

DEC Solicits Feedback on the Regulation of Freshwater Wetlands, Hoping to Clarify Recent Legislation

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In 2022, Governor Hochul signed into law an historic expansion of New York's Freshwater Wetlands Act. In January, the New York State Department of Environmental Conservation (DEC) issued preliminary draft rules and an Advanced Notice of Rulemaking, seeking stakeholder input prior to formal rulemaking. This advisory revisits the 2022 Amendments to the Act and the recent efforts by DEC to clarify them through regulation and stakeholder feedback.

The 2022 Amendments to the Freshwater Wetlands Act

The 2022 amendments to the state Freshwater Wetlands Act (ECL Article 24) (the "Act"), gave DEC the authority to protect over one million acres of wetlands — e.g., marshes, swamps, bogs, and wet meadows — that had previously gone without protection. Without adequate clarification by DEC, however, the new broadly written statutory standards for identifying wetlands would leave landowners, developers, consultants and attorneys with little guidance.

Pre-amendment, the Act only covered (1) freshwater wetlands of 12.4 acres or more or (2) wetlands of "unusual local importance." ECL § 24-0301(1). This left many smaller wetlands unprotected by state law. More importantly, even if the size or importance criterion were met, a freshwater wetland would only be regulated and protected if it were officially "mapped." The mapping process entailed on the ground surveys and inventories, plus a notice and public comment process, before any wetland mapping could be made final. Maintaining a complete and up-to-date inventory of freshwater wetlands proved quite a challenge for DEC.

Starting *in 2025*, the amended Act does away with the mapping requirement altogether; a wetland may be protected regardless of whether it has been mapped. Going forward, maps will be advisory only and may be adjusted without notice and public comment. Instead, DEC will rely primarily on aerial imagery and available remote data to determine its jurisdiction over a land parcel on a case-by-case basis. The new law will continue to regulate wetlands of 12.4 acres or more but will also regulate smaller wetlands of "unusual importance," a modification of the prior "unusual *local* importance" standard. In 2028, freshwater wetlands of 7.4 acres or more come under categorical protection.

The amended law requires DEC to judge the "unusual importance" standard against eleven characteristics, the presence of any one of which is sufficient to qualify a wetland for protection. To name just a few, any wetland located "in a watershed that has experienced significant flooding in the past, or is expected to experience significant flooding from severe storm events related to climate change," is now under protection, as is any wetland "located within or adjacent to an urban area," that "has wetland functions and values that are of local or regional significance," is "determined by the [Commissioner of DEC] to be of significant importance to protecting the state's water quality," or that was previously mapped.

The application of these eleven characteristics will expand the scope of wetland protection considerably, for example, by ensuring that all urban wetlands receive protection. On its face, this criterion bestows protection on even the tiniest and most marginal of urban (or urban adjacent)

located wetlands. But many of the criteria are not as specific and thus the law as written leaves a great deal of uncertainty as to which wetlands are protected and which are not.

DEC has now taken the first steps in a rulemaking process that should give the regulated community clarity needed for effective implementation of the amended Freshwater Wetlands Act.

DEC's Advanced Notice of Proposed Rulemaking

On January 3, 2024, DEC invited the public to review an [Advanced Notice of Proposed Rule Making \("ANPRM"\)](#) for potential revisions to 6 NYCRR Part 664 and a [pre-proposal draft of the regulatory updates](#), which would clarify certain key aspects of the Freshwater Wetlands Act. The ANPRM describes potential changes to Part 664 and solicits input from stakeholders on eight specific topics, as well as soliciting general comments and comments on the pre-proposal draft rules. The public response deadline is February 19, 2024.

Wetlands of Unusual Importance

The ANPRM primarily focuses on the regulation of small wetlands of "unusual importance." In particular, DEC seeks input regarding how it should interpret and apply the eleven statutory characteristics that would help DEC identify wetlands that should be classified as having "unusual importance."

For example, DEC is considering clarifying the Act's "significant flooding" criteria to mean a wetland located in a watershed sub-area (as designated by a United States Geological Survey 12-digit Hydrologic Unit Code) that has 2 percent or more impervious surface; less than 5 percent of its surface is comprised of lakes, ponds, reservoirs, or wetlands; and is located within 2.48 miles of an Urban Area as defined by the Census Bureau.

The amended Act deems a "vernal pool that is known to be productive for amphibian breeding" to meet the "unusual importance" standard. DEC's pre-proposal-draft would make this criterion more specific by limiting the covered vernal pools to those located in regions where DEC has "documented" specified numbers of spotted salamander or wood frog egg masses.

DEC has also attempted to bring clarity to what is perhaps the Act's vaguest criteria for wetland designation: "it has wetland functions and values that are of local or regional significance." Under the draft regulation, a wetland qualifies if it is located in a Critical Environmental Area pursuant 6 NYCRR Part 617 or is partially located within the Adirondack Park and under the Park Agency's jurisdiction. This approach would have the virtue of predictability, and it would limit the impact of this criteria to areas that are already well-known to be environmentally sensitive.

Notably, the draft regulation does little to clarify the standards to be applied by the DEC Commissioner when exercising his/her authority under the Act to treat a freshwater wetland as "protected" upon making a determination that the wetland is "of significant importance to protecting the state's water quality." The draft regulation only states that the DEC Commissioner's determination must be in writing, based on "substantial evidence" and explain how the wetland is important to protecting state water quality or preventing exceedances of DEC's water quality standards. This approach, however, would do very little to make freshwater wetland protection more predictable.

Adjacent Area Extension

DEC also seeks input about a proposed extension of wetland adjacent areas – areas that extend beyond the boundary of a wetland that DEC may regulate where it is necessary to protect and preserve a freshwater wetland. Currently, DEC may regulate certain activities beyond 100 feet of the wetland's boundary. DEC is considering extending the adjacent area to 300 feet for "Nutrient Poor Wetlands," which encompass certain plants specifically identified in the draft regulation. The question of whether the presence of certain plant communities would broaden the protected area would add an additional layer of ambiguity on top of the threshold question of whether a wetland is protected in the first place.

Jurisdictional Determination and Review

Finally, in a tacit recognition that a certain degree of uncertainty is unavoidable in this area, DEC has indicated that it is considering updating its jurisdictional review procedure to allow any person to inquire about the freshwater wetland status of a parcel and additionally to allow requests for determinations as to whether a land parcel includes freshwater wetland adjacent areas subject to regulation and whether a permit is required for a proposed activity. DEC must make a determination within 90 days, which is subject to extension. A negative answer would provide a defense for the property owner for a period of five years from the date DEC issued the negative answer. If DEC issues a positive answer, the proposed rule creates a formal, structured appeal process. The draft regulations do not clarify how an appeal is affected if DEC fails to respond to a completed jurisdictional review application.

Carter Ledyard's Environmental Practice Group will continue to closely track the implementation of these historic reforms to the regulation of freshwater wetlands in New York.

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