



M E M O R A N D U M

TO: Terry Martino, Executive Director
FROM: James Townsend, Counsel
RE: Proposed Rule Making - Emergency Projects
DATE: March 5, 2014

Please find attached a draft resolution, and accompanying proposed rule, for consideration and action by the Agency that would authorize staff to file a Notice of Proposed Rule Making pursuant to the State Administrative Procedure Act ("SAPA") for a new "emergency project" rule. The proposed rule would implement the Agency's authority under Executive Law § 809(15) to promulgate regulations to define land use and development that is an "emergency project."

The Notice of Proposed Rule Making will commence a public comment period which will include public hearings to receive comment on the proposed rule. After conclusion of the public comment period, staff will bring the proposed rule back to the Agency for further consideration and possible adoption.

Background:

Since 2011, there have been numerous state declared emergency weather events, including the 2011 flooding, Hurricane Irene, Tropical Storm Lee, and Hurricane Sandy. These weather events required prompt action both during the event itself and the remediation and recovery phase after the event. Some of the actions that were taken included measures subject to Agency jurisdiction under the Adirondack Park Agency Act, the Freshwater Wetlands Act or the Wild, Scenic and Recreational Rivers Act.

Unless these measures are legitimate "emergency projects," an Agency permit, order or variance is required for any jurisdictional land use and development that occurs during an emergency and its aftermath. The Agency does not presently have a regulatory definition to establish when land use and development is an "emergency project." The proposed rule would fill this gap.

A draft of this rule was presented to the Agency at its October, 2013 meeting. Since then, Agency staff has worked extensively to review and refine the proposed rule. In early 2014, staff met with representatives from the New York State Departments of Environmental Conservation ("DEC") and Transportation ("DOT"). The feedback from each of these agencies has been invaluable in shaping the proposed rule.

Staff expects to continue to work with these agencies in planning for future emergency events. Both DEC and DOT have the capacity to commit significant staff and other resources to such events and coordinating with DEC and DOT on appropriate responses to emergency events is in the Agency's and the public's interest. The proposed rule will provide a predictable and consistent Agency response that will support this inter-agency coordination.

Statutory Authority:

The Agency's statutory authority to determine whether land use or development is an "emergency project" is set forth in Executive Law §§ 806(4), 809(15) and 814(4).¹ Each of these sections contains a clause stating that the section does not apply to land use or development that is "immediately necessary for the protection of life or property." Executive Law § 809(15) authorizes the Agency to promulgate rules which define what constitutes an "emergency project."

Proposed Rule:

In the midst of responding to an emergency event, the proposed rule allows a project sponsor to obtain an emergency certification from the Agency for land use or development that is an "emergency project." Importantly, the project sponsor is not required to obtain an emergency certification before the emergency project is undertaken because while an emergency is ongoing, it is often not possible to obtain approval before one must act to protect life or property. Thus, a project sponsor may request the Agency to issue an emergency certification either before undertaking an emergency project or within 30 days after undertaking the emergency project. In either case, the Agency will determine whether the project is (or was) an "emergency project," including whether it will be (or was) undertaken in response to an "emergency" and is (or was) limited to the measures necessary to address the emergency. The certificate may also include conditions to limit the timing of

¹ Article 70-0107 of the Environmental Conservation Law specifies that the Wetlands Act and Rivers Act are subject to the provisions of section 809 of the APA Act. See N.Y. ENVTL. CONSERV. LAW §70-0107 (McKinney 2013).

the emergency project and its impact on affected resources. The Executive Director, Deputy Director - Regulatory Programs, and such other Agency staff as the Executive Director may designate, will be authorized to issue emergency certifications.

Additional recovery measures may also qualify as an "emergency project." The proposed rule also allows the Deputy Director - Regulatory Programs to issue an emergency recovery authorization for jurisdictional land use and development that is necessary for repair, remediation or recovery from an emergency if the emergency project meets a specific set of criteria. There is generally more time to allow for planning and review during the recovery phase from an emergency; therefore, a project sponsor is required to receive an emergency recovery authorization before undertaking this type of emergency project. An important requirement to obtain an emergency recovery authorization is that the emergency project must be directly related to a specific storm event or natural calamity that has been declared to be an emergency by federal or state officials. Again, conditions may be included to limit the timing of the emergency project and its impact on affected resources.

The proposed rule provides a procedure for obtaining a determination from the Agency that land use and development is, in fact, an "emergency project." The certificate or authorization thus provides Agency documentation that land use or development does not (or did not) require a permit, order or variance.² Individuals who undertake jurisdictional land use or development without an Agency determination that it is an "emergency project" may be subject to enforcement action. This risk is no different from any landowner undertaking any jurisdictional land use and development without an Agency permit, order or variance.

Recommendation:

Staff recommend Agency approval of the attached resolution authorizing the filing of a Notice of Proposed Rule Making pursuant to SAPA § 202(1) for the proposed rule accompanying the resolution.

² DOT has indicated that documentation that the land use or development is an "emergency project" will facilitate reimbursement for response costs from the Federal Emergency Management Agency. For individuals, it will also provide documentation that land use or development is lawful for Agency purposes in future property transactions.

A new section 572.15 is added to read as follows:

Section 572.15 Emergency Projects.

(a) *General.* This section provides the procedural requirements for the issuance of an emergency certification or an emergency recovery authorization for an emergency project undertaken to address an emergency. No other requirements of this Subtitle shall apply to an emergency project. It is within the Agency's discretion to determine whether a specific event or conditions constitutes an emergency and whether land use or development is an emergency project.

(b) *Definitions used in this section.* (1) *Emergency* means: (i) a specific event or condition which presents an immediate threat to life or property; or (ii) a specific storm event or natural calamity that has been declared to be an emergency by federal or state officials. (2) *Emergency project* means land use or development that is necessary to address an *emergency* and would otherwise require a permit, order or variance. (3) *Emergency Certification* means a written determination by the Agency that an *emergency* exists or has existed and that an *emergency project* may be undertaken or has been undertaken. (4) *Emergency recovery authorization* means a written determination by the Agency authorizing an *emergency project* that is necessary for repair, remediation or recovery from an *emergency* as defined in subdivision (b)(1)(ii) of this section and is not covered by an *emergency certification*.

(c) *Emergency Certification Procedures.* (1) To obtain an emergency certification, a project sponsor shall: (i) notify the Agency and obtain an emergency certification prior to undertaking an emergency project or as soon thereafter as practicable; and (ii) provide the Agency with sufficient information for a determination as to whether an emergency exists and whether the project is an emergency project as those terms are defined in subdivisions (b)(1) and (b)(2) of this section. (2) The Agency shall issue an emergency certification for an emergency project upon the request of a project sponsor upon a determination that: (i) an emergency is ongoing

or occurred within the last 30 days; and (ii) the emergency project is limited in scope to the land use and development necessary to address the emergency. (3) The emergency certification shall include a description of the land use and development comprising the emergency project, and may include conditions to limit the timing of the emergency project and its impact on any of the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the Park. (4) An emergency certification may only be issued by the executive director, deputy director – regulatory programs and such other Agency staff as the executive director shall designate.

(d) *Emergency Recovery Authorization Procedures.* (1) A project sponsor proposing an emergency project under this section shall notify the Agency prior to undertaking the emergency project and must provide the Agency with the following information: (i) a brief statement identifying the specific storm event or natural calamity declared to be an emergency by federal or state officials that created the need for the emergency project; (ii) a description of the proposed land use and development and why it is necessary for repair, remediation or recovery from an emergency; (iii) documentation of existing conditions; (iv) a location map; (v) actions proposed to be taken to minimize environmental impacts; and (vi) any additional information requested by the Agency necessary for the issuance of an emergency recovery authorization. (2) The deputy director – regulatory programs may issue an emergency recovery authorization for an emergency project if he determines that: (i) the emergency project is directly related to an emergency as defined in subdivision (b)(1)(ii) of this section; (ii) the emergency project is limited in scope to the land use and development necessary to repair, remediate or recovery from an emergency; and (iii) the emergency project will cause the least change, modification, disturbance or damage to the environment practicable. (3) The emergency recovery authorization shall include a description of the land use and development comprising the emergency project and may include conditions to limit the timing of the emergency project and its impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the Park.

(e) *Limitations.* (1) The Agency may modify or rescind an emergency certification or emergency recovery authorization if new information demonstrates that an emergency does not exist or that the emergency project is not necessary or appropriate. (2) Undertaking land use or development that ordinarily requires a permit or variance from the Agency and is not described in an emergency certification or emergency recovery authorization issued pursuant to this section may constitute a violation subject to enforcement action.

Subdivision (a) of section 572.22 is amended to read as follows:

(a) Appeals of actions taken [by the deputy director – regulatory programs] pursuant to this section.

(1) Any project sponsor or variance applicant may appeal the following actions of the deputy director-regulatory programs to the agency: (i) determinations whether a project or variance application is complete, and the contents of requests for additional information; (ii) conditions precedent to the issuance of, and conditions imposed in, permits issued pursuant to the authority delegated in section 572.11 of this Part; (iii) determinations pursuant to section 572.19(b) of this Part whether a request to amend a permit or variance involves a material change; (iv) denial or conditional approval of requests to amend permits or variances, or requests to renew permits; (v) any other action with respect to a project or a variance pursuant to delegated authority. (2) Any project sponsor may appeal a determination made pursuant to section 572.15 of this section.

Draft Resolution – Emergency Project Rule Making

WHEREAS, the Adirondack Park Agency (“Agency”) is authorized to adopt, amend and repeal rules and regulations pursuant to Executive Law §§ 804(9) and 809(14),(15); and

WHEREAS, any rule making undertaken by the Agency must be done in accordance with the State Administrative Procedure Act (“SAPA”); and

WHEREAS, pursuant to SAPA § 202(a), prior to the adoption of a rule the Agency is required to submit a notice of proposed rule making to the Secretary of State for publication in the State Register and to afford the public an opportunity to comment on the proposed rule; and

WHEREAS, as set forth in accompanying proposed rule, the Agency seeks to promulgate a rule providing a procedure for determining whether land use or development constitutes an emergency project for purposes of Executive Law §§ 806(4), 809(15) and 814(4); and

WHEREAS, pursuant to SAPA § 201-a(2)(a), the proposed rule will not have any measureable impact on jobs and employment opportunities because it does place any new or increased regulatory burden on any person; and

WHEREAS, pursuant to SAPA §§ 202(a), 202(b), and 202(bb), the Agency is required to develop and issue a regulatory impact statement, a regulatory flexibility analysis and a rural area flexibility analysis for any rule proposed for adoption; and

WHEREAS, adoption of the proposed rule by the Agency is subject to the State Environmental Quality Review Act (Environmental Conservation Law § 8-0801 *et seq.*) and is a Type II action pursuant to 9 NYCRR § 586.5(b) since it does not effect substantive change in Agency jurisdiction or project review procedures.

NOW, THEREFORE, BE IT RESOLVED that:

- I. Pursuant to SAPA § 202(a), Agency staff shall submit a notice of proposed rule making for the proposed rule accompanying this resolution to the Secretary of State for publication in the State Register and shall hold public hearings on the proposed rule and afford the public a 45-day period to submit comments on the proposed rule. Prior to submission of the notice of proposed rule making to the Secretary of State, the Executive Director may make non-substantive or technical changes to the proposed rule.
- II. For purposes of complying with SAPA, Agency staff shall develop and issue with the notice of proposed rule making a draft job impact statement, regulatory impact statement, regulatory flexibility analysis and rural area flexibility analysis.