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Proceed with Caution: Developing Near Wetlands in the Wake of 'Chautauqua Lake Property Owners Association et al. v. New York State'

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In 2022 New York State amended the Freshwater Wetlands Act (Act) to vastly expand its reach. Two weeks ago, the State Supreme Court in Albany sent that expansion effort into limbo by annulling the Department of Environmental Conservation's implementing regulations for the 2022 statute.

In the same case, however, the court rejected constitutional challenges to the Act itself. As a result, New York landowners must still comply with the Act as amended, but without benefit of the additional guidance the regulations provided. Landowners will likely also lack the benefit of the "general permits" that DEC developed to streamline approvals. We take a closer look at select aspects of the decision and consider the short-term implications for property development.

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The 2022 Amendments Imposed Two Key Changes That Shift the Burden from DEC to Landowners

Under the 1975 Freshwater Wetlands Act, the state was authorized to regulate development on or within 100 feet of freshwater wetlands that are 12.4 acres or larger and smaller ones of "unusual local importance." In practice, nowhere near all wetlands meeting these criteria were subject to state jurisdiction; the Act required both types of wetlands to be "mapped" by DEC as a pre-condition to regulatory jurisdiction.

Promulgating jurisdictional maps was a time-consuming process involving on-the-ground surveys, public notice and comment periods, and paper maps created during the 1970's and 1980's. Maintaining

up-to-date maps proved challenging for the state. According to DEC's court filings, as of 2019 over one million acres of jurisdictional wetlands were missing from the maps and thus unregulated.

Through the 2022 amendments to the NY Environmental Conservation Law (ECL), the state sought to close this gap. The legislature eliminated the mapping requirement. In lieu of mapping, the Act now creates a rebuttable presumption that any wetland meeting the statutory definition of freshwater wetlands—mapped or unmapped—is under DEC's jurisdiction and subject to permit requirements. ECL 24-0301(4). In 2028 the acreage threshold will drop from 12.4 to 7.5. Separately, the Act continues to regulate select smaller wetlands, but now deems these wetlands of "unusual importance" if they meet any one of eleven new statutory criteria.

Some of these criteria would be self-evident to a property owner—such as being located in an urban area or previously mapped by DEC as a wetland of "unusual local importance." Other criteria would be less obvious, such as the presence of rare plant species that occur "in fewer than 35 sites statewide" ECL 24-0105(9). While the Act has time-limited processes for seeking jurisdictional determinations from DEC, it still constituted a decisive shift of burden from the DEC to landowners.

The states's push to not only correct flaws in the Act and regulate more wetlands is driven in part by "recent curtailment of federal wetland protections." See ECL 24-0105(2). The issue has only become more urgent since 2022. The U.S. Supreme Court further narrowed the federal protection of freshwater wetlands under the Clean Water Act in *Sackett v. EPA* in 2023. The U.S. Environmental Protection Agency narrowed the definition of "waters of the United States" in 2025.

The Challenges

In four consolidated cases, an array of homeowners associations, municipalities, businesses, trade groups, developers and individual land owners sued the state on multiple grounds. Given limited space we focus here on two specific claims: first, that DEC failed to comply with the State Environmental Quality Review Act (SEQRA); and second, that the 2022 legislative amendments are facially unconstitutional.

The Regulations: Three of the four challenges asserted that DEC failed to take the "hard look" required under SEQRA when it adopted the new Part 664 rules. DEC categorized the action as "unlisted," completed a short environmental assessment form, and issued a negative declaration after concluding that the rulemaking would have "no" or "only minor" adverse impacts in eleven substantive areas, and would have beneficial effects on wetlands.

The court took issue with this conclusion with respect to land use and found—essentially—that DEC looked only at the positive consequences of the regulations and not the negative. The court held DEC "fail[ed] to identify and examine the reasonably foreseeable environmental consequences of Part 664" including the potential for causing "urban sprawl and other growth-inducing impacts." The court noted that DEC's own SEQRA rules define "'a substantial change in use, or intensity of use, of land... or in its capacity to support existing uses' as an indicator of a potentially adverse impact" (citing 6 NYCRR 617.7(c)(1)(viii)).

The Act: One of the challenges sought a declaratory judgment that the 2022 amendments violated the procedural due process requirements of the federal and state constitutions. The court disagreed. The court noted that actions of the

legislature are entitled to a strong presumption of constitutionality, and that if a statute may be applied in any manner that is constitutional, it cannot be struck down as facially invalid.

While the court left open the possibility that the statute might fail some future, specific as-applied challenge, it also noted the amended statute generally provides both notice and an opportunity to be heard. In other words, even though the burden of knowing a wetland is regulated is now on the landowner, the Act at least provides a process to enable a landowner to seek clarity from the agency. The court added that there is no constitutional requirement that DEC continue to map regulated wetlands rather than provide specific definitions of regulated lands.

General Permits

Anticipating a huge expansion in the number of permit applications and the large number of these that will involve common activities subject to common conditions and mitigations, DEC has been in the process of developing eight general permits to streamline the permitting process. Some have already been issued (*see, e.g.* Solar Photovoltaic Projects (less than 25mw) General Permit GP-0-25-004) while others are not yet final (*see, e.g.* Housing Development Freshwater Wetlands General Permit (GP-0-25-006)).

Most of these permits cross-reference the annulled Part 664 regulations. For example, the Housing Development Permit provides that any property with a vernal pool meeting the new, and now annulled, Part 664 definition is ineligible for the general permit. DEC is likely to hold off on finalizing draft general permits until after the regulations are either reinstated or replaced. It is unclear whether it will continue to allow the issued general permits to be used.

What's a Property Owner to Do?

Although DEC now lacks implementing regulations for the 2022 Act, those statutory amendments are arguably self-executing in many respects. For example, they clearly specify that any wetland of 12.4 acres or more is subject to regulation and spell out a framework for securing jurisdictional determinations. Similarly, many of the criteria that apply to smaller wetlands do not require rulemaking to be objectively understood; a wetland in an urban area is subject to regulation regardless of size.

We recommend the regulated community assume that DEC will require permits for projects on or adjacent to freshwater wetlands that are unambiguously jurisdictional under the 2022 amendments, and that the agency will not shy away from carrying out its enforcement authority in such cases. DEC may be hesitant to assert jurisdiction over areas of ambiguity or clear contention, such as the expanded adjacent areas defined in the now-annulled rules.

Regardless, the availability of the jurisdictional determination process with or without Part 664 should provide clarity and protection, including a complete defense to regulation for five years in some circumstances. But as we noted at the outset of this article, the burden remains firmly on landowners.

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