

Express Terms - Summary

The purpose of this rule making is to implement amendments to the Freshwater Wetlands Act (the Act) adopted on April 9, 2022, that, among other changes, expanded protections to previously unprotected wetlands throughout the State. These changes fundamentally altered the statutory framework of Environmental Conservation Law (ECL) Article 24, and this action is necessary to clarify statutory provisions and guide the Department of Environmental Conservation's (department) implementation of the changes to the Act that take effect January 1, 2025. This action would repeal in its entirety 6 NYCRR Part 664, Freshwater Wetlands Maps and Classification, and replace it with a new Part 664, Freshwater Wetlands Jurisdiction and Classification. In addition, the action would repeal Part 662, Interim Permits, which has not been used by the department for more than 25 years. The following is a summary of each section of the proposed rule.

664.1. Applicability.

This section describes how these regulations apply to other jurisdictions implementing the Act and the relationship of these regulations to other implementing regulations. In addition, this section provides transition periods for projects that have achieved certain development thresholds prior to January 1, 2025, so that those projects may continue without a new freshwater wetlands jurisdictional determination for a specified time period.

664.2. Definitions.

This section provides 36 definitions for terms used throughout the rest of the regulation. Terms defined include: act, adjacent to an urban area, amphibian, census

tract, commissioner, contiguous, critically imperiled, delineation, department, essential behavior, flood, flood insurance rate map, floodplain, floodway, freshwater wetland, freshwater wetland boundary, hydrologic unit code or HUC, hydrophytic vegetation, imperiled, initial consultation, jurisdictional determination, local government, nutrient poor wetland, permit, person, plant community, pollution, previously mapped wetland, regulated adjacent area, significant flooding, sub watershed, verified delineation, vernal pool, vernal pool complex, vulnerable, and watershed.

664.3. Purposes and Approach.

This section provides the statutory basis for these regulations and reiterates the benefits of wetlands as stated in ECL Article 24.

664.4. Classification Procedures.

This section describes the procedures for classifying wetlands and includes the requirement to classify wetlands according to the highest class achieved within an individual wetland. In addition, this section clarifies that previously mapped wetlands altered for agricultural purposes would continue to be regulated according to its original classification once exempt agricultural activities cease.

664.5. Classification System.

This section describes the system that classifies wetlands based on 34 characteristics organized into four broad categories: rare species conservation and biodiversity, hydrological and pollution control features, cover types and other special features, and distribution and location. Classifications range from Class I to Class IV. Class I wetlands contain: habitat for endangered or threatened animal species, endangered or threatened plant species, wetlands within a Significant Coastal Fish and

Wildlife Habitat Area, tidally influenced wetlands not regulated by New York's Tidal Wetlands Law (ECL Article 25), freshwater wetlands adjacent to tidal wetlands regulated by ECL Article 25, a critically imperiled wetland plant community, a nutrient poor wetland, wetlands within a floodway, and wetlands contiguous with Class A waters. Class II wetlands contain: critically imperiled or imperiled animals, habitat for a high priority Species of Greatest Conservation Need, critically imperiled or imperiled plant species, a Great Lakes coastal wetland, a vernal pool productive for amphibian breeding, an imperiled wetland plant community, wetlands within a 100-year floodplain, wetlands overlying a sole source aquifer, wetlands contiguous with Class B waters, wetlands contiguous with an impaired surface water, three structural groups, floating or submerged aquatic vegetation not dominated by invasive species, wetlands within an urban area, wetlands within a disadvantaged community, or contain wetlands within a potential environmental justice area. Class III wetlands contain: vulnerable animals, wetlands within a 500-year floodplain, wetlands contiguous with Class C waters, shrub-scrub or forested cover types, emergent marsh or wet meadow not dominated by invasive species, a vulnerable wetland plant community, or a wetland that is within a town in which wetland acreage is less than one percent of the total acreage. Class IV wetlands contain: wetlands contiguous to Class D waters, floating or submerged aquatic vegetation dominated by invasive species, or an emergent marsh or wet meadow dominated by invasive species.

664.6. Wetlands of Unusual Importance.

This section provides specific standards for determining which wetlands are of unusual importance under ECL § 24-0107(9) and therefore regulated regardless of size.

It clarifies the scope of the 11 statutory unusual importance criteria, namely: wetlands located in watersheds with significant flooding, wetlands in urban areas, wetlands containing rare plants, wetlands containing rare animals, Class I wetlands, Unusual Local Importance wetlands under the previous statutory regime, vernal pools productive for amphibian breeding, wetlands in designated floodways, wetlands previously mapped under the previous statutory regime, wetlands of local or regional significance, and wetlands important for protection of New York State's water quality. For example, regarding watersheds with significant flooding, wetlands would be regulated regardless of size in watersheds that: have two percent or more impervious surface; have less than five percent of its surface area as lakes, ponds, reservoirs, or wetlands; and are located within four kilometers (2.48 miles) of an urban area.

664.7. Miscellaneous Provisions.

This section describes two situations where the regulated adjacent area would be extended beyond the default 100-foot distance. Nutrient poor wetlands would have a 300-foot regulated adjacent area and vernal pools productive for amphibian breeding would have an 800-foot adjacent area. In addition, this section states that two or more wetlands would be treated as a single wetland if they meet two criteria: the wetlands are hydrologically connected, either on the surface or sub-surface, and are no more than 50 meters (approximately 164 feet) apart.

664.8. Jurisdictional Determination Procedure.

This section provides the regulatory process for landowners to obtain jurisdictional determinations and delineations of regulated wetlands. It sets a deadline of 90 days for the department to issue determinations and provides a process for

landowners to notify the department if that deadline is missed. Once notified of the missed deadline, the department has 10 days to provide the jurisdictional determination, or the jurisdiction would be waived for 5 years.

664.9. Consultation, and Review of Positive Jurisdictional Determinations.

This section provides a formal process for landowners to appeal a positive jurisdictional determination. The process begins with an initial consultation and an informal evaluation of the site-specific determination and delineation of the wetland boundary. Following the initial consultation, landowners have 120 days to submit an appeal and then the department has 60 or 90 days to issue a decision on that appeal, depending on whether an additional visit to the subject parcel is necessary. Appeals are limited in scope to omissions of material fact and incorrect application of current regulatory criteria or wetland guidance documents.