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**Via Email**

January 2, 2025

Abby Valachovic  
New York State Department of Environmental Conservation  
Division of Fish and Wildlife  
625 Broadway,  
Albany, NY 12233

**Re: Comments on Proposed Regulations: Endangered and  
Threatened Species Mitigation Bank Fund, 6 NYCRR Part 182**

Dear Ms. Valachovic:

Protect the Adirondacks ("PROTECT") is pleased to submit the following comments regarding the new regulations proposed by the Department of Environmental Conservation ("DEC") implementing the Endangered Species Mitigation Bank Fund ("the Fund"), as authorized by Environmental Conservation Law § 11-0535-c.

**General Comments**

PROTECT applauds DEC's ongoing efforts to protect endangered and threatened species and their habitat. DEC's recent adoption of regulations implementing the State's endangered species act was a critical step in providing important protections to endangered and threatened species and their habitat.

Subject to the two exceptions summarized below, PROTECT strongly supports the proposed regulations implementing the Fund because they provide a reasonable and balanced means for funding projects that will achieve a net conservation benefit for protected species that are adversely impacted by major energy projects. In most respects, the proposed regulations rationally balance the need for construction of major renewable energy projects and supporting infrastructure, as regulated by the Public Service Commission ("PSC") and the Office of Renewable Energy Siting ("ORES"), with DEC's statutory obligation to protect endangered and threatened species.

PROTECT does not support the proposal to allow contributions to the Fund to compensate for the take of individual members of a protected species. To the extent that individual members of a protected species are taken by construction

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or operation of a major energy project, that should be factored into determining the amount of the required contribution to the Fund, but it should not be a fixed amount per individual taken. PROTECT opposes the proposed monetization of protected species, which would allow applicants to view the killing of individual members of an endangered or threatened species as merely the cost of doing business.

PROTECT also opposes the failure to include an opportunity for public comment on the amount of mitigation payments to the Fund as required by DEC and ORES. PROTECT urges DEC to include an opportunity for the public to comment on proposed mitigation payments to the Fund, particularly since the methodology for determining such payments is not specified in the proposed regulations.

### **Specific Comments**

Section 182.2(p): The proposed definition of “major electric transmission facility” is identical to the definition of that term in Public Service Law § 137(3). PROTECT therefore suggests that, to avoid confusion, this provision simply refer to the definition set forth in the Public Service Law.

Section 182.2(q): The definition of “major renewable energy facility” is identical to the definition of that term in the ORES regulations at 16 NYCRR § 1100-1.2(ag). PROTECT therefore suggests that, to avoid confusion, this provision simply refer to the definition set forth in the ORES regulations.

Section 182.2(t): The definition of “net conservation benefit plan” would be clarified by moving the phrase “approved by the office” to follow the phrase “shall mean the plan.”

Section 182.18(a): PROTECT suggests modifying this section to read as follows:

The department may utilize funds in the Endangered and Threatened Species Mitigation Bank Fund for the **sole purpose** of facilitating the achievement of a net conservation benefit to any endangered or threatened species which may be taken by the construction or operation of a major renewable energy facility or a major electric transmission facility that cannot avoid or minimize such impacts.

PROTECT believes it is essential for DEC to make clear that the sole purpose of the Fund is to provide moneys for achievement of a specifically articulated net conservation benefit for impacted species.

Section 182.18(b)(1): PROTECT suggests modifying this section to read as follows:

All moneys deposited in the Endangered and Threatened Species Mitigation Bank Fund shall be available for projects undertaken **pursuant to an approved net conservation benefit plan or endangered and threatened species mitigation plan** to facilitate a net conservation benefit to endangered and threatened species potentially impacted by a permitted major renewable energy facility or a major electric transmission facility.

PROTECT believes it is important for this section to make clear that the net conservation benefit to be funded has been specifically identified in an approved net conservation benefit plan or endangered and threatened species mitigation plan.

Section 182.18(b)(3): This section as proposed states:

Appropriate contributions to the department's Endangered and Threatened Species Mitigation Bank Fund may satisfy all or part of the net conservation benefit requirement as specified in an endangered and threatened species mitigation plan or net conservation benefit plan submitted approved by the office in regard to a major renewable energy facility or a major electric transmission facility consistent with this Part.

This section implies that an applicant's legal responsibility to achieve a net conservation benefit for an impacted species may be satisfactorily completed by the applicant's contribution to the Fund, regardless of whether the contribution results in a verifiable net conservation benefit. There also appears to a word missing in the final sentence of the provision. PROTECT suggests that this section be clarified to read as follows, so that it is clear that the contribution to the Fund must result in a net conservation benefit for the affected species:

Appropriate contributions to the department's Endangered and Threatened Species Mitigation Bank Fund may satisfy all or part of the net conservation benefit requirement as specified in an endangered and threatened species mitigation plan or net conservation benefit plan ~~submitted~~ approved by the office **provided that the contribution results in or is reasonably likely to result in a net conservation benefit for the affected species** ~~in regard to a major renewable energy facility or a major electric transmission facility consistent with this Part.~~

Section 182.18(c). This section of the proposed regulations sets forth criteria for determining the amount of required payments into the Fund. However, as proposed, the determination of the amount to be paid, together with the methodology used to calculate the payment, is to be determined by DEC in consultation with ORES, with no opportunity for public review or comment. PROTECT urges DEC to include an opportunity for the public to comment on proposed mitigation payments to the Fund, particularly since the methodology for determining such payments is not specified in the proposed regulations.

Section 182.18(c)(1)(i): PROTECT suggests that this section of the proposed regulations be modified to clarify that the take of individual members of a protected species should be factored into determining the amount of the required contribution to the Fund, but that the amount of the contribution will in no instance be based only upon a fixed amount per individual taken. PROTECT suggests the following modified language:

The take or taking to be quantified may be based on any or all the following: loss of occupied habitat, loss of productivity, loss of individual animals **and** the anticipated duration of such taking, **provided however that there shall not be a fixed amount levied for each individual animal taken but the taking of individual animals shall be considered in quantifying the amount to be paid.**

Section 182.18(c)(1)(iii): This proposed provision uses different terms to refer to payments into the Fund and includes an unnecessary caveat that creates a large loophole in the regulations that must be eliminated. PROTECT suggests that the following changes be incorporated to address these problems:

The department, in consultation with the office, shall determine the required payment of funds sufficient to implement such off-site mitigation into the Endangered and Threatened Species Mitigation Bank Fund. ~~Costs~~ **Such payments** shall be related to the take or taking ~~to the extent practicable~~, with:

Section 182.18(c)(1)(iii)(c). This section, as proposed, states that “loss of individual animals addressed by mechanisms that increase productivity or survival through reduction of existing threats such as predation, human disturbance or collisions with vehicles or structures, *or research identified by the department that will lead to such an outcome.*” (Emphasis added). PROTECT opposes the use of moneys from the Fund to support research because it will not directly provide a net conservation benefit. DEC’s regulations implementing New York’s Endangered Species Act define a “net conservation benefit” as:

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

6 NYCRR § 182.2(o).

While PROTECT supports DEC’s efforts to develop more scientific data concerning protected species through research, the Fund is not the appropriate means to achieve this goal. However laudable such research may be, it does not provide “a successful enhancement” of a protected species’ local or overall population and does not directly contribute to the recovery of the species in New York. PROTECT therefore urges DEC to eliminate research as eligible for receiving moneys from the Fund.

Section 182.18(c)(2). This section includes the cost calculations for the “successful implementation of mechanisms needed to generate a net conservation benefit.” PROTECT suggests that subsection (iii) should be amended as follows to include monitoring of the mitigation actions to ensure that they will be successfully implemented:

equipment, supplies and materials necessary to implement **and monitor** the mitigation actions;

**Conclusion**

On behalf of the Board of Directors of Protect the Adirondacks, please accept our gratitude for the opportunity to share our comments on this proposed project.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Amato", written in a cursive style.

Christopher Amato  
Conservation Director and Counsel