428.1 Responsibility of State agencies with regard to registered and eligible property.

To the fullest extent practicable, it is the responsibility of every State agency, consistent with other provisions of law, to avoid or mitigate adverse impacts to registered or eligible property. Every agency shall fully explore all feasible and prudent alternatives and give due consideration to feasible and prudent plans which avoid or mitigate adverse impacts on such property.

428.2 Coordination with other review procedures.

(a) No project requiring review by the commissioner acting in his capacity as State Historic Preservation Officer in accordance with section 106 of the National Historic Preservation Act of 1966, as implemented by the regulations of the Federal Advisory Council on Historic Preservation, “Protection of Historic and Cultural Properties” (36 CFR 800), shall be reviewed in accordance with these procedures.

(b) A draft environmental impact statement (DEIS) prepared in compliance with the State Environmental Quality Review Act (SEQR) shall be submitted to the commissioner and to the chairman of the board and may be accepted for the purpose of complying with subdivisions (b) and (c) of section 428.8 of this Part, provided that the commissioner determines that the DEIS contains sufficient detailed information to satisfy the requirements of those subdivisions.

428.3 Activities undertaken by more than one State agency.

(a) If more than one State agency is involved in an undertaking which is subject to review under this Part, a single consolidated review will be acceptable, provided that it encompasses all agency activities associated with the undertaking which are subject to review.

(b) The primary responsibility for complying with the provisions of this Part is on the agency initiating the undertaking. However, the involved agencies may agree among themselves which agency shall act as lead agency for purposes of this Part.

(c) Notwithstanding the provisions of subdivisions (a) and (b) of this section, every State agency involved in an undertaking shall be responsible for ensuring that the provisions of this Part are complied with.

428.4 Undertakings subject to review.

(a) As early in the planning process as possible, and in any case prior to the preparation or approval of any final design or plan or the permitting or approval of an undertaking the APO shall determine if the undertaking is subject to review under this Part. APO’s are strongly encouraged to consult with the commissioner when making this determination.
428.4 Undertakings subject to review.

(b) Except as provided in sections 428.11 through 428.13 of this Part such review is mandatory whenever it appears that any aspect of the proposed undertaking may or will cause any change, beneficial or adverse, in the quality of any eligible or registered property in the project impact area. For purposes of this Part a change includes but is not limited to; the whole or partial restoration or rehabilitation of the property, or landscape or improvements to the site; any action which might lead to the destruction or alteration of all or part of the property; alteration of the property's surrounding environment; the introduction of any visual, audible or atmospheric elements or any other actions which might cause or contribute to the destruction, alteration or neglect of the property.

(c) If it appears that any property in the project impact area, including but not limited to inventoried property as defined in section 426.2(h) of this Title, may meet any of the criteria for listing set forth in section 427.3 of this Title the APO shall request an eligibility determination in accordance with section 428.5 of this Part. This request shall be made prior to or concurrently with the notice and request for determination of impact made pursuant to subdivision (d) of this section.

(d) If it is determined that an undertaking is subject to review under this Part, the APO shall notify the commissioner in writing and request that the impact of the undertaking on eligible or registered property be determined. This notice must list all State agencies participating in the undertaking and review and indicate if a single consolidated review is being conducted pursuant to section 428.3 of this Part.

(e) The APO shall provide sufficient documentation for the commissioner to make an informed and reasoned determination concerning the impact of the undertaking on eligible or registered property. Submission of a completed PRDS will generally be deemed sufficient for this purpose. However, the commissioner may determine that the PRDS is not adequate and require the agency to submit any additional studies or documentation deemed necessary.

428.5 Request for determination of eligibility.

(a) At the request of an APO or any other interested party, the commissioner shall determine if any property which may be affected by an undertaking is eligible for the State Register.

(b) Except as provided in section 428.4(c) of this Part a request for an eligibility determination shall be made at a reasonable time prior to the implementation of the undertaking. The commissioner, after notifying the APO in accordance with the provisions of subdivision (d) of this section, will determine on a case-by-case basis what constitutes a reasonable time, and this determination shall be conclusive.

(c) The request, whether made by an APO or an interested party, shall be accompanied by sufficient information concerning the property for the commissioner to make an informed and reasoned determination of eligibility. The commissioner may require submission of whatever additional information is deemed necessary to this determination. When an APO requests a determination of eligibility a completed PRDS should accompany the request.

(d) If an interested party requests a determination of eligibility the commissioner shall notify the APO of any agency having jurisdiction over the property or known to be involved in the undertaking. The commissioner may ask the APO to submit a completed PRDS or any other information relating to the undertaking and give the APO an opportunity to comment on the request.
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428.6 Determination of eligibility pursuant to request.

(a) Within 30 days of receiving sufficient information pursuant to section 428.5 of this Part, the commissioner shall determine if the property meets any of the criteria for listing found in section 427.3 of this Title and is therefore eligible for the State Register. Notice of the commissioner’s ruling shall be given to the party who requested the determination and to the relevant APO.

(b) If the commissioner identifies eligible properties or resources, the APO must comply with the provisions of section 428.4.

428.7 Assessment of impact.

(a) In determining whether an undertaking will have an adverse impact on eligible or registered property, the commissioner shall consider whether the undertaking is likely to cause:

1. destruction or alteration of all or part of the property;
2. isolation or alteration of the property’s environment;
3. introduction of visual, audible or atmospheric elements which are out of character with the property or alter its setting;
4. neglect of the property resulting in its deterioration or destruction.

(b) When a determination of eligibility is made pursuant to section 428.6 of this Part following the submission of a completed PRDS and any other information requested pursuant to section 428.5 the commissioner shall determine the impact of the undertaking at the same time eligibility is determined. Both determinations shall be included in the notice given to the APO under section 428.6(a) of this Part.

(c) In all other cases the commissioner shall determine if the project will have an adverse impact on eligible or registered property and notify the APO of this determination within 30 days of receiving a completed PRDS and any other information requested pursuant to section 428.4(e) of this Part.

(d) If, upon reviewing a project as proposed by the undertaking agency, the commissioner is satisfied that it will cause no adverse impact on eligible or registered property, notice of this determination shall be given to the APO and no further review or consultation under this Part shall be required.

428.8 Consultation process: exploration of feasible and prudent alternatives.

To the fullest extent possible it is the duty of every State agency to avoid or mitigate the adverse impacts of its undertakings on eligible or registered properties. To protect these irreplaceable assets and meet their legal obligations, agencies must make every effort to reconcile their programs with the public policy of the State regarding historic preservation by finding a feasible and prudent means to avoid or mitigate any adverse impact of the undertaking identified by the commissioner. To this end, the following procedures shall be followed:

(a) If the commissioner determines that an undertaking will have an adverse impact on eligible or registered property recommendations shall be formulated which the undertaking agency must consider when exploring all feasible and prudent alternatives. These recommendations shall accompany the notice of adverse impact given by the commissioner pursuant to section 428.7. When appropriate, the commissioner’s recommendations shall include methods and standards for the curation and/or disposition of archaeological finds produced as a result of the undertaking.
428.8 Consultation process: exploration of feasible and prudent alternatives.

(b) Unless the agency elects to abandon the project, it shall fully explore and give thorough consideration to the commissioner’s recommendations and respond to them in writing within a reasonable time. The agency’s response must specify if it agrees or disagrees with the commissioner’s recommendations and, if it disagrees, give the factual basis for its position.

(c) If the agency disagrees with one of the commissioner’s recommendations, its response under subdivision (b) of this section must also include an alternative proposal which, in the agency’s opinion, would avoid or mitigate to the greatest extent possible the adverse impacts identified by the commissioner. Any such proposal must include a statement of the facts which support it.

(d) In formulating recommendations or alternatives, both the commissioner and the undertaking agency must give primary consideration to the State's historic preservation policy as expressed in article 14.00 of the Parks, Recreation and Historic Preservation Law. Other factors such as cost, program needs, safety, efficiency, code requirements or alternate sites may also be considered. However, none of these factors standing alone shall be determinative of whether a particular proposal is feasible or prudent.

428.9 Consultation process: public participation.

(a) The agency proposing the undertaking is responsible, through the State Environmental Quality Review process or similar procedures, for obtaining the views of the public concerning the undertaking.

(b) At the commencement of the consultation process, the APO shall confer with the commissioner to establish a process for appropriate public notification and participation which may include public hearings at which representatives of local government and interested citizens may express their views on the undertaking or on any alternatives which would avoid or mitigate the adverse impacts of the undertaking on eligible or registered properties. If it is determined that a public hearing is appropriate, whenever possible, be conducted concurrently with other public hearings which the undertaking agency might be required to hold under other provisions of law. If the commissioner and the APO do not agree on the need for a public hearing or the adequacy of hearings held under other provisions of law either of them may unilaterally decide to conduct a public hearing. Notice of any public hearing held pursuant to this section shall be given at least 15 days in advance of the hearing date.

428.10 Consultation process: letter of resolution.

The dialogue contemplated by sections 428.8 and 428.9 of this Part should, if at all possible, culminate in the execution of a Letter of Resolution between the commissioner and the undertaking agency. To this end, the following procedure shall be followed:

(a) After reviewing all information regarding the proposed undertaking and after any on-site inspection or public hearings, the agency and the commissioner shall determine if there are feasible and prudent alternatives which would avoid or mitigate any adverse impact of the undertaking on eligible or registered property.

(b) If the commissioner and the agency agree on a course of action which would avoid or satisfactorily mitigate an adverse impact, their agreement shall be embodied in a Letter of Resolution, executed by both parties, and specifying how the undertaking will proceed. Except for submission of the certification of completion described in subdivision (c) of this section execution of a Letter of Resolution will conclude the consultation process.
428.10 Consultation process: letter of resolution.

(c) At the conclusion of the undertaking the agency shall certify in writing that the undertaking has been completed in accordance with a Letter of Resolution. The commissioner may request drawings, photographs or other materials to document satisfactory completion of the undertaking.

(d) If the agency determines that there are no feasible and prudent alternatives which would avoid or satisfactorily mitigate adverse impacts and also determines that it is nevertheless in the public interest to proceed with the undertaking, it may unilaterally terminate consultation by declaring that no feasible and prudent alternative exists. The agency must give the commissioner written notice of this determination which shall include the reasons for the agency’s decision and the facts supporting it.

(e) The agency and the commissioner may agree that there are no feasible and prudent alternatives which would avoid or mitigate adverse impacts but that it is nonetheless in the public interest to proceed with the undertaking. In such event, the agency and the commissioner shall make a joint written declaration to this effect which shall include the factual basis for their decision.

428.11 Individual undertakings exempt from review.

When an undertaking is exempt, the agency shall have no further obligations under these procedures. The following undertakings shall be exempt:

(a) an undertaking which has been certified by the Director of the Budget, pursuant to section 10 of the New York State Historic Preservation Act of 1980 (chapter 354 of the Laws of 1980), as one on which substantial time, work and money have been expended prior to the effective date of the act; and

(b) an undertaking which is a State project necessary to prevent an immediate and imminent threat to life or property.

428.12 Designation of categories of undertakings exempt from review.

At the request of an APO, the commissioner shall consider the designation of certain categories of undertakings as being exempt from review pursuant to this Part. In order to be designated by the commissioner as an exempt category, the category of undertaking must not be likely to change the quality of historic resources. The designation of exempt categories will occur in the following manner:

(a) The APO shall make a written request to the commissioner for designation. The request must be accompanied by the following documentation:

(1) a complete description of the nature of all activities that would be implemented in the particular category of undertaking; and

(2) a statement from the APO concerning the reason(s) for believing that activities implemented in the particular category of undertaking will not cause a change to any registered or eligible property.

(b) If the commissioner determines that the documentation submitted is insufficient, the agency shall provide additional documentation requested by the commissioner in order for the commissioner to make a determination.

(c) The commissioner shall consider the information provided pursuant to subdivisions (a) and (b) of this section, and shall respond whether the category of undertaking will be exempt from review pursuant to these regulations. The commissioner shall provide the reason(s) for this determination.
428.12 Designation of categories of undertakings exempt from review.

(d) The commissioner shall respond to the request within 30 calendar days of receipt. If the commissioner requests that additional information be submitted pursuant to the provisions of subdivision (b) of this section, the commissioner shall respond within 30 calendar days of the receipt of the additional material.

(e) If an agency makes a request to the commissioner for certification of an exempt category, until such time as the commissioner issues a written determination that the category is exempt the agency shall comply with the provisions of this Part as if the category of undertaking is not exempt.

428.13 Establishment of standards for series of similar undertakings.

(a) If an agency anticipates a series of similar undertakings that are not exempt from review pursuant to section 428.11 of this Part and are not in an exempt category designated pursuant to section 428.12, but would otherwise require individual reviews, the APO may request the establishment of overall standards for the implementation of the undertakings, eliminating the need for a review of such undertakings on a case-by-case basis. The APO shall provide:

   (1) a request for consultation with the commissioner; and
   (2) a description of the series of similar undertakings under consideration.

(b) If the commissioner concurs with the APO that establishment of standards for the purpose of eliminating the need for review on a case-by-case basis would be appropriate, then the commissioner and APO will confer further for the purpose of defining the series of undertakings and establishing mutually acceptable standards for their implementation.

(c) For as long as the standards are strictly conformed to by the agency in the implementation of each undertaking of the series of similar undertakings, the undertakings will be exempt from further review. However, if the commissioner determines that an agency is not conforming to standards established pursuant to subdivision (b) of this section, he will so notify the agency, and the agency will be required to comply with the provisions of this Part for each undertaking in the series as if it were a separate undertaking.

(d) Until such time as standards have been agreed to pursuant to subdivision (b) of this section, the agency will comply with the provisions of this Part for each undertaking in the series as if it were a separate undertaking.

428.14 Changes different from those normally occurring.

Notwithstanding the provisions of sections 428.12 and 428.13 of this Part, if an APO learns that any activity in an exempt category, or in a series of undertakings for which standards have been agreed upon, shall have a result different from the result contemplated in designating the category or establishing the standards, the agency shall review the activity as a separate undertaking pursuant to the provisions of sections 428.4 through 428.10 of this Part.

428.15 State Board for Historic Preservation.

(a) The board may review and comment in writing to the commissioner on projects of its choosing which are being reviewed by the commissioner. It may review and comment on environmental assessments or statements submitted to it pursuant to subdivision (b) of section 428.2 of this Part. In addition, the board may review and comment, as otherwise provided by law, on undertakings where it appears that any aspect of the undertaking may or will cause any change, beneficial or adverse, in the quality of the historic, architectural, archaeological or cultural character that qualifies an historic or cultural place for listing on the State Register.
428.15 State Board for Historic Preservation.

(b) At the request of the board, the commissioner shall provide the board with the PRDS and other documentation relating to any project selected by it for review.

(c) The board may submit its comments to the commissioner for his consideration and inclusion in the record relating to the project.

428.16 Written record; report.

(a) The commissioner shall maintain a written record of all materials submitted to him, all documents and all findings and comments thereon, and shall make them available pursuant to the Freedom of Information Law and Part 463 of this Title.

(b) An APO shall provide the reasons for a determination that an undertaking is not subject to the review of the commissioner, pursuant to section 428.4 of this Part, to any interested party requesting this information in writing.

(c) The commissioner shall issue an annual report of State agency undertakings on which comment has been requested and issued, including the results of the review process and alternatives proposed or implemented by State agencies.