory definition with consistent language in

jurisdictional determinations and permits regarding the structure amenities and uses that are not allowed, and which would transform a hunting and fishing cabin into a seasonal dwelling. That supplemental language is now permanently embodied in the proposed regulation.

The current definition limits the use of the structure to "hunting, fishing or similar purposes." The Agency discussed whether the use of a "hunting and fishing cabin" should be confined to solely "hunting and fishing or similar uses," or whether incidental recreational uses should be allowed. The Agency determined that the proposed physical limitations on the structure, coupled with the requirement of "occasional occupancy" which is also necessary for its status as a Group U structure under the State Building Code, will ensure a limited use. The addition of the word "primarily" clarifies that incidental recreational use of the structure (such as occasional hiking and bird watching) will be allowed. The physical and temporal use limitations are all essential to ensure that a "hunting and fishing cabin" does not become a seasonal dwelling. These issues were discussed at length with the TAL and with representatives of forest landowners specifically convened for this purpose.

The Agency also discussed whether to include in the definition specific language requiring that the cabin be "rustic" and "un-insulated" in order to ensure its primitive nature, and that it would be suitable only for "occasional occupancy." Those limitations have not been included in the proposed definition since, in any case, a qualifying cabin must meet the physical and temporal limitations expressly included which, in effect, ensure there will be limited amenities, and hence limited or "occasional" use.

The issue was raised as to whether hunting and fishing cabins should be allowed only on the leased lands of industrial forest landholders. Said another way: is it possible for an individual owner of a small parcel of land to construct and use a hunting and fishing cabin on her own property, in the absence of a lease, deed covenants, or permit conditions which ensure both "occasional occupancy" and that the structure is used primarily for hunting and fishing? No change was made to the current interpretation that any landowner may

construct a "hunting and fishing cabin" which meets the regulatory definition,[3] since "hunting and fishing cabins" are listed in Section 805 of the APA Act as a "compatible use" in every land use area.

Finally, the question was raised whether a rustic cabin meeting the physical criteria of the proposed definition for a "hunting and fishing cabin," owned by and located on the lands of the landowner, if rented to the general public for "hunting and fishing" purposes, would qualify as a "hunting and fishing cabin." Such cabin would be considered a "tourist accommodation" under the APA Act, and would not constitute a "hunting and fishing cabin" regardless of the physical amenities.

c. Subdivision "involving wetlands." While many alternatives were evaluated, two received specific attention in Agency board deliberations. A 200-foot setback area will generally assure a building site with adequate separation of well and sanitary systems. However, the 200-foot criterion for the new property boundary lines for a non-jurisdictional determination is a number that provides protection to the wetland proportionate to its scale. A larger setback provides more protection, a smaller one less. For instance, in a location with fast-percolating soils, on-site wastewater treatment systems should be located a minimum of 200 feet from a wetland. Thus the 200-foot boundary setback is insufficient to accommodate a conventional on-site wastewater disposal system for the lot containing the wetland if there are fast-percolating soils; a 250-foot setback would be necessary. Also, the 200-foot setback may be insufficient to accommodate site problems due to steep slopes and shallow depth to ground water. In the discussion of this issue, the Agency board authorized hearing on the 200-foot setback alternative from a range of distances at this general scale.

The second alternative would substitute a development setback for the boundary line setback for the non-jurisdictional criterion. A development setback would provide more effective wetland protection than a property boundary setback. The location of a property boundary line, in and of itself, has no adverse impact to

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[3]Some such cabins may require an Agency permit, which could be denied if environmental conditions warrant in a given case.

wetlands. Keeping all boundary lines outside wetlands continues an incentive to "gerrymander" and reduces design options that are available based on development setbacks. Importantly, sound environmental design might involve a boundary line which crosses a wetland. The Agency authorized hearing on the boundary line alternative because development setbacks are difficult to assess and assure in the jurisdictional inquiry process where no recorded permit instrument results, and hence this alternative is more appropriate for a general permit and omitted in the regulation's jurisdictional criteria.

d. Expansion of non-conforming shoreline structures. The "no-action" alternative was rejected because existing regulations are inconsistent with the statute, and continued implementation creates a significant adverse environmental impact to the shorelines of the Park. The expansions currently allowed without variances create both water quality and visual impacts. Also, existing non-conforming structures may expand in ways which conforming structures cannot, creating an inconsistent application of the law. At the Conference on the 30th Anniversary of the APA held in 2002, there was consensus by participants that shoreline protection under the APA Act was not adequate and there was a general recommendation for changes that would create better protections.

With regard to on-site sewage system replacements and expansions, the "no-action" alternative is considered insufficient to protect water quality. Any replacement system should comply with current standards if at all possible. The "no-action" alternative for expansions of non-conforming on-site wastewater systems is unacceptable, as by definition a non-conforming system has insufficient soils and setback from the water to properly treat the wastewater, creating direct polluting impacts to the water body. Expansions have no statutory protection and should not be permitted unless the wastewater system can meet current standards.

e. Subdivision of parcels of record with areas separated by rights-of-way owned in fee by another. The preferred alternative, as determined by the Agency and the TAL, is to delete the regulatory exception from the general rules for subdivision, thereby making the creation of any substandard sized lot jurisdictional, whether or

not it is all of one's ownership on one side of a road or right-of-way owned in fee. The current rule, applied regardless of the size and location of the resulting parcels, creates a potential conflict with the application of the APA Act intensity guidelines. In some scenarios, multiple undersized lots can be created contrary to the statutory intensity guidelines. If the regulation did not exist, the sale of one's ownership on one side of a road would remain non-jurisdictional only if both lots are large enough under the applicable minimum jurisdictional lot sizes (and there are no wetlands or other critical environmental areas). Creation of an undersized lot, despite the existence of an intervening road, would be jurisdictional the same as any other newly created lot. The new regulation is prospective only, so lots already conveyed remain lawful, but may have ambiguous principal building privileges under the statutory intensity guidelines depending on the specific circumstances of each parcel. The proposed revision simply implements the APA Act's jurisdictional criteria for lots that do not comply with the statutory intensity guidelines.

The "no-action" alternative does not solve the problems created by the existing regulation, which permits the creation of substandard sized lots without any consideration of environmental impacts or direction as to the allocation of the APA Act intensity guidelines.

One alternative is to leave the existing regulation as is and allow the lawful creation of substandard lots by the sale of all one's ownership on one side of a road or right-of-way owned in fee, but require that our non-jurisdictional letters state clearly that there may not be any principal building privilege associated with such parcel. It was determined that this would not prevent the sale of substandard lots or subsequent requests for building on such lots, and that the uninformed buyer would suffer the consequences. Since non-jurisdictional letters are not required, and if obtained may not be shared with prospective buyers, many buyers would not receive notice and could be left with a parcel of land which has no building potential. The "notice" requirement will generally not prevent the sale of such substandard lots and the subsequent problem of non-compliance with the APA Act intensity guidelines.

Another alternative would be to draft a regulation which is explicit with respect to building privileges, particularly for a substandard lot. This poses a similar problem as to the "notice" option, since the unwary buyer may still purchase a substandard lot lawfully, only to find it has no building potential. The Agency determined it would be better and more reliable to treat the creation of all substandard lots similarly: they will all be jurisdictional.

9. Federal standards:

These proposals do not involve any federal statutory authority or standards.

10. Compliance schedule:

The "involving wetlands" rule will benefit the regulated public by providing clear criteria for the creation of a non-jurisdictional wetland subdivision. While they will apply prospectively, they will also operate as a "safe harbor" for existing, otherwise unlawful, wetland subdivisions that meet the non-jurisdictional criteria.

The "hunting and fishing cabin" definition would also provide "safe harbor" for any structure which meets its criteria. The Agency recognizes there may be other existing (less than 500 square feet in Resource Management classified lands) structures that qualify as lawful hunting and fishing cabins based on size and/or use, and also recognizes that pre-August 1, 1973 structures may qualify as lawful pre-existing hunting and fishing cabins without strict compliance with these criteria. The replacement or relocation of such structures would be evaluated on a case-by-case basis to determine if "hunting and fishing cabin," single family dwelling, or other APA Act rules would apply.

The Agency now utilizes the world wide web to disseminate applications and procedural guidance. These tools along with conventional information channels will be used to ensure a smooth transition to the new rules.

These rules will apply prospectively, effective immediately upon approval and filing.