

Advanced Notice of Proposed Rule Making  
For  
Potential Revisions to Freshwater Wetlands Regulations  
6 NYCRR Part 664

## Introduction

New York’s 2022-2023 budget included landmark amendments to the state’s Freshwater Wetlands Act, Article 24 of the Environmental Conservation Law (“ECL”) that contained three fundamental changes. First, existing maps depicting freshwater wetlands will no longer be regulatory beginning on January 1, 2025. After that date, the New York State Department of Environmental Conservation (“DEC”) will be relying primarily on available aerial imagery and available remote data to determine whether there are state-regulated freshwater wetlands on a parcel. Second, smaller wetlands of “unusual importance” will be regulated beginning on January 1, 2025, if they meet one, or more, of 11 newly established statutory criteria. Third, the default threshold for regulated wetlands will decrease from 12.4 acres to 7.4 acres in 2028. Implementing these statutory changes requires replacing the existing Freshwater Mapping and Classification regulations (6 NYCRR Part 664).

## Purpose

The purpose of this Advanced Notice of Proposed Rule Making (“ANPRM”) is to solicit written stakeholder input which may inform DEC’s development of any future proposed rule making(s) to amend Part 664. The ANPRM is arranged into eight sections that

correspond to specific areas where DEC is seeking feedback. Each section contains a question, or series of questions, the answers to which may assist DEC staff in identifying key issues or concerns that can be used to inform any future proposed rule makings. DEC staff are seeking answers to specific questions, as well as general input and suggestions on the full draft DEC is considering to replace existing Part 664, which can be found at: <https://on.ny.gov/3NAMsK5> .

This ANPRM is a feedback-gathering exercise, not a regulatory action; therefore, it has no regulatory impact in and of itself. Future rule making efforts, if any, based on feedback gathered through the ANPRM may or may not have a regulatory impact associated with them, and those impacts will be assessed and shared with the public when any future rule makings are noticed in the State Register.

Written comments on this Advanced Notice of Proposed Rule Making may be submitted until close of business February 17, 2024.

Contact: NYS DEC – Division of Fish and Wildlife, 625 Broadway, Albany NY 12233-4756, Phone (518) 402-8920; E-mail: [WetlandRegulatoryComments@dec.ny.gov](mailto:WetlandRegulatoryComments@dec.ny.gov)

## 1) Wetlands of Unusual Importance – Significant Flooding (ECL § 24-0107)

DEC is considering using the following criteria to identify freshwater wetlands located in a watershed that has experienced significant flooding or is expected to in the future:

- a) The freshwater wetland is located in a 12-digit Hydrologic Unit Code (HUC) that meets all of the following three criteria:
  - 1) It has 2 percent or more impervious surface based on recent land cover data;
  - 2) less than 5 percent of its surface area is comprised of floodwater storage zones in the form of lakes, ponds, reservoirs, or wetlands based on recent land cover data; and
  - 3) it is located within 4 kilometers (2.48 miles) of an Urban Area as defined and identified by the United States Census Bureau.

'Hydrologic Unit Code or 'HUC' means a hierarchical land area classification system created by the United States Geological Survey that is based on surface hydrologic features in a standard, uniform geographical framework. Each unit is identified by a unique numeric hydrologic unit code consisting of two-to-twelve digits based on the level of classification. Each hydrologic boundary is determined from topography and represents a drainage divide between the various levels of units.

Question:

- a) What specifically could DEC do to improve the three criteria used to determine wetlands of unusual importance in watersheds with significant flooding? Please explain why these actions would improve the criteria and include in your response any relevant scientific data or information.

2) Wetlands of Unusual Importance - Rare Animals (ECL § 24-0107)

DEC is considering using the following criteria to identify freshwater wetlands that contain habitat for an essential behavior of an endangered or threatened species, a species of special concern, or a species of greatest conservation need identified in New York's wildlife action plan:

- a) contains habitat for an essential behavior of a species listed as endangered in Part 182 of this Title; or listed as endangered by the United States Department of the Interior in the Code of Federal Regulations (50 CFR Part 17).
- b) contains habitat for an essential behavior of a species listed as threatened in Part 182 of this Title; or listed as threatened by the United States Department of the Interior in the Code of Federal Regulations (50 CFR Part 17).
- c) contains habitat for an essential behavior of species of special concern. Species of special concern are native species of fish and wildlife found by the DEC to be at risk of becoming threatened in New York based on the criteria for listing in Part 182 of this Title.
- d) contains habitat for an essential behavior of a species of greatest conservation need listed in the New York State Wildlife Action Plan (Sept.

2015) where habitat loss has been identified by the DEC as a high or moderate threat to New York populations.

Question:

- a) Do you have any specific concerns with any of these criteria? Please explain the basis of your concern and include in your response any relevant scientific data or information.

3) Wetlands of Unusual Importance – Vernal Pools (ECL § 24-0107)

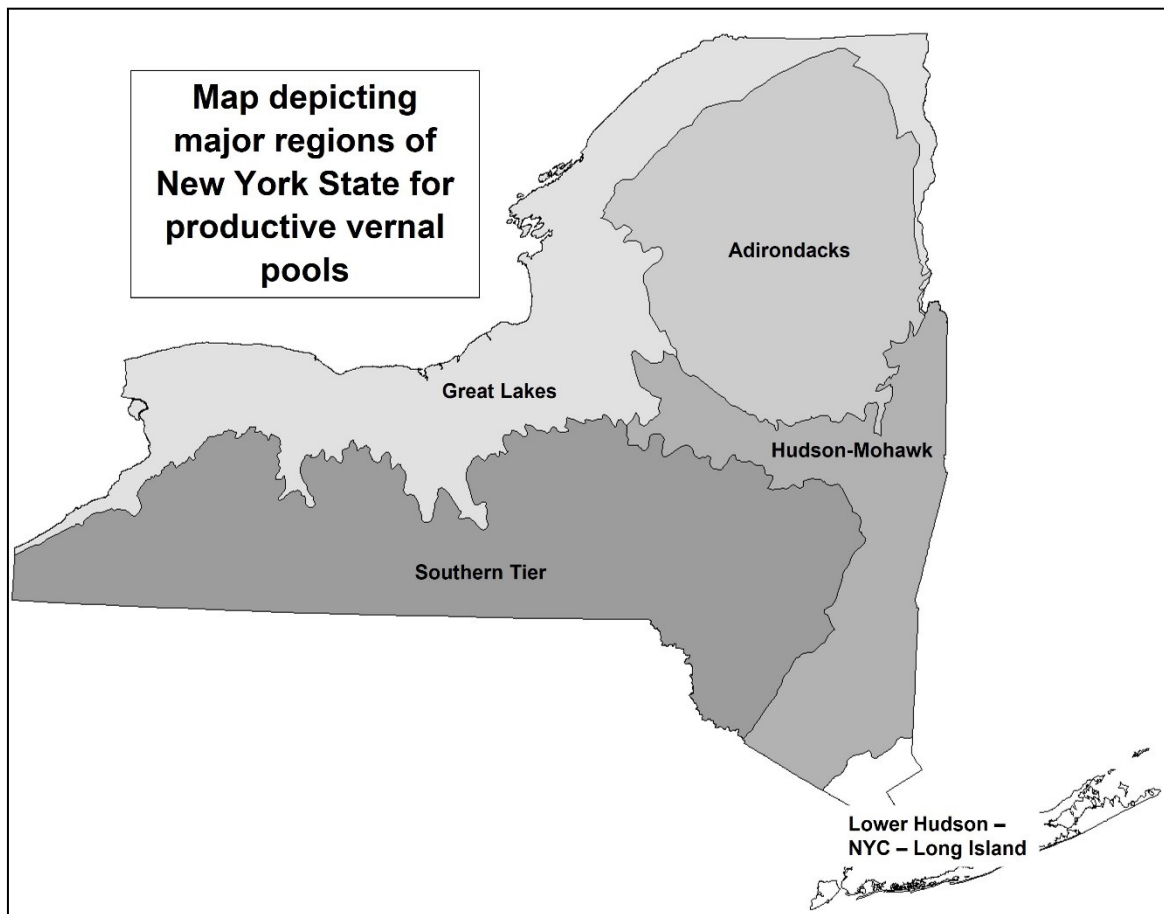
DEC is considering using the following criteria and process to identify vernal pools known to be productive for amphibian breeding:

- a) DEC shall determine that a vernal pool is known to be productive for amphibian breeding within a region of the state (See map of regions below) where it has documented one or more of the following in a particular vernal pool:
  - 1) In the Hudson-Mohawk Region, 55 or more Spotted Salamander egg masses, or 30 or more Wood Frog egg masses;
  - 2) In the Great Lakes Region, two or more Spotted Salamander or Wood Frog egg masses;
  - 3) In the Lower Hudson-NYC-Long Island, Adirondack, and Southern Tier Regions, 10 or more Spotted Salamander egg masses or 15 or more Wood Frog egg masses;

- 4) In the Lower Hudson-NYC-Long Island or Adirondacks Regions, one or more egg masses or larvae of Jefferson Salamander, Blue-Spotted Salamander, or hybrids of Jefferson and Blue-Spotted Salamander; or
  - 5) In the Great Lakes, Southern Tier, or Hudson-Mohawk Regions, 20 or more egg masses or larvae of Jefferson Salamander, Blue-Spotted Salamander, or hybrids of Jefferson and Blue-Spotted Salamander; or
  - 6) In any Region, one or more egg masses or larvae of Eastern Tiger Salamander, or Marbled Salamander.
- b) The department shall create and maintain on its website a list of geographic coordinates of vernal pools known to the department and that meet the criteria in subparagraphs (1) through (6) of paragraph (g) of this section. The department shall publish updates to the productive vernal pool list in the Environmental Notice Bulletin.

Questions:

- a) Do you have any specific concerns regarding any of the six criteria for identifying vernal pools known to be productive for amphibian breeding?  
Please explain the basis for your concern and include in your response any relevant scientific data or information.
- b) Do you have any specific concerns regarding the notification and documentation requirements set forth in item b) above? Please explain the basis for these concerns and provide ways DEC could improve the language.



4) Wetlands of Unusual Importance – Local or Regional Significance (ECL § 24-0107)

DEC is considering using the following criteria to identify freshwater wetlands that have wetland functions and values that are of local or regional significance:

- a) It has wetland functions and values that are of local or regional significance because it meets one or more of the following criteria:
  - 1) the wetland is located within an area designated, pursuant to 6 NYCRR Part 617, as a Critical Environmental Area (CEA) with specific reference to wetland protection by a local government;
  - 2) the wetland is partially located within the Adirondack Park and jurisdictional to the Adirondack Park Agency.

Questions:

- a) Do you have any specific concerns regarding the criteria to identify wetlands of local or regional significance? Please explain the basis of your concern and include in your response any relevant scientific data or information.

5) Wetlands of Unusual Importance – Class I Wetlands (ECL § 24-0107)

Class I wetlands, regardless of size, would be regulated by DEC, pursuant to ECL § 24-0107(e). DEC is considering using the following criteria for Class I wetlands:

A wetland shall be a class I wetland if it has any of the following enumerated characteristics, as documented by DEC:

- a) it provides habitat for an essential behavior of an endangered or threatened animal species;
- b) it contains an endangered or threatened plant species;



- c) it falls within, or is contiguous to a designated Significant Coastal Fish & Wildlife Habitat area;
- d) it is a tidally influenced wetland that is not regulated by DEC pursuant to Article 25 of the Environmental Conservation Law;
- e) it is contiguous to a tidally influenced wetland that is regulated under Article 25;
- f) it contains a wetland plant community identified as critically imperiled
- g) It is a nutrient-poor wetland;
- h) it is located in an area designated as a floodway on the most current Digital Flood Insurance Rate Map (DFIRM) produced by the Federal Emergency Management Agency (FEMA);
- i) it is contiguous to fresh surface waters having classifications of A, AA, AA-S, A-S, A(t), A(ts), AA(t), AA(ts), AA-S(ts), or N, as set forth in 6 NYCRR Part 701.

'Critically imperiled' means a wetland plant community, plant species, or animal species that because of extreme rarity, steep declines in population, or severe threats are at a high risk of extirpation in New York State, with generally five or fewer occurrences or few remaining individuals within the state.

'Nutrient Poor Wetlands' means the following wetland plant communities as identified by the DEC: black spruce-tamarack bog, coastal plain Atlantic white cedar swamp, coastal plain pond shore, coastal plain poor fen,

dwarf shrub bog, highbush blueberry bog thicket, inland Atlantic white cedar swamp, inland poor fen, marl fen, medium fen, northern white cedar swamp, perched bog, pitch pine-blueberry peat swamp, red maple-tamarack peat swamp, rich graminoid fen, rich hemlock-hardwood peat swamp, rich shrub fen, rich sloping fen, seal level fen, sedge meadow.

Questions:

- a) Do you have any specific concerns with any of the Class I characteristics? Please explain the basis of your concern and include in your response any relevant scientific data or information.

6) Extending Adjacent Areas (ECL § 24-0701(2))

Where necessary to protect and preserve a freshwater wetland, DEC may regulate certain activities beyond 100 feet of the boundary of such wetland. DEC is considering the following criteria for extending regulated adjacent areas:

- a) The adjacent area of Nutrient Poor Wetlands documented by DEC shall be extended to 300 feet to protect and preserve the wetland pursuant to section 24-0701(2) of the Act.
- b) "Nutrient Poor Wetlands" means the following wetland plant communities as identified by DEC: black spruce-tamarack bog, coastal plain Atlantic white cedar swamp, coastal plain pond shore, coastal plain poor fen, dwarf shrub bog, highbush blueberry bog thicket, inland Atlantic white cedar swamp, inland poor fen, marl fen, medium fen, northern white cedar swamp, perched

bog, pitch pine-blueberry peat swamp, red maple-tamarack peat swamp, rich graminoid fen, rich hemlock-hardwood peat swamp, rich shrub fen, rich sloping fen, seal level fen, sedge meadow.

Questions:

- a) Do you agree with this approach? Please explain.
- b) Are there other wetland types that the DEC should consider extending the adjacent area around? Please explain why those other wetland types should be considered and include in your response any relevant scientific data or information.

#### 7) Jurisdictional Determination Procedure (ECL § 24-0703)

DEC is considering the following procedure for providing jurisdictional determinations for freshwater wetlands:

- a) Any person may submit to DEC a request for a determination as to whether a given parcel of land includes freshwater wetlands or freshwater wetland adjacent areas subject to state regulation. Such request may also inquire as to whether a permit is required for a proposed activity, provided the person has submitted a verified wetland delineation and site-specific development plans to DEC.
- b) Requests for a jurisdictional determination or wetland delineation must be made in writing and submitted consistent with instructions that shall be available on DEC's website.

- c) DEC shall provide a definite answer in writing within 90 days of such request as to the jurisdictional status of a parcel, the assigned classification of any wetlands present on the parcel, and whether a permit is required for proposed activities. Provided however, that weather or ground conditions prevent DEC from making a jurisdictional determination within ninety days, it may extend such period until a determination can be made.
- d) A positive jurisdictional determination shall be reviewable pursuant to the procedures in 6 NYCRR section 664.9. A negative jurisdictional determination shall be a complete defense to the enforcement for a period of five years from the date it is issued.

Questions:

- a) How could the process of jurisdictional determinations be improved or clarified? Please explain.

8) Jurisdictional Determination Review (ECL § 24-0703(5))

DEC is considering the following procedure and criteria for the recipient of a positive jurisdictional determination to seek review of DEC's jurisdictional determination:

- a) Any person who owns property having received a positive wetland jurisdictional determination from DEC after January 1, 2025, may appeal such determination pursuant to this section.
- b) Any person wishing to make an appeal must first have an initial consultation with DEC and provide a verified delineation of the wetland or wetlands identified in the jurisdictional determination. If such person does not already

have a delineation, they may request that DEC undertake to delineate the boundary of the particular wetland or wetlands on their property prior to the date of the initial consultation.

- c) If after the initial consultation, a landowner still wishes to formally appeal the determination pursuant to this section, they must complete a freshwater wetlands jurisdictional determination appeal application and submit it to DEC. Appeal applications shall be available on DEC's website. Appeal applications are not complete until the applicant has provided all necessary information. Appeals must be submitted no more than 120 days from the date of the initial consultation.
- d) DEC shall issue a decision in writing within 60 days after receipt of a complete freshwater wetlands jurisdictional determination appeal application, provided that this deadline may be extended by the DEC for an additional 30 days if it determines that an additional visit to the property is necessary.
- e) The acceptable basis for an appeal is technical information indicating an omission of material fact, incorrect application of the current regulatory criteria, or incorrect application of guidance for identifying wetlands and delineating wetland boundaries.

Questions:

- a) How could the process of review of jurisdictional determinations be improved or clarified? Please explain.