Final

Generic Environmental Impact Statement (FSGEIS) on the Process for the Proposed Revision of the Adirondack Park Agency Rules and Regulations

Incorporating Proposed Amendments to

9 NYCRR Subtitle Q - Parts 570, 573, 575, 578

Representing the
Agency's 2008 Rulemaking
Pursuant to GEIS, January 2001
October 31, 2008

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Generic Environmental Impact Statement (FSGEIS) on the Process for the Proposed Revision of the Adirondack Park Agency Rules and Regulations

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FINAL SUPPLEMENTAL GENERIC ENVIRONMENTAL IMPACT STATEMENT
Adirondack Park Agency 2008 Rulemaking
October 31, 2008

EXECUTIVE SUMMARY

This FSGEIS, representing the 2008 Rulemaking of the Agency's regulatory revision effort, presents the text of proposed changes involving five specific subject areas: 1) wetland subdivision; 2) expansion of non-conforming shoreline structures; 3) land division along roads or rights-of-way; 4) definition of "floor space"; and, 5) definition of "hunting and fishing cabin." These involve new or amended definitions and companion changes to sections of the Agency's regulations in Parts 570, 573, 575, and 578 of 9 NYCRR Subtitle Q**.**

Rule making is an essential function of State government, and is specifically authorized by Section 804(9) of the Adirondack Park Agency Act and the State Administrative Procedures Act. The Agency has a duty to regularly review and update its rules. After a long hiatus, this process was resumed at the Agency in 2001, and has continued since then. The current proposals will improve clarity and consistency of the rules; reduce unintended consequences from their administration, and improve the protection of shorelines and wetlands consistent with the direction of the Adirondack Park Agency Act.

The Agency's regulations implement the three statutes administered by the Adirondack Park Agency; namely, the Adirondack Park Agency Act, the State Wild, Scenic and Recreational Rivers Systems Act, and the State Freshwater Wetlands Act.

The Adirondack Park Agency initiated a multi-year, multi-phase public process in 1996 to comprehensively revise its rules and regulations, specifically 9 NYCRR Subtitle Q - Parts 570 to 588 and Appendices.

Part 1 of this process was completed in January 2001 with the adoption of eleven amendments to Parts 572, 573, and 588. The public process and these amendments were subject to a Draft and Final Generic Environmental Impact Statement on the Process for the Proposed Revision of the Adirondack Park Agency Rules and Regulations Incorporating Proposed Amendments for 9 NYCRR Subtitle Q - Parts 572, 573, and 588.

Both the Agency and the independent Task Force on Expediting Adirondack Park Agency Operations and Simplifying its Procedures (Task Force) that studied the Agency in 1994 recognize there have been many evolving events over the years, creating a need for a comprehensive examination and revision of Agency regulations.

The Agency is continuing its open and public process of examining and revising its regulations for the multiple purposes of simplifying and expediting its delivery of services to the public, and introducing more consistency, uniformity, and predictability into Agency administration and decision making.

The process of completing this comprehensive review and revision of the Agency's regulations now continues on an ongoing basis.

Since this process was initiated in 1996, the Agency held more than twenty-five public meetings and hearings to solicit public comment and input on the overall process, the scope of work for this effort, and the proposed draft and final regulatory changes to the first eleven priority subjects addressed in Part I of this process. Eight additional public meetings were held on the subject of the proposed second part of the Agency's regulatory revision process, regulatory definitions.

The Second Rulemaking involved changes to Parts 570, 573, 574, 575, and 580, was also the subject of a Draft Supplemental Generic Environmental Impact Statement (DSGEIS) and Final Supplemental Generic Environmental Impact Statement (FSGEIS), and amendments became effective May 1, 2002.

The Third Rulemaking implemented a complete revision of Agency regulations addressing enforcement processes: 9 NYCRR, Subtitle Q, Part 581. Both a DSGEIS and an FSGEIS were prepared for the Third Rulemaking; the FSGEIS was accepted November 27, 2002 and the amendments became effective January 14, 2003.

The Fourth Rulemaking became known as the 2005 Rulemaking and included changes and corrections that were largely ministerial or codified existing practice. It took effect on September 15, 2005.

Copies of these materials are available for review at the Adirondack Park Agency.

This rulemaking is labeled the 2008 Rulemaking. It addresses additional subjects first discussed in conjunction with the 2005 rulemaking. For instance, the question of an effective definition for "hunting and fishing cabin" was the subject of dialogue, field consultations with land managers and work with the codes division of the Department of State to incorporate and reconcile different regulatory and practical considerations in the administration of this activity which is particularly important to commercial forest land management, but also a consideration for individuals in all land use areas of the Park. The proposals reviewed here complete the careful consideration of five separate topics with draft regulatory amendments addressing each. The Agency has met twice with the Technical Advisory List group (TAL), an independent multi-disciplinary team providing technical and critical advice in this process. The Agency has discussed these issues multiple times in open session and considered public comments. With the publication of this FSGEIS, the Agency completes the more formal part of the process.

The alternatives considered for the proposed amendments were first presented in the DSGEIS; this FSGEIS responds to public comment received since its publication and at the formal State Administrative Procedures Act (SAPA) hearings held October 14, 15 and 20, 2008. The process will conclude with consideration of the proposed rules for promulgation by the Agency Board at a regularly scheduled meeting. The changes are prospective in nature and if adopted by the Agency, they will only affect future land use and development in the Park.

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DESCRIPTION OF THE ACTION

The Adirondack Park Agency proposes to continue undertaking a public process initiated in 1996 leading to additional amendments of its existing regulations (9 NYCRR Part 570 et seq.) for the purposes of: (1) clarifying the Agency's existing regulatory language; (2) expediting the Agency's delivery of services to the public; (3) introducing more consistency, uniformity, and predictability into Agency administration and decision making consistent with governing statutes, and (4) otherwise improving the Agency's regulatory, advisory, and educational functions.

Proposed amendments to Agency regulations constitute an unlisted action pursuant to 6 NYCRR Part 617. The Adirondack Park Agency, pursuant to 6 NYCRR 617.4(a)(1) and its implementing regulations, specifically 9 NYCRR Part 586.5(a)(10), has elected to include certain revisions of its regulations as Type I actions.

The current regulatory revision proposals are deemed to be Type I actions as they involve changes in jurisdiction and review functions. While this Type I designation carries with it the presumption the proposed action will have a significant impact on the environment, the Agency has not yet identified any significant adverse impacts, and, therefore, revision of its regulations as presented herein will not have an adverse impact on the environment. However, in consideration of the nature of this action and its ramifications, and in the interest of providing as many opportunities as possible for public involvement and the identification, presentation and discussion of alternatives, the Agency has chosen to prepare a FSGEIS pursuant to 6 NYCRR 617.10 for this 2008 Rulemaking.

As with earlier regulatory revision, the Agency chose not to conduct a formal SEQR scoping effort for this 2008 Regulatory Revision. It has, however, previously solicited public comment and input on the process and the proposed scope of work for each segment of the regulatory revision effort by utilizing a number of varied resources including regularly scheduled meetings of the Agency and its Legal Affairs Committee, press releases, progress reports, and consultation with the TAL.

More specifically, the chronology of events leading up to the development of this FSGEIS and the presentation of the proposed draft regulatory definition and companion changes includes the following:

February 2003
Agency discusses potential scope of work for the fourth part of its regulatory revision effort. Staff is to prepare problem statements and options for regulatory change for discussion.

April 2003
Staff's April 30, 2003 memo compiled 17 separate subject areas for revision. Agency discusses them at length. Eleven of the 17 items were preliminarily identified to proceed in an expedited manner as either ministerial or implementing existing practice.

July 2003
Agency Members and staff met with the TAL on July 23, 2003 to discuss the 17 subject areas identified.

August 2003
At its August meeting, after discussing TAL comments as summarized in the staff August 7, 2003 memo, Agency agrees to include ten ministerial items in the fourth revision package (2003), and reserves six subject areas for the current revision package.

September 2003-June 2004
Agency has lengthy discussions in public sessions regarding each of the six subject areas in the current revision package, including draft regulatory language and options.

July 2004
Agency and staff meet on July 1, 2004 with the TAL to discuss the six topics in the current revision package, including draft language and options.

September 2004
Staff submits report of the July TAL meeting. Agency discusses TAL comments and draft revisions to proposed regulatory language based on TAL comments.

November 2004
Agency discusses and votes on the draft language for the current revision and to refer the package to the Governor's Office of Regulatory Reform for review.

September 2005
Agency discusses and votes on an adjustment to the draft language for this revision to limit the change to the "Campground" definition to the deletion of regulatory size restrictions for camping vehicles and to refer the revised package to the Governor's Office of Regulatory Reform for review.

April 2007
Agency authorizes public hearings on an updated submission that omits any reference to the "Campground" definition.

July 2008
The Agency was authorized to proceed with the State Administrative Procedure Act hearings that are a prerequisite to regulatory adoption.

August 2008
On August 13, 2008 a DSGEIS was published; and on August 27, State Register Notice and Regulatory Impact Statement were published anticipating hearings on October 14 (Ray Brook); October 15 (North Creek) and October 20, 2008 (Albany). Regulatory Revision documents were placed on the Agency web site, www.apa.state.ny.us.

October 2008

Public hearings were completed, including live and delayed webcast of the initial Ray Brook hearing (link available on www.apa.state.ny.us). The comment period closed October 29, 2008.

The following chart briefly summarizes the five subject areas and the content of the regulatory changes in the 2008 Regulation Revision.

Subject	Proposed Action
"Involving Wetlands"	Revise regulatory definitions to make Adirondack Park Agency Act and Freshwater Wetlands Act jurisdiction identical; tailor wetland subdivision jurisdiction to potential for impacts (9 NYCRR 578.3, 570.3, 573.3 and companion general permit).
Expansions of non-conforming shoreline structures	Modify existing regulation which allows unlimited lateral and rear expansion of non-conforming shoreline structures (9 NYCRR 575.5). Companion change: require improvements to non-conforming on-site wastewater treatment systems where possible, and ensure expansions in such service are subject to shoreline setback requirements (9 NYCRR 575.7).
Land division along roads or rights-of-way owned in fee.	Remove existing regulation which allows divisions along roads without permit even though the overall intensity guidelines cannot be met (9 NYCRR 573.4).
"Floor Space"	Add a regulatory definition which defines the “square feet of floor space” of a building and the “square footage” of any other structure (9 NYCRR 570.3).
"Hunting and Fishing Cabin"	Amend current definition to provide additional detail as to what constitutes a "hunting and fishing cabin" (9 NYCRR 570.3).

Authority for this Action

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"). Rule-making is further governed by the State Administrative Procedures Act (SAPA) and this action is supported by the full suite of SAPA documents available at www.apa.state.ny.us.

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ENVIRONMENTAL SETTING

The Adirondack Park

The Adirondack Park was created by the New York State Legislature in 1892. At six million acres, it encompasses one-fifth the land area of New York State and is the largest publicly designated park outside Alaska. With its public lands, it contains the largest wilderness area in the eastern United States.

The Park is a unique mixture of public and private lands. Approximately 46 percent, or about 2,660,000 acres, of the Park is owned by the people of the State, part of New York's Forest Preserve which the State Constitution requires be "forever kept as wild forest lands." The remaining 54 percent, or 3,160,000 acres, are in private land ownership, ranging from large forest holdings to small hamlet homes. The Park is home to 132,000 people living in more than 100 towns, villages, and hamlets. These communities provide facilities and services for an additional 75,000 seasonal residents and approximately nine million visitors each year. The Park is also within a day's drive of some 70 million people. Not surprising, tourism is the major industry. Forestry, agriculture, and mining are the other major components of the region's economy.

The Adirondack Park Agency

The Adirondack Park Agency was created in 1971 pursuant to Article 27 of the Executive Law (the Adirondack Park Agency Act) as an independent agency in the Executive Department. According to Section 801 of the Act, the basic purpose of the Act is "to insure optimum overall conservation, protection, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack Park."

This State policy is implemented by Agency administration of two land use plans: the Adirondack Park State Land Master Plan, first approved by the Governor in 1972 pursuant to Section 816 (then Section 807) of the Act, and the Adirondack Park Private Land Use and Development Plan, enacted by the Legislature as amendments to the Act itself by L. 1973, c. 348, effective August 1, 1973.

Together, these two plans represented a pioneering State government initiative for an environmentally sensitive region which has been held in high regard by the people of the State since the original creation of the Forest Preserve by statute in 1885. The Park was established in 1892 as an area within which Forest Preserve acquisitions were to be concentrated. The Forest Preserve was established by the State Constitution itself in 1895.

The Agency also administers the State Wild, Scenic and Recreational Rivers System Act (ECL Article 15, Title 27) for private lands in the Park, and the State Freshwater Wetlands Act (ECL Article 24) for both public and private lands in the Park. Administration of these statutes within the Park allows the Agency to integrate the goals of preserving river areas and wetlands with the closely related purposes of the State and private land use plans.

The Agency regulations implementing those three statutes it administers, as well as the State Environmental Quality Review Act, Open Meetings Law, Freedom of Information Act and State Administrative Procedure Act are contained in 9 NYCRR Subtitle Q.

The Agency is now continuing an open and public process that began in 1996 for the purpose of simplifying and expediting the delivery of services to the public, and introducing more consistency, uniformity, predictability and other improvements into administration of the regulatory program. Four parts of this regulatory revision process are complete, with amendments taking effect on January 3, 2001, May 1, 2002, January 14, 2003, and September 15, 2005.

This FSGEIS covers the 2008 Regulatory Revision of the Agency's regulatory revision process and presents proposed draft changes to five subject areas addressed by the Agency's regulations.

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Evaluation of Potential Impacts
and
Discussion of Proposed Rule Text Amendments by Subject

(Key: [boldface] text proposed to be deleted;

boldface text proposed to be added)

ADIRONDACK PARK AGENCY PROPOSED REGULATORY AMENDMENT: #1

SUBJECT: **"Involving wetlands"**
SECTION: 570.3, 573.3, and 578.3
STATUTORY AUTHORITY: Executive Law Article 27

PROPOSED REVISION/NEW DEFINITION:

578.3(n)(1) *Regulated activity* means any of the following within the boundaries of a freshwater wetland:

(i) land use and development **[or subdivision]**;

* * * * *

578.3(n) **(3) *Regulated activities for subdivision involving wetlands.***

(i) For subdivision, a *regulated activity* includes any proposed lot which contains wetlands (including the parcel proposed for the subdivision road) and any proposed lot adjoining such wetland lot, and all land use and development related to such lots. The lots referred to in this paragraph constitute the "wetland subdivision cluster" for each wetland.

(ii) If all lots in a "wetland subdivision cluster" meet the following criteria, that cluster will not be considered a regulated activity. If any lot does not meet the criteria, the subdivision of the entire cluster will remain a regulated activity. The criteria are:

(a) all proposed parcel boundaries for the wetland subdivision cluster must be located at least 200 feet from any wetland boundary at all points; and

(b) all subdivision roads which provide access for more than one lot must be located at least 50 feet from the wetland and on natural slopes less than 15 percent; and

(c) all non-wetland areas of each lot must be able to be reached by an access road which does not require a wetland crossing and which will not cause adverse wetland impacts, unless such non-wetland areas are designated by deed covenant to be non-development areas; and

(d) if any lot described in (i) above contains a lawfully existing principal building, the lot must meet this criteria: the on-site water supply and wastewater treatment systems for the principal building must be located on the lot containing that principal building and there must be identified on that lot an adequate replacement site for the on-site wastewater treatment system which site is located at least 100 feet from the wetland.

(iii) The landowner proposing the subdivision must obtain a written jurisdictional determination pursuant to section 571.1(a) to take advantage of the exception from wetland subdivision review provided by (ii), above.

(iv) The burden is on the landowner to demonstrate compliance with this section. A subdivision map must be submitted which identifies the proposed boundaries of lots for the entire subdivision, and for each lot in the wetland subdivision cluster. The map must also identify the location of all proposed subdivision roads and appropriate non-wetland access to all upland areas for all lots in the wetland subdivision cluster.

(v) The landowner shall provide all purchasers of lots with a copy of the jurisdictional determination and subdivision map which were authorized pursuant to this section.

(vi) The construction of a structure on any lot in a subdivision or wetland subdivision cluster may require a wetland permit pursuant to section 578.3(n)(1) or (2).

(vii) Nothing in this section affects Agency jurisdiction created by other sections of law or regulation.

(4) [(3)] Regulated activities do not include:

* * * * *

Add as new 570.3(o) and renumber subsequent sections:

Involving wetlands **means any activity which is a regulated activity as defined in section 578.3(n) of Agency regulations.**

PROPOSED COMPANION CHANGES:

Section 573.3 Projects located in critical environmental areas.

[(a)] **Except in the case of a project involving wetlands, [R]r**eview of a land use or development or subdivision which requires an Agency permit solely because it is located, in part, in a critical environmental area shall be confined to that portion of the land use or development actually located within the critical environmental area or, in the case of a subdivision, to those lots proposed to be sold which are located within or have situate upon them a critical environmental area.

[(b) A subdivision of land shall not be subject to agency review due to the involvement of a critical environmental area if the critical area is located wholly upon that portion of the subdivision being retained by the seller. However, an agency permit is required for new land use and development in the critical environmental area.]

Section 573.4 Subdivisions

(e) *Division of land by gift, devise or inheritance.*

* * * * *

(7) A permit is required for the division of land through conveyance by gift, devise or inheritance of any lot, parcel, or site **which is a regulated wetland activity as defined in section 578.3(n)(3) of Agency regulations.** **[involving wetlands including but not limited to instances where the division line intersects or crosses a wetland which is subject to agency jurisdiction.]** **However, a proposed gift lot may not require a permit if the requirements of section 578.3(n)(3) and this section are met.**

TERMS FOR A PROPOSED COMPANION GENERAL PERMIT:

A proposed "wetland subdivision cluster" which requires an Agency permit pursuant to Executive Law §810 and 9 NYCRR 578.3(n)(3) will be eligible for a "general wetlands subdivision permit" if the lots are not located in the resource management land use area and if each lot meets the following requirements and conditions:

1. All proposed development except roads will occur more than 100 feet from the wetland boundary and on natural slopes which are less than 15 percent as demonstrated by appropriate site plans; and

2. All subdivision roads which provide access for more than one lot must be located at least 50 feet from the wetland and on natural slopes less than 15 percent; and

3. All non-wetland areas of each lot must be able to be reached by an access road which does not require a wetland crossing and which will not cause adverse wetland impacts, unless such non-wetland areas are designated by deed covenant to be non-development areas; and

4. If any proposed lot contains a lawfully existing principal building, the lot must meet this criteria: the on-site water supply and wastewater treatment systems for the principal building must be located on the lot containing that principal building and there must be identified on that lot an adequate replacement site for the on-site wastewater treatment system which site is located at least 100 feet from the wetland; and

5. The burden is on the landowner seeking the general permit to demonstrate compliance with this section. A subdivision map must be submitted which identifies the proposed boundaries of lots for the entire subdivision, and for each lot in the wetland subdivision cluster, must also identify the proposed uses, and the principal building and accessory structure locations, including locations for the on-site water supply and wastewater treatment systems; and

6. If there are bases of Agency jurisdiction in addition to the subdivision which is a regulated activity, the general permit may not be issued; and

7. If any subdivision lot in a proposed "wetland subdivision cluster" does not meet all the criteria for issuance of this general permit, then the "wetland subdivision cluster" will not be eligible for the general wetlands subdivision permit; and

8. The subdivision map approved by the general permit must cite the permit and, if a plat, must be filed in the office of the county clerk for the county in which the property is located and proof of filing provided to the Agency. The general permit must be filed in the Adirondack Park Agency permit register and indexed in the deed register; and

9. The permittee shall provide all purchasers of a lot subject to this general permit with a copy of the subdivision map which was approved and filed, and a copy of the general permit, and shall advise all purchasers in writing that they must build according to and within the building area identified in the approved map and within the parameters of the general permit; and

10. The permittee or the purchaser of a lot subject to a general permit must seek a permit amendment if he or she wishes to alter the location of a structure site, access road, on-site water supply and wastewater treatment systems, or any other aspect of the permitted subdivision map or development proposal.

DISCUSSION:

Overview

The major goal to be addressed by this regulatory change is to tailor wetland jurisdiction more closely to the potential for wetland impacts. Staff identified a number of specific goals:

1. Create parallel jurisdiction under the Adirondack Park Agency Act and the Freshwater Wetlands Act 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 which in most cases will ensure there will not be adverse wetland impacts.

4. Ensure wetland subdivision jurisdiction over wetland lots and lots adjacent to such lots, unless certain criteria are met which in most cases will prevent wetland impacts.

5. Encourage developers of land to assess property as a whole in initial stages of subdivision design to create subdivisions taking into account the long-term protection of wetlands.

The proposal to make identical Adirondack Park Agency wetlands jurisdiction and Freshwater Wetlands Act jurisdiction will eliminate confusion that now exists in the implementation of these two laws. This goal is satisfied by new Section 570.3(o), which defines “involving wetlands” under the Adirondack Park Agency Act to be the same as “regulated activity” under the Agency Freshwater Wetlands Act regulations.

With regard to subdivision jurisdiction for lands which have wetlands upon them, the initial premise is that the subdivision design and development of all proposed lots surrounding a wetland may in fact impact the wetland. This is true whether they are proposed for sale or retained by the landowner. This group or "cluster" of lots should be subject to Agency jurisdiction, unless the demonstrated design for these lots will eliminate potential wetland impacts by adherence to specific requirements.

Another practical reason for making the cluster of lots around the wetland subject to review comes from Agency experience with the existing wetlands jurisdiction, which is limited to only the lot or lots proposed for sale and containing wetland. Since all lots surrounding the wetland lot do not require a permit, they are often sold first. In that case, when all surrounding lots are already sold, the boundaries of the wetland lot are already established. In all cases, (unless the Agency has another basis of jurisdiction) the Agency review over the wetland lot cannot adjust the boundary of the wetland lot or the overall design of the subdivision. Agency jurisdiction in effect is limited to an evaluation of only the proposed development on the wetland lot; there is no true “subdivision” jurisdiction, since the lot lines already have been established by prior sales of adjoining lots, and/or by the fact that the Agency does not have jurisdiction over any lot except the lot with the wetland on it.

For this reason, an important component of the proposed regulation is that it establishes Agency jurisdiction over the lots with wetlands upon them, and all adjoining lots (the “wetland subdivision cluster”). This ensures that the portion of the subdivision which may in fact impact wetlands is subject to review and also prevents gerrymandering.

The proposed regulation defines the “wetland subdivision cluster” which is jurisdictional, but provides a set of parameters for creating a cluster which will not require an Agency permit. A companion proposal is to also create a more flexible general permit for a “wetland subdivision cluster,” based on different parameters and permit conditions. Of course, if neither set of parameters can be met, the subdivider still has the option of applying for a wetland subdivision permit under the full review processes of Section 809 of the Adirondack Park Agency Act.

A major goal of this proposal is to create an incentive for the landowner to take into account the potential for wetland impacts at the earliest stage of subdivision design. This is done by rewarding good design which protects the wetlands, with either the non-jurisdictional determination or the general permit, both of which will be issued promptly once the parameters are met.

Proposed Regulation
The current proposal creates a non-jurisdictional option for the wetland subdivision cluster provided all property boundaries for such lots are more than 200 feet from the wetland, any subdivision road is 50 feet from any wetland and on less than 15 percent slopes, and all upland areas on such lots are accessible without wetland impacts. There are less restrictive requirements for parcels which contain a lawfully existing principal building. All lots in the wetland subdivision cluster must satisfy all the requirements; otherwise the cluster will be jurisdictional.

A wetland subdivision cluster may be eligible for a general permit based on different criteria. General permit eligibility will be based on a subdivision site plan map showing all development will meet a 100-foot setback and be located on slopes less than 15 percent. Similar to the jurisdictional criteria, there are requirements for the subdivision roads and access roads to all upland areas, relating to wetland protection. In addition, the general permit will require the permittee to provide all buyers with a copy of the Adirondack Park Agency-approved subdivision map or plat, and the permit will be recorded and the plat filed. The general permit also provides the mechanism for permit amendment, should the buyer wish to change the approved development site or other aspects of project design.

The requirements for non-jurisdiction or the general permit involve specific distances from the wetland, either for the property boundaries, or the development, all of which can be determined objectively. The requirements have a general scientific basis, and flow from the presumption that if certain lot sizes and separation distances are met, the subdivision lot will accommodate a principal building without impacts to the wetland. The 200 foot distance correlates to the minimum setback for sanitary systems in fast perking soils established in Appendix Q-4 of Agency Regulations. The efficacy of these criteria will be assessed on an ongoing basis and at the five-year regulatory review intervals.

The proposed regulation, therefore, offers the landowner the option to create a non-jurisdictional wetland subdivision meeting one set of criteria directed principally at the location of lot boundaries, or obtain a general permit based on subdivision design criteria based on development that is proposed. The third option, of course, is to obtain a standard wetland subdivision permit through the usual review process. The requirement to obtain a formal jurisdictional determination or the general permit ensures that wetland boundaries will be accurately delineated and verified by the Agency.

A major advantage of this proposal is that it should be easy for the jurisdictional office to determine jurisdiction based on lot lines and wetland boundaries. Also, the general permit is useful as its parameters can be adjusted if and when it appears adjustments are necessary once the permit is in use. Another advantage of a general permit is that it will be recorded and enforceable the same as any other Agency permit.

Finally, it must be noted that the proposed regulatory changes do not alter the potential for Agency jurisdiction over any proposed development if it may substantially impair the functions and benefits of the wetland, pursuant to 9 NYCRR 578.3(n)(2). Using this approach, the non-jurisdictional letter will be for the subdivision only; a permit may still be required for subsequent development depending on design, location, and site-specific wetland conditions.

ALTERNATIVES CONSIDERED:

- No Action: The "No Action" alternative was rejected since it would fail to achieve the Agency's overall intended goals of clarification, consistency, predictability, uniformity, and wetlands protection. Moreover, the existing regulations tend to create over-broad jurisdiction in some instances, and too little jurisdiction in other instances. The "No Action" alternative would not alleviate these problems.

- Alternative One: The first alternative is identical to the drafted alternative above, except it increases the property boundary setback to 250 feet, rather than 200 feet, for all lots in the non-jurisdictional wetland subdivision cluster. This alternative is raised because the 200-foot setback may result in lots which cannot support the required on-site sewage disposal system when the soils are fast-percolating. For soils having a perc rate of 3 minutes or less, the wastewater treatment systems must be located a minimum of 200 feet from a waterbody or wetland. A 200-foot boundary setback is, therefore, insufficient to accommodate this requirement for the lot containing the wetland; a 250-foot setback would be necessary.

- Alternative Two: Jurisdiction would be determined based on the relationship between new land use and development associated with the subdivision and the wetland based on a formal site plan delineating the subdivision, wetland boundaries and building footprints, with a minimum wetland boundary and development separation of 250 feet required to avoid wetland subdivision jurisdiction. This is premised on the proposition that mere subdivision does not impact wetlands; rather it is the proximity of development activity that is of primary concern for wetland protection.

  This alternative creates a non-jurisdictional wetland subdivision option based on a 250-foot development setback, rather than property boundary setbacks, and would otherwise include the same road setback and accessibility requirements as those set forth in the general permit discussed above.

  "Alternative Two" benefits from its focus on new development. The location of a property boundary line, in and of itself, has no adverse impact to wetlands. What does have impact is how close development will be to the wetland, along with other site factors which directly affect development impacts, such as drainage, soils and slopes. Hence, criteria based on development setbacks will be a more consistent way to protect the wetlands.

  The primary objection to this alternative is that a non-jurisdictional determination will require adequate subdivision plans with site plans for each lot in the wetland cluster. It would require a way to record the determination with the County Clerk. This would be difficult to implement and is not currently required for a jurisdictional determination. Recording is essential to ensure that buyers of such lots will be on notice as to where development is permitted. Similarly, this option would allow non-jurisdictional subdivision development to proceed pursuant to the approved plans without any recorded permit, which may complicate any subsequent enforcement action in the event of non-compliance.

- Alternative Three: This is another variation on the proposed regulation. It would create the jurisdictional "wetland subdivision cluster," but provide for a non-jurisdictional determination for any individual lot if it has boundaries more than 200 feet from the wetland. Similarly, large lots could be addressed separately. The two major variations with this alternative are that individual lots could become non-jurisdictional, and addressing jurisdiction based on lot size.

- Alternative Four: Another option discussed is similar to "Alternative One", but the environmental parameters chosen to ensure wetlands would not be impacted involve specific soils analysis and compliance with Department of Health standards. These standards were problematic for implementation, since in all cases the Agency engineer would have to review site specific plans, which would simply not be feasible or an appropriate use of his expertise considering other Agency priorities. It was determined to establish parameters that would be more easily and objectively implemented by our jurisdictional staff.

RELATED LONG- AND SHORT-TERM IMPACTS, CUMULATIVE IMPACTS AND OTHER ASSOCIATED ENVIRONMENTAL IMPACTS:

The proposal to amend Agency wetland subdivision jurisdiction could have a significant long-term impact and cumulative impacts. The initial enlargement of wetland subdivision jurisdiction with a subsequent “take out” for lots which meet certain requirements is intended to encourage subdivision design which protects wetlands. All the parameters are directed at wetland protection. If the parameters do not protect wetlands in all cases as planned, the Agency may amend the general permit or review the regulation based on that experience, to ensure that wetlands are thereafter protected.

The current situation results in inconsistent and confusing wetland jurisdiction, gerrymander of lots to avoid jurisdiction with probable long-term impacts to wetlands, and Agency jurisdiction limited in ways that make mitigation of wetland impacts as required by the Adirondack Park Agency Act and Freshwater Wetlands Act impossible. Lots with wetlands upon them are jurisdictional only if proposed for sale, which rule has created significant gerrymandering. Moreover, having jurisdiction only over the lot with the wetland upon it has resulted in such a narrow jurisdiction as to not be effective in protecting the wetland in many cases, and it discourages intelligent and practical subdivision design which has wetland protection as a high priority.

It is unclear how many currently jurisdictional subdivisions will become non-jurisdictional, or vice-versa. Clearly, that will depend on site-specific environmental factors as well as the developers’ willingness to design so as to satisfy the proposed parameters. It is the Agency’s assumption based on 35 years experience that most developers will attempt to take advantage of any non-jurisdictional or general permit option. Therefore, we anticipate that the number of such projects may decrease significantly. However, any remaining jurisdictional projects will likely, therefore, involve difficult site limitations.

The Agency also assumes that projects which proceed as non-jurisdictional or with a general permit will not impact wetlands. If experience shows otherwise, the general permit can be amended in a matter of months. However, any amendment to the jurisdictional parameters established by regulation will take longer to correct through the regulatory revision process.

ADVERSE ENVIRONMENTAL IMPACTS THAT CANNOT BE AVOIDED:

None identified.

IRREVERSIBLE AND IRRETRIEVABLE COMMITMENT OF ENVIRONMENTAL RESOURCES:

None identified.

MITIGATIVE MEASURES:

None identified.

GROWTH-INDUCING ASPECTS:

None identified.

USE AND CONSERVATION OF ENERGY:

None identified.

ADIRONDACK PARK AGENCY PROPOSED REGULATORY AMENDMENT: #2

SUBJECT: **Expansion of non-conforming shoreline structures**
SECTION: 575.5 and 575.7
STATUTORY AUTHORITY: Executive Law Article 27

PROPOSED REVISION/NEW DEFINITION:

Proposed regulatory changes:

- **575.5 Replacement and expansion of existing structures.**

(a) Any existing structure lawfully in nonconformance with the building setback restrictions, or any such structure which was existing on August 1, 1973 and was thereafter removed or destroyed may be replaced in kind on the same foundation or location or in the same immediate vicinity, provided the previously existing setback non-conformance is not increased. A mobile home may be replaced by a single family dwelling, and a single family dwelling may be replaced by a mobile home.

(b) Expansions of existing structures in proximity to lakes, ponds, rivers or navigable streams shall be subject to the shoreline building setback restrictions according to the following rules:

(l) Expansions of existing structures which are in compliance with the building setback restrictions may not result in violation of such restrictions.

[(2) An existing single family dwelling or mobile home which is lawfully in noncompliance with the building setback restrictions may be expanded to the rear or laterally provided such expansion does not bring the structure any closer to the mean high-water mark, and provided the structure continues to be used as a single family residence. An existing structure other than a single family dwelling or mobile home may be expanded to the rear, but may not be expanded laterally within the applicable setback distance to a greater extent than 25 percent of the average width of the structure existing within the setback distance as of May 22, 1973.]

(2) An existing structure located within the shoreline setback area may not be expanded in any direction within the shoreline setback area, including an increase of structure height, without a variance.

(c) Expansions of existing structures may also be subject to agency permit jurisdiction, according to the rules set forth in section 573.5 of these regulations.

- **575.7 Application of sewage system setback restrictions.**

(a) Any seepage pit, drainage field or other leaching facility receiving any form of household effluent, regardless of whether it receives toilet wastes, is subject to the sewage disposal system setback restrictions.

(b) Any outhouse privy or other pit privy which is not a self-contained system is subject to the sewage disposal system setback restrictions.

(c) Any lawfully existing on-site wastewater treatment system which is in non-conformance with the Agency shoreline setback requirements, when proposed to be replaced, must be replaced in conformance with the setback requirements and Appendix Q4 regulations to the greatest extent possible, and in any case, no closer to the mean high water mark. No variance will be required for a replacement system which meets this requirement and which will also provide enhanced treatment over the lawfully existing system as determined by the Agency, provided such system is not also being expanded to meet an actual or potential occupancy increase.

(d) Any proposed expansion of a non-conforming on-site wastewater treatment system designed to service an actual or potential increase since May 22, 1973 in occupancy of the shoreline structure served, must meet all existing standards for such systems, including the shoreline setback requirements and Appendix Q4 of Agency regulations. Otherwise, a variance will be required for the system expansion.

PROPOSED COMPANION CHANGES:

None.

DISCUSSION:

The proposed change to Section 575.5 is intended to bring Agency regulations into conformance with Executive Law §806 (which addresses "use, construction or alteration of buildings or structures") and §811(5) (which provides that "increase or expansion shall [not] violate, or increase any non-compliance with, the minimum setback requirements of the shoreline restrictions"). The existing regulation allows significant expansions of non-conforming structures within the shoreline setback area, yet no expansion into the setback area is allowed for conforming structures. Thus, the existing rule creates an anomaly which allows a non-conforming structure to increase its non-compliance, 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. Moreover, the resulting anomalies are fundamentally unfair to the law abiding neighbors and the public and not protective of shoreline values that are protective of the Park's lakes and streams. Consistent with the stated intent to protect shorelines, the Executive Law requirements should be read and implemented to prevent increasing non-compliance with statutory shoreline protection.

Section 811[5] of the Adirondack Park Agency Act provides that preexisting 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 critical environmental area [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 more important than the general rule allowing preexisting 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 the shoreline 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.

Replacement of non-conforming on-site wastewater treatment systems is addressed by §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 has no absolute requirements for replacement of a non-conforming system, but only requires use of the best option available under the circumstances, recognizing 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 unless the system can be brought into compliance with the shoreline setback requirements and Appendix Q4.

ALTERNATIVES CONSIDERED:

- No Action: The "No Action" alternative with regard to expansion of structures was rejected because it appears the existing regulation is unfair to conforming and law-abiding neighbors, inconsistent with the statute, and it does create a significant adverse environmental impact. The existing regulation fails to achieve the Agency•s overall intended goals of consistency, predictability, uniformity, and shoreline protection. Currently, existing non-conforming structures (i.e. structures located within the setback area) may expand laterally, to the rear and upward, creating a significant adverse environmental impact on the shoreline. 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 Adirondack Park Agency Act was not adequate and there was a general recommendation for changes that would create better protections. This proposal enhances shoreline protections as anticipated by the Act.

  With regard to on-site sewage system replacements and expansions, the "No Action" alternative is considered insufficient to protect water quality. It is the Agency's position that any replacement system should comply with current standards if at all possible; the current standards have been created to reduce environmental impacts. However, since the statute allows replacement "in kind," the proposed replacement standard is not mandatory. The "No Action" alternative for expansions of non-conforming on-site wastewater systems is also unacceptable for the same reasons as the expansion of non-conforming structures, and is very important, 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.

- Other Alternatives: With regard to expansions of non-conforming structures, the possibility of allowing some expansion was discussed. A 25 percent expansion is authorized under the current regulations; assuming that any expansion is lawful under statutory provisions, a limited upward expansion would not increase the footprint on the ground and may be a reasonable option. This was discussed. However, any expansion was rejected as failing to comply with the statute which prohibits any increase in non-conformance. Moreover, the statutory intent to protect the shorelines is paramount in the Act and the prohibition should be strictly honored.

RELATED LONG- AND SHORT-TERM IMPACTS, CUMULATIVE IMPACTS AND OTHER ASSOCIATED ENVIRONMENTAL IMPACTS:

The revision of 575.5(b)(2) will eliminate an extraordinary provision in the regulations which has provided for the almost unlimited expansion of non-conforming shoreline structures. The current regulation would allow a tiny, one-story cabin to be expanded laterally on either side, to the rear, and upward, potentially resulting in a dwelling of significantly larger proportions. It also allows a 25 percent expansion of other non-conforming structures. If enacted, the new regulation will prohibit the expansion of such structures, though it would allow replacement in kind, or a new and expanded structure which fully complies with the shoreline setback. Also, a variance remains an option in unusual circumstances, where there is practical difficulty building in compliance with the setback. Both in the short and long term, the shorelines will be better protected from expanded development right on or near the water, a major contributor to adverse water quality and aesthetic impacts. The regulation will ensure the existing non-conforming structures are not expanded within the setback area and, over time, there will be a significant positive cumulative impact.

The requirement to improve replacement non-conforming on-site wastewater treatment facilities whenever possible also will have significant positive short-term, long-term and cumulative impacts. This provision will help improve water quality, but will not penalize those situations where there are no better options than the existing situation. Moreover, expansions of such systems, and hence expansions of the related development, will not be permitted unless there is an appropriate plan for on-site wastewater treatment facilities in conformance with existing standards. In the short and long term, this will prevent expansions which are not able to be supported by appropriate wastewater treatment.

ADVERSE ENVIRONMENTAL IMPACTS THAT CANNOT BE AVOIDED:

None identified.

IRREVERSIBLE AND IRRETRIEVABLE COMMITMENT OF ENVIRONMENTAL RESOURCES:

None identified.

MITIGATIVE MEASURES:

None identified.

GROWTH INDUCING ASPECTS:

None identified.

USE AND CONSERVATION OF ENERGY:

None identified.

ADIRONDACK PARK AGENCY PROPOSED REGULATORY AMENDMENT: #3

SUBJECT: **Land division along roads or rights-of-way owned in fee**
SECTION: 573.4
STATUTORY AUTHORITY: Executive Law Article 27

PROPOSED REVISION/NEW DEFINITION:

- **573.4 Subdivisions.**

(a) *Subdivisions along land use area boundaries.* A subdivision of land solely along a land use area boundary does not require an agency permit.

[(b) *Subdivisions along roads and other rights-of-way.* The sale of a landowner's entire ownership on one side of a public road, railroad, right-of-way owned in fee, or other intervening fee ownership, will not be considered a subdivision.]

(subsequent sections (c) through (j) will be re-numbered)

PROPOSED COMPANION CHANGES:

None.

DISCUSSION:

9 NYCRR 573.4(b) allows the lawful sale without an Agency permit of a portion of a merged[1] 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. The regulation provides that such conveyance is not a "subdivision" under the Adirondack Park Agency Act.

The existing regulation does not address the allocation of the overall intensity guidelines (OIGs) when either the conveyed or retained portions of the original ownership are substandard in size. (The OIGs dictate the total number of principal building privileges allowed on a given parcel based on total acreage.) In such a case, the total merged landholding would qualify for at least one single family dwelling as a "pre-existing lot of record" under Section 811(1)(a) of the Act, but might not qualify for two, even though two lots are lawfully created by exercise of the option created by the existing regulation. In the past, certain development cannot be approved on such substandard parcels created in conformance with the existing regulation, as they do not satisfy the OIG

[1] 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.

requirements of the Adirondack Park Agency Act. Absent the Agency regulation, the sale of a substandard-sized lot would be a jurisdictional "subdivision" and the OIGs would apply to the original merged parcel and allocated as part of the project review, thereby resolving the OIG dilemma.

The issue of how to apply the OIGs to substandard lots created pursuant to 573.4(b) was identified as needing Agency direction.

The preferred alternative, as determined by the Agency and the TAL, is to delete the regulation, 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 OIGs under the Act. In some scenarios, multiple substandard lots can be created. 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 CEAs). Creation of substandard lots by location of an intervening road, the source of OIG problems, would be jurisdictional just as any other substandard sized lot. The new regulation is prospective only, so lots already conveyed remain lawful, but may have ambiguous principal building privileges depending on the specific circumstances of each parcel. The proposed regulation implements what the Act intended, providing for Agency review over the creation of substandard-sized lots.

ALTERNATIVES CONSIDERED:

- No Action: 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 OIGs.

- Alternative One: 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 to build on such lots, and that the un-informed 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 OIGs.

- Alternative Two: Another idea 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 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.

RELATED LONG- AND SHORT-TERM IMPACTS, CUMULATIVE IMPACTS AND OTHER ASSOCIATED ENVIRONMENTAL IMPACTS:

The proposed amendment will simplify jurisdiction in that all proposed conveyance of substandard-sized lots will require an Agency permit (or a permit from a municipality which administers an Agency-approved local land use plan). This will result in an increased number of projects than are currently jurisdictional, but will also reduce confusion and potential subsequent enforcement problems with regard to development of parcels in violation of the OIGs. The short- and long-term impacts and the cumulative impacts will be a more consistent application of the OIGs, which will in turn better protect the environment. The proposal eliminates exceptions to the density requirements created by the existing regulation.

ADVERSE ENVIRONMENTAL IMPACTS THAT CANNOT BE AVOIDED:

None identified.

IRREVERSIBLE AND IRRETRIEVABLE COMMITMENT OF ENVIRONMENTAL RESOURCES:

None identified.

MITIGATIVE MEASURES:

None identified.

GROWTH-INDUCING ASPECTS:

None identified.

USE AND CONSERVATION OF ENERGY:

None identified.

ADIRONDACK PARK AGENCY PROPOSED REGULATORY AMENDMENT: #4

SUBJECT: **"Floor Space"**
SECTION: 570.3
STATUTORY AUTHORITY: Executive Law Article 27

PROPOSED REVISION/NEW DEFINITION:

Add to 570.3:

(ag) *"Square feet of floor space"* of a building shall be the area in square feet measured from the exterior walls of a structure, including the sum total of all floor areas, and including all attached covered porches and covered decks, and all other attached components with a roof or cover. The area shall also include any finished attic or basement. For the purpose of this definition, a finished basement or attic is one which contains walls, flooring, and ceiling suitable for use as a bedroom, living room, playroom or office area, or if a non-residential use, suitable for storage, work area, or office.

(ah) *"Square footage"* of a structure other than a building shall be the exterior area of the structure, measured in either the elevation (face) or plan (top) view, whichever is larger.

PROPOSED COMPANION CHANGES:

None.

DISCUSSION:

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, they establish a threshold beyond which an Agency permit is needed for new land use or development. Without definitions, it has been difficult to ensure consistency.

Any measurement methodology adopted will be an advantage to landowners in some cases, and a disadvantage in other regards; therefore, there is no consistent benefit to be gained by any particular measurement methodology.

The 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 difficult to obtain for odd shapes. Outside measurements would be far easier and more consistent in application.

The main area of discussion has been whether uncovered decks should be counted in the measurement. Uncovered decks are not part of the habitable structure from a building code point of view, but are part of the structure's footprint on the landscape from an environmental impact point of view. Based on these factors, one

could go either way on the issue of whether to include uncovered decks in the measurement. This proposal does not include uncovered decks in the measurement, but does include all covered decks and porches. If a roof is added to a deck at some later date, that square footage will be added to calculation of the overall square footage of the structure.

This section 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.

ALTERNATIVES CONSIDERED:

- No Action: 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.

- Alternative One: Current practice includes the area of decks in the measurement of floor space; mainly because a deck does have an impact on the land and creates disturbed 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.

- Alternative Two: The exclusion of all "outside" or unheated porches from the measurement of "floor space" was considered. This alternative was rejected because any covered porch 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.

- Alternative Three: The exclusion of storage areas under four 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.

RELATED LONG- AND SHORT-TERM IMPACTS, CUMULATIVE IMPACTS AND OTHER ASSOCIATED ENVIRONMENTAL IMPACTS:

The differences in the measurement methodologies are minor in some regards. Also, as discussed above, any methodology has advantages and disadvantages to the landowner. Non-jurisdictional less-than-25 percent expansions are based on floor space. In this context, the landowner would want everything with floors to be measured, to get the highest base number from which to calculate the non-jurisdictional expansion. However, many projects are jurisdictional based on the proposed floor space of the structure. In these cases, the landowner would want to exclude as much as possible from the measurement, so that jurisdiction will begin at an essentially larger size criterion. As a result of these converse effects, both the long- and short-term potential impacts of the measurement methodology should ultimately balance out and be neutral over the Park as a whole. Similarly, the methodology should also have an essentially neutral effect on cumulative impacts. The potential cumulative impact is also insignificant since the difference in methodologies, as applied over the long term, will be overcome by the legitimate issuance of permits when the jurisdictional criteria are eventually reached.

ADVERSE ENVIRONMENTAL IMPACTS THAT CANNOT BE AVOIDED:

None identified.

IRREVERSIBLE AND IRRETRIEVABLE COMMITMENT OF ENVIRONMENTAL RESOURCES:

None identified.

MITIGATIVE MEASURES:

None identified.

GROWTH-INDUCING ASPECTS:

None identified.

USE AND CONSERVATION OF ENERGY:

None identified.

ADIRONDACK PARK AGENCY PROPOSED REGULATORY AMENDMENT: #5

SUBJECT: **"Hunting and Fishing Cabin"**
SECTION: 570.3
STATUTORY AUTHORITY: Executive Law Article 27

PROPOSED REVISION/NEW DEFINITION:

Change Section 570.3(m).

(m) *Hunting and fishing cabin* and *hunting and fishing and other private club structure* [shall mean] means a cabin, camp or lean-to or other similar structure designed and used only for occasional occupancy and primarily for hunting, fishing, [or] and similar purposes that (i) is a one-story structure but may include a sleeping loft; (ii) is built on posts or piers and does not have a permanent foundation; (iii) is served by a sanitary pit privy or chemical toilet and does not have a conventional, on-site wastewater treatment system; (iv) does not have pressurized or indoor plumbing (this prohibition does not preclude a kitchen sink with appropriate grey water leach pit); and (v) is not connected to any public utilities (such as electric, phone, cable, water or sewer systems).

PROPOSED COMPANION CHANGES:

None.

DISCUSSION:

The Task Force on Expediting Adirondack Park Agency Operations and Simplifying its Procedures recommended in its 1994 Report that the definition of "hunting and fishing cabin" be updated, along with other definitions. The Agency, over the course of years since that time, has consulted with environmental groups and the industrial forest landowners on the issue of updating the definition of "hunting and fishing cabins." In 2001 Agency Members were invited to tour various hunting and fishing cabins and private club structures and discuss their observations. Specific language has been discussed with the TAL on a number of occasions and their comments as well as the comments of others have been taken into account in identifying the problems with and solutions for the definition.

In addition, the Agency has on quite a number of occasions since 1994 met with the Empire State Forest Products Association (Association) to discuss their views and concerns regarding any proposed change in the definition. The Association has an interest because the lease of lands for hunting and fishing, including the construction and use of hunting and fishing cabins by the lessees, is a major form of income for the industrial forest landowners. The Agency fully considered the comments of the Association, and in particular considered the comments sent by their attorney dated November 1, 2004. After much discussion, the Agency proposes to retain most of the original definition, including the "occasional occupancy" component, but also adds specific structural requirements which are easily determined by a site visit. The Agency maintains the position that hunting and fishing cabins must primarily be used for hunting and fishing and only for "occasional occupancy;" general recreation must be clearly subordinate to the hunting and fishing use, and only a limited component of

the occasional occupancy. Covered porches will be included in the measurement of such structures, but open decks will not. (Previously, open decks would have been included in any measurement.) These changes enact what is allowable while conforming to what the Agency believes is the statutory intent.

The Adirondack Park Agency 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 §802[63]) However, the definition of "subdivision" exempts "the lease of land for hunting and fishing and other open space recreation uses."[2] 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 (e.g. mobile home or single family dwelling) on a site is considered a "subdivision into sites" (9 NYCRR 570.3[ah][3]).

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 "subdivision into sites." Hunting and fishing cabins do not constitute principal buildings unless they exceed 1250 square feet in size.

The purpose of this definition, therefore, is to define the characteristics that distinguish a "hunting and fishing cabin" from a "single family dwelling." The latter would constitute a "principal building" and the construction of more than one such structure on one parcel is a "subdivision." The former is generally not a "principal building" and the construction of more than one on one parcel is not a "subdivision." These legal consequences are very significant. In fairness to all landowners and the legislative intent, the difference between the two types of structures must be clearly identified and enforceable.

We believe the legislature intended that "hunting and fishing cabins" be small and rustic in nature, for occasional occupancy. The radical difference in legal consequences between a "hunting and fishing cabin" and "single family dwelling" with regard to jurisdictional thresholds and the application of the OIGs is only justified if the two uses are functionally and physically different. Under the Adirondack Park Agency 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, a single family dwelling of any size utilizes one principal building unit under the OIGs. Also in contrast to hunting and fishing cabins, permits are required for single family dwellings when a certain threshold number are proposed, or when small lot sizes are involved, and in all cases in Resource Management.

The proposed definition is a clarification of current Agency practice and is consistent with current jurisdictional determinations and permits issued regarding hunting and fishing cabins. The proposed definition implements what the Agency has included as requirements in non-jurisdictional determinations and permits for years. Compliance with the current definition would generally mean compliance with the proposed definition.

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

Lawfully pre-existing uses (any use constructed prior to August 1, 1973) may continue. However, in any other case involving the lease of lands for hunting and fishing, any such hunting and fishing cabins must be brought into conformance with the new rules, at a minimum at least at the time the lease is renewed. For hunting and fishing cabins located on one's privately owned parcel, the cabin must conform to this definition within a reasonable time frame, unless an Agency permit authorizes something different.

The proposed definition is consistent with the NYS Building Code definition of Group U structures, as confirmed by recent advice given by the DOS Codes Office. The building code creates a similar bright line between dwellings and occasional use (Group U) structures. The limited amenities and occasional occupancy aspect of the proposed hunting and fishing structures are essential for qualification as Group U structures.

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

In recent years, people have attempted to push the limits of rustic hunting and fishing cabins. Backcountry cabins have been constructed or proposed in clusters and/or with amenities such as in-ground wastewater systems, pressurized wells, solar panels or generators for electricity. The use of these cabins has been proposed to include a wide range of recreation and traditional "vacation home" uses. Some have maintained that such accommodations and uses should qualify as "hunting and fishing cabins" because they are on leased forest lands, despite the fact that usage is not strictly limited to "hunting, fishing or similar purposes." In common lease arrangements by the industrial forest landholders, there are often mechanisms which specify the allowable structure, limit the structure to occasional use, tie the use to hunting and fishing, and prevent the use of such cabins for residential purposes associated with vacation homes. The Agency definition clarifies essential lease content and provides specific guidance where no lease exists.

The question has arisen as to whether a cabin used solely for "open space recreation" will qualify as a "hunting and fishing cabin." The Agency has addressed this by including in the definition of "hunting and fishing cabin" the requirement that "hunting and fishing" be the primary use, as was clearly intended by the legislature in the use of the phrase "hunting and fishing cabin." However, the Agency also recognizes that there may be incidental and clearly subordinate recreational uses associated with the hunting and fishing use, provided the primary use remains hunting and fishing. If open space recreational uses other than hunting and fishing are significant or dominate the use of the structure, it will be considered a "single family dwelling." The introduction of the word "primarily" is intended to clarify the Agency's position on this issue.

The Agency has chosen to pursue a definition which is largely oriented to the physical properties of the structure, with the additional qualifications that the structure be only occasionally occupied, and used primarily for hunting and fishing, consistent with the clear intent of the Act and the Agency's implementation of the previous definition. The specific physical limitations for the structure will ensure ease of enforcement. However, the use limitations are also essential in order to distinguish the hunting and fishing cabin from the single family dwelling or tourist accommodation.

ALTERNATIVES CONSIDERED:

- No Action: The "No Action" alternative is unacceptable to the Agency. The proposed definition implements specific, enforceable structural 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.

- Alternative One: 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 use 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" is also necessary to clarify that incidental and clearly subordinate recreational use of the structure (such as occasional hiking and bird watching) will not change the status of the structure. The physical and temporal use limitations are essential to ensure that a "hunting and fishing cabin" remains primarily used for hunting and fishing and does not become a seasonal dwelling.

- Alternative Two: 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.

- Alternative Three: The issue was raised as to whether hunting and fishing cabins should be allowed only on the leased lands involved in active forest management. Said another way: Is it possible for an individual owner of a small parcel of land to construct and maintain a hunting and fishing cabin on his 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 compatible uses in all land use areas.

- Alternative Four: 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 Adirondack Park Agency Act, and would not constitute a hunting and fishing cabin, regardless of the physical amenities.

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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.

RELATED LONG- AND SHORT-TERM IMPACTS, CUMULATIVE IMPACTS AND OTHER ASSOCIATED ENVIRONMENTAL IMPACTS:

The Adirondack Park Agency Act creates significant jurisdictional and density exceptions by allowing hunting and fishing cabins without calling the placement of more than one on a single parcel of land the creation of a "subdivision," and without calling each a "principal building." Hunting and fishing cabins are generally allowed to be built without an Agency permit, and there is no limitation as to the total number of such structures on one parcel of land. In contrast, single family dwellings constitute one principal building, and two or more on one parcel of land constitutes a "subdivision." Therefore, the distinction between a "hunting and fishing cabin" and a "single family dwelling" must be clear. This proposed definition will both clarify and identify what will qualify as a "hunting and fishing cabin." In comparison to the existing definition, which was implemented similarly to the proposed definition but without the express regulatory language, the physical components and temporal use of the structure will be expressly limited. These physical and temporal limitations will minimize the size, amenities and use of the structure, and, therefore, should alleviate any adverse impacts in the long and short term, and cumulatively. The potential use of the structures for incidental recreation does not alter the other mandates of the definition, now clearly defined, which on the basis of clarity alone will have a positive impact on the environment, both in the short term, long term and cumulatively.

ADVERSE ENVIRONMENTAL IMPACTS THAT CANNOT BE AVOIDED:

The potential that the definition will allow unregulated multiple use structures more akin to seasonal dwellings is avoided by the explicit physical limitations and by the continuation of the "occasional occupancy" requirement, as well as the requirement that the primary use must be for "hunting and fishing".

IRREVERSIBLE AND IRRETRIEVABLE COMMITMENT OF ENVIRONMENTAL RESOURCES:

The potential use of the structure for incidental recreation, now expressly recognized for the first time, may encourage and result in the construction of more "hunting and fishing cabins" without Agency review. As the structures would still be limited by the physical and temporal use requirements, it is expected that the nature of such structures will be modest, involving limited investment. In that context, such structures are easily removed or relocated, and, therefore, create an easily reversible commitment of resources. The requirements of the proposed definition will minimize environmental impacts.

MITIGATIVE MEASURES:

The limitations proposed in the definition are the mitigation measures that will protect the environment.

GROWTH-INDUCING ASPECTS:

None identified.

USE AND CONSERVATION OF ENERGY:

Allowing the "hunting and fishing cabins" to be insulated will help conserve energy.

RESPONSE TO COMMENTS ON PROPOSED REGULATIONS

General Comments

General comments received object to the overall regulation revision proposal as being outside the scope of the authority of the Adirondack Park Agency and an expansion of Agency jurisdiction. This document more clearly specifies the authority and duty for regulatory revision at the Agency and specific proposals that have been advanced in this process, and also references the suite of documents required by the State Administrative Procedures Act and available on the Agency web site, www.apa.state.ny.us. Any change in jurisdiction or circumstances requiring an Agency permit or variance under the proposed revisions flows directly from the terms of the Adirondack Park Agency Act and/or the NYS Freshwater Wetlands Act.

Involving Wetlands (see discussion beginning at page 13)

Comments questioned regulatory impact statement conclusions that the cost of administration would be approximately equivalent to the current regulatory rules and asked that the regulation be deferred until a formal cost/benefit analysis is completed. Costs of administration of this provision to applicant involve the drafting of subdivision documents by professional surveyors, including the need to locate wetland boundaries and capture that information on documents filed with the Agency for jurisdictional determinations or subdivision permission. That requirement is substantially unchanged, though the proposed regulation creates a significant incentive to configure proposed subdivision lots differently than the outcome with the current regulatory framework. Whether a greater volume of subdivision activity would be reviewed by the Agency will depend on the design practices of future subdividers and the effectiveness of the general permit strategy suggested in this FSGEIS.

A comment suggested using a term other than “cluster” to describe lots involving wetlands to avoid confusion with that term as used in the Character Descriptions, Purposes and Policies of Section 805 of the Act. A non-material change and substitute term will be proposed in presenting this proposal to the Agency.

Questions were also posed regarding the source, appropriateness and/or adequacy of the 200 foot separation between the property boundary and the wetland boundary for a non-jurisdictional subdivision.

The 200 foot separation is derived directly from Appendix Q-4 of Agency regulations relating to minimum separation from a wetland or water body for a sanitary waste disposal system located in fast-perking soils. This would assure that at the adjacent parcel boundary there would be a very low potential for impacts from such adjacent development. This FSGEIS also discusses a potential General Permit that would further reduce administrative costs for both subdivider and the Agency based on performance standards for development location that would only be enforceable in the context of a recorded Agency permit. This would be much more flexible with respect to property boundaries because it could focus on development sites rather the lot lines and could allow boundary lines through wetlands. However a General Permit is inappropriate for administration in the jurisdictional determination process.

Several comments object to the proposed revisions related to wetland subdivision as creating new jurisdiction for the Agency.

The proposed revision makes no change to the fundamental statutory authority of either the Adirondack Park Agency Act, adopted in 1973, or the Freshwater Wetlands Act, adopted in 1975. Implementing regulations took effect on May 1, 1983 to reconcile and harmonize both statutes in the Park. The regulations have been long recognized as having unintended consequences that diminish their effectiveness, ensnare individuals in inadvertent violation of the law, and result in creation of lots with no logical reason for existence and no development potential, solely to avoid jurisdiction. ("wetland gerrymander").

Expansion of Non-Conforming Shoreline Structures (see discussion beginning at page 22 above)

Several comments object to changing a privilege granted by the regulations for many years. Some of these comments are framed in statutory terms, though the primary action that is proposed deletes regulatory language rather than adding to it, relying more directly on the actual statutory language for authority. Expansion of structures within the shoreline setback area has always been limited by statute, and the proposed regulation revision merely quantifies and clearly establishes which activities would "increase non-compliance", including single-family dwelling expansion.

While there was little comment on the proposals regarding sanitary waste facilities, technical issues associated with small non-conforming lots make reference to Appendix Q-4 of the Agency Regulations inappropriate as an eligibility criterion for the exemption from a variance requirement. Agency staff apply Department of Health guidance when such situations are jurisdictional to the Agency. Minor non-material changes to the proposed language will be presented by staff to the Agency. The core objective is to remove any actual or perceived obstacles to an improved, but still non-conforming replacement sanitary wastewater system where there is no expansion of the accompanying structure.

Land Division Along Roads or Rights-of-Way Owned in Fee (see discussion beginning at page 27)

Some comment supports this proposed revision, referring to the existing exemption from permit requirements as a "loophole".

Other comments suggest the proposed regulation revision will add cost and delays to subdivisions because the existing regulation allows forest owners to separate or exchange large parcels conveniently, often where no new land use or development is ever contemplated. For instance, tracts which are under conservation easement may require Agency subdivision review when there is no associated development rights issue, thus adding unnecessary cost. Others characterize this regulation revision as an expansion of Agency jurisdiction without legislative action.

The Agency believes that proper interpretation of the Adirondack Park Agency Act and its explicit "merger" provision on which density calculations are based requires analysis of a parcel as a whole and in fact §811 specifically refers to a "pre-existing lot of record", not to lots separated from each other by an intervening road or right-of-way owned in fee. The Agency already expedites subdivisions which are Minor Projects (those involving only two lots) by issuance of a General Permit (GP 2005G-2). This General Permit might be further adjusted to facilitate bulk land transfers of concern to forest land managers.

Floor Space (see discussion beginning at page 30)

Several comments support the proposed addition of the method of measurement of floor space, in that it provides clear guidance and is conveniently measurable. One suggests that the measurement of floor space should include both covered and uncovered porches and decks.

Other comments call attention to prior practices of the Agency based on interior structure measurements, as outlined by a previous Agency Executive Director. However this would involve the Agency (or lease managers) to enter structures like hunting and fishing cabins to measure useable space, including lofts and other sleeping space. While this is the current practice, an exterior measurement was considered more consistent and fair by most of the participants in the multi-year process that lead to this proposal.

Others referenced different standard methods of measurement of floor space based on the Uniform Building Code and ANSI standards.

The purpose of the proposed regulation is not to facilitate appraisal nor to insure compliance with other applicable codes, but merely to establish a consistent measurement method to be used when determining Agency jurisdiction. Although uncovered structure components also have the potential for environmental impact, the proposed regulation was drafted with the understanding that covered components represent a higher level of investment in the structure and higher potential for year-round use of enclosed areas.

Hunting and Fishing Cabins (see discussion which begins at page 33)

The structural elements of this definition have been broadly supported in a multi-year drafting effort and among most comments received. However a number of comments object to actual use as an element of the definition in light of the straightforward structural aspects captured in the proposal. Some comment specifically proposed the addition of “open space recreation use” as an allowable use associated with a hunting and fishing cabin.

Comment also suggested that the square footage measurement for hunting and fishing cabins should include all attached enclosed space, covered and uncovered porches and decks and also sleeping lofts.

The definition as proposed reflects substantial consensus after a long contentious dialogue, particularly the structural elements. During the hearing process it was clear that the administrative history of this proposed rule should reflect a presumption of compliance when the structural requirements are met, based on exterior observations. However, use is also an important fall back consideration to avoid ambiguity in situations where a fully compliant structure is offered in commerce for different purposes, such as tourist accommodation. Such an offering would be apparent through advertisements, or actual business practice, not through the observed activities in any given structure.

Appendix 1

Comment letters received.