

NY Budget Bill Institutes Historic Reforms to the Protection of Freshwater Wetlands

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The 2022-23 budget passed by the New York State Legislature and signed into law by Governor Hochul on April 9, 2022, includes an historic expansion in the protection of New York's freshwater wetland resources (S.8008C/A.9008). The budget bill's amendments (Part QQ) to the state Freshwater Wetlands Act, which places strict limitations and permitting requirements on development in and around wetlands, will give the New York Department of Environmental Conservation (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 broadly written standards for identifying wetlands will be troublesome for owners, developers, consultants and attorneys.

Prior to the new law, state law 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. In both cases, wetlands were only regulated if they were mapped. The mapping process entailed aerial photography and on the ground surveys and inventories, plus a notice and public comment process, before any map could be made final, and a wetland protected. In a large state like New York, maintaining a complete and up-to-date inventory of freshwater wetlands has proven to be a quite a challenge. Starting in 2025, the amended law does away with the mapping requirement altogether; wetlands maps will be advisory only and may be adjusted without notice and public comment. 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.

These amendments to the Freshwater Wetlands Act (ECL Article 24) have been many years in the making and were lobbied hard for by environment groups. They reflect the recognition that increasing wetlands protection is crucial to the conservation of aquatic and terrestrial habitats, protecting the state's water quality, reducing flooding in our communities and, crucially, keeping them resilient to the effects of climate change. The amendments, which also fix structural shortcomings in the prior regime, arrive at a time when the regulatory status of the federal protection of wetlands under the Clean Water Act remains in a long running limbo and several months after the U.S. Supreme Court agreed to hear a case — *Sackett v. U.S. Environmental Protection Agency* (21-454) — that could end up curtailing federal wetland protections.

The amended law requires the "unusual importance" standard to be judged 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," "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, such as the others mentioned above, are not as specific and thus for the moment the new law leaves

a great deal of uncertainty as to which wetlands are protected and which are not. Although the prior wetlands protection regime was not without its faults, the fact that only officially mapped wetlands were regulated gave it the virtue of certainty and predictability. The real practical effect of the new law remains to be seen and will not be fully known until DEC designs regulations implementing it, including by providing elaboration on how the “unusual importance” criteria will be applied. In many instances, the wisest and safest approach will likely be for developers to take advantage of the law’s process that allows any person to inquire with DEC as to whether or not a given parcel of land includes a regulated freshwater wetland, which DEC must respond to in the affirmative or negative within ninety days, and upon which that person may legally rely.

Carter Ledyard’s Environmental Practice Group plans to closely track the implementation of these historic reforms to the regulations of freshwater wetlands, as well as related issues at the federal level. As always, we will keep you advised of any legal developments.

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