Regulatory Impact Statement

6 NYCRR Part 664, Freshwater Wetlands Jurisdiction and Classification

Table of Contents:

The New York State Department of Environmental Conservation (department) proposes to 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, this action would repeal 6 NYCRR Part 662, Freshwater Wetlands Interim Permits, which has not been used by the department for more than 25 years.

1. Statutory authority:

On April 9, 2022, New York State adopted amendments to the Freshwater Wetlands Act (the Act) that, among other changes, expanded protections to previously unprotected wetlands throughout the State. The department is authorized to adopt these regulations pursuant to Chapter 58, Part QQ, Section 19 of the 2022 Laws of the State of New York and Environmental Conservation Law (ECL) §§ 3-0301 and 24-1301. ECL§ 3-0301 provides the department with authority to carry out the policy of the State, which is “to conserve, improve and protect its natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being,” as provided in ECL § 1-0101. Chapter 58, Part QQ, Section 19 of the 2022 Laws of the State of New York and ECL § 24-1301 each provide the department with specific authority to adopt regulations to implement the Act.

2. Legislative objectives:

ECL § 24-0103 directs that it shall be the policy of the State “to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and

development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state." The 2022 amendments did not change that policy. The proposed regulations are designed to protect and conserve freshwater wetlands by regulating their use and development, while also recognizing the importance of beneficial economic, social, and agricultural development.

3. Needs and benefits:

On April 9, 2022, New York State adopted landmark amendments to the New York State Freshwater Wetlands Act. It has been more than 40 years since the passage of the original Act. While the original Act has been instrumental to the State's efforts to protect and conserve freshwater wetlands, environmental conditions have changed with the passage of time necessitating strategic statutory revisions to the original Act. As recognized in the original Act's legislative findings, "The freshwater wetlands of the state of New York are invaluable resources for flood protection, wildlife habitat, open space, and water resources." However, the 2022 amendments to the Act provide increased protections for wetlands that will help the State adapt to increased flooding risk associated with the changing climate and conserve critically important natural resources, including threatened and endangered species and the wetlands that they inhabit.

Since passage of the original Act in 1975, State freshwater wetland regulations have been limited in scope, applying only to wetlands included on State freshwater wetland maps promulgated by the Commissioner pursuant to ECL § 24-0301(5). Inadvertent omissions and inaccuracies in the department's original mapping efforts

meant that an estimated one million acres of unmapped wetlands, meeting State jurisdictional criteria for protections, were left unprotected from development pressure and other impacts. Inaccurate maps have adversely impacted program compliance and project review efficiency, often requiring the department to clarify the extent of State jurisdiction for respondents and permit applicants. Removal of the mapping requirement allows the department to clarify the connection between observed field conditions and the department's jurisdiction, thereby providing regulatory clarity to meet wetland protection objectives. In addition, revisions to the Act establish clear jurisdictional criteria providing protections for wetlands of unusual importance.

Stakeholder Outreach

The department conducted a comprehensive two-phase outreach plan to engage stakeholders and solicit their input for the development of the proposed regulations. Phase 1 began in April 2022 and continued through December 2023. Phase I raised general awareness about wetlands; explained the statutory changes enacted in 2022; and solicited general input before the department developed proposed regulatory language. Phase 2 began in December 2023 and continued through April 2024. Phase 2 sought specific input from stakeholders on potential regulatory criteria through an Advanced Notice of Proposed Rule Making (ANPRM).

In Phase 1, multiple in-person and remote meetings were held with more than 30 stakeholder groups representing development interests, agriculture, environmental advocacy, energy generation and transmission, environmental consultants, municipalities, land trusts, and State agencies. These meetings provided stakeholders with information about the legislation and, in-turn, provided the department with valuable

feedback from interested stakeholders. However, based on these meetings, the department determined that review by the stakeholders of a tangible proposal would more effectively elicit specific feedback.

Thus, on January 3, 2024, the department published an ANPRM in the State Register and the department's Environmental Notice Bulletin (ENB). The ANPRM included pre-proposal draft regulatory text and questions targeting eight specific areas of interest. To supplement publication in the ENB and State Register, the department sent email messages to all stakeholders involved in the Phase 1 outreach, as well as other interested groups representing realtors, builders, indigenous communities, loggers, and the wood products industry. In addition, the department conducted more than a dozen webinars to describe the ANPRM and solicit direct feedback. Combined, these webinars reached more than 1,300 participants.

Phase 2 generated substantial engagement, with stakeholders sending the department approximately 2,600 written responses during the 48-day feedback period. The vast majority of responses were supportive of the pre-proposal draft and urged the department to expand protections for vernal pools and rare animal species. However, many responses expressed concerns regarding potential regulatory delay during the jurisdictional determination process and regulatory uncertainty resulting from an abrupt transition to the new rules for well-developed yet unfinished projects. The department used feedback on the ANPRM to improve the pre-proposal draft regulatory text by: clarifying the jurisdictional determination process; enhancing protections for vernal pools; and developing a plan to provide a smooth regulatory transition for mature and unfinished projects as the new statutory provisions take effect on January 1, 2025.

Key Components of the Regulations

A. Expanded Definitions

To enhance programmatic clarity and transparency, the department retained, modified, or replaced the original eleven section 664.2 definitions and added twenty-five new definitions. The term “Freshwater wetlands map or map” has been modified to “Previously mapped wetland” to distinguish wetlands included on current regulatory maps from other wetlands to be reviewed under the proposed regulations. The terms “boundary of a wetland” and “adjacent area” have been modified to “freshwater wetland boundary” and “regulated adjacent area,” respectively, to clearly distinguish freshwater from tidal wetlands. Definitions for “Adjacent to an urban area” and “Contiguous” have been added to specify the department’s regulatory application of these terms, which may differ from their use by other government agencies. In addition, twenty-two definitions have been added to ensure that the regulations are clear for all parties impacted by proposed changes.

B. Simplified Classification System

Shifting to a new regulatory model, in which wetland jurisdictional determinations and classifications will be conducted remotely, requires simplification of the current wetland classification system. To accomplish this task, the department developed a classification system that relies on Geographic Information Systems (GIS) data to rapidly identify wetland characteristics and efficiently classify wetlands remotely. Where the original wetland classification system included 42 characteristics, many requiring field confirmations for their assignment, the proposed classification system will be reduced to 34 remotely identifiable characteristics.

ECL § 24-0701 provides that certain agricultural activities are excluded from regulation and shall not require a permit. ECL § 24-0107 and the proposed regulations provide that any wetlands mapped by the department prior to December 31, 2024, shall be regulated regardless of size. Section 664.4 of the proposed regulations provide that such previously mapped wetlands that have been altered for agricultural purposes and therefore meet the exemption of ECL § 24-0701, shall continue to be regulated according to its original classification when the landowner ceases the exempt agricultural activity or use. While the circumstances of each case may vary, cessation generally occurs when the landowner seeks to conduct a non-exempt activity. In such cases, the department strongly encourages landowners to contact the appropriate regional permit administrator for a preapplication conference to discuss how to obtain a permit prior to conducting any regulated activity identified in 6 NYCRR 663.4(d) on the subject parcel.

C. Unusual Importance Wetlands

Statutory changes expanded the department's jurisdiction to wetlands less than the standard 12.4 acre, or 7.4 acre (beginning in 2028), threshold if the wetlands meet at least one of 11 criteria identified in ECL § 24-0108(9). Five of the 11 criteria are clear enough for the department to implement without any further clarification in regulation. The following subsections clarify the technical basis and proposed approach the department will use to identify the other six categories of unusually important wetlands.

ECL § 24-0107(9)(a) provides that a wetland, regardless of size, shall be regulated if "it is located in a watershed that has experienced significant flooding in the past or is expected to experience significant flooding in the future from severe storm

events related to climate change." To develop proposed regulatory criteria that can be applied in GIS to identify flood prone watersheds, the department spatially examined floodwater storage capacity and the concentration of impervious surfaces within watersheds in relation to population centers. The department proposes to assess flooding associated metrics at the 12-digit Hydrologic Unit Code (HUC) scale as defined by the United States Geologic Survey because this is the smallest HUC unit, averaging 20,300 acres each, with 1,439 covering the State. Using best professional judgment, the department concluded that watersheds having 2% or greater impervious surface and less than 5% of the watershed comprised of floodwater storage zones, present significant flooding risk when these metrics coincide within areas having high population densities. The department's best professional judgment relied on an iterative process, using GIS to assess impervious surface and floodwater storage capacity metrics within HUC 12 watersheds. To further refine the 2% and 5% thresholds, the department solicited specific feedback during the Phase 2 Stakeholder Outreach but received no suggestions for alternative thresholds. The department reviewed flood studies to identify an appropriate proximity metric to apply in relation to impervious surface and floodwater storage capacity metrics. Based on that review, the department proposes a 4-kilometer proximity metric suggested within the findings of a modeling study[1] conducted by the U.S. Environmental Protection Agency (EPA). The EPA's findings identified a "benefit area" of 4 kilometers "as a reasonable and conservative distance for delineating the area where people could benefit . . . downstream" from flood regulation services

[1] Bousquin, J., K. Hychka, and M. Mazzotta. 2015. Benefit indicators for flood regulation services of wetlands: A modeling approach. EPA/600/R-15/191. US Environmental Protection Agency, Narragansett, Rhode Island, USA.

provided by wetlands.

ECL § 24-0107(9)(d) provides that a wetland, regardless of size, shall be regulated if “it contains habitat for an essential behavior of an endangered or threatened species or a species of special concern as defined under section 11-0535 of this chapter or listed as a species of greatest conservation need in New York's wildlife action plan.” The proposed regulation focuses regulatory attention on species of greatest conservation need listed in the New York State Wildlife Action Plan (SWAP) with a nexus to habitat loss of wetland dependent species. The SWAP was developed by the department in 2015 to identify, track, and protect at-risk fish and wildlife populations. In developing the SWAP, the department assessed 597 species, cataloging information on their life history, abundance, population threats, and current conservation status. Based on information contained in the SWAP, the department generated a list of 20 freshwater wetland dependent species of greatest conservation need having moderate to very high threats to their populations due to habitat loss. To identify wetlands of unusual importance that provide habitat for essential behaviors of wetland dependent species of greatest conservation need, the department will cross-reference spatial data on the location of these 20 species as jurisdictional determinations are made and wetland classifications are assigned.

ECL § 24-0107(9)(a) provides that a wetland, regardless of size, shall be regulated if “it is classified by the department as a Class I wetland.” The department proposes to identify Class I wetlands according to nine criteria designed to ensure that the Class I designation is reserved to those wetlands most in need of protection. Of the nine proposed criteria, five focus on wildlife habitat, plant community, and wetland cover

type, replacing four original Class I classification characteristics. The description of two original Class I criteria addressing flooding and public water supply concerns are proposed with revisions to be easily identified through GIS review of spatial data. Lastly, the department proposes the addition of two Class I criteria to provide Article 24 protections for tidally influenced freshwater wetlands not currently regulated under Article 25 (Tidal Wetlands Act).

ECL § 24-0107(9)(a) provides that a wetland, regardless of size, shall be regulated if "it is a vernal pool that is known to be productive for amphibian breeding." Beginning in January 2025, the 2022 amendments to the Act will provide the department with the authority to regulate vernal pools, that are "known to be productive for amphibian breeding," as wetlands of unusual importance. The department proposes to define vernal pool as "a naturally occurring or purposefully created depression wetland containing hydrophytic vegetation that is geographically isolated from, and lacking a connection to, permanent surface waters. Vernal pools, temporarily hold water during the spring, summer, and/or fall, and typically dry up for a period of time during the year. Vernal pools do not support permanent adult fish populations, yet they provide essential habitat for amphibian, invertebrate, and other species." The department proposes to use minimum egg mass counts of specific amphibian species documented in individual vernal pools or vernal pool complexes as criteria for determining which vernal pools are productive for amphibian breeding.

The proposed regulations focus on specific common and rare species and establish minimum egg mass counts that vary according to five unique geographic regions across the State. Counting egg masses to measure productivity is a reasonable

and reliable approach that has been used in other Northeastern states.[2] The species-specific egg mass thresholds contained in this rule making are based on a study of vernal pools conducted by New York Natural Heritage Program[3] that indicates vernal pools meeting these thresholds are, in fact, productive for amphibian breeding.

Egg mass counts from individual vernal pools, or total egg mass counts from vernal pool complexes, are being proposed in this rule making to meet the minimum thresholds because clusters of vernal pools can impact productivity of amphibian breeding[4] and are important for the viability of amphibian populations.[5] The proposed regulations define a Vernal Pool Complex as a grouping of individual vernal pools in which each pool is 50 meters (approximately 164 feet) or less from at least one other pool in the grouping.

To provide a consistent and transparent process for making jurisdictional determinations regarding vernal pools, the proposed regulations require the department to maintain an informational list of known vernal pools meeting regulatory criteria and to publish updates to that list on the Environmental Notice Bulletin. In addition, the proposed regulations provide a voluntary process for landowners to report and document productive vernal pools on their property.

ECL § 24-0107(9)(j) provides that a wetland, regardless of size, shall be

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[2] Calhoun, A. J. K., T. E. Walls, S. S. Stockwell, and M. McCollough. 2003. Evaluating vernal pools as a basis for conservation strategies: a Maine case study. Wetlands 23:70-81.
[3] Schlesinger, M. D., L.J. Shappell, L. D. Nagel, S. A. McNulty, and J. P. Gibbs. 2021. Determining the importance of vernal pools across geophysical and urbanization gradients. EPA Wetland Program Development Grant, Final Report. New York Natural Heritage Program, Albany, New York, USA.
[4] Van Dyke, F., A. Berthel, S. M. Harju, R. L. Lamb, D. Thompson, J. Ryan, E. Pyne, and G. Dreyer. 2017. Amphibians in forest pools: Does habitat clustering affect community diversity and dynamics? Ecosphere 8(2):e01671.
[5] Nagel, L. D., S. A McNulty, M. D. Schlesinger, and J. P. Gibbs. 2021. Breeding effort and hydroperiod indicate habitat quality of small, isolated wetlands for amphibians under climate extremes. Wetlands 41:22, 11 pages.

regulated if “it has wetland functions and values that are of local or regional significance.” The department proposes the addition of two criteria in support of the Adirondack Park Agency (APA) and local governments seeking to protect freshwater wetlands under their jurisdiction. Additionally, to support protections for freshwater wetlands, identified as partially jurisdictional by the APA due to their acreage within the boundary of the Adirondack Park, the department proposes to regulate portions of such wetlands falling outside APA jurisdiction to ensure they receive appropriate protection in their entirety. The department proposes to regulate freshwater wetlands of any size if they are specifically referenced by local governments in their written justifications for designation of Critical Environmental Areas, pursuant to 6 NYCRR Part 617.

ECL § 24-0107(9)(k) provides that a wetland, regardless of size, shall be regulated if “it is determined by the commissioner to be of significant importance to protecting the state’s water quality.” The proposed regulations state a wetland will be regulated if it has significant importance to protecting the State's water quality based on substantial evidence, as determined by the Commissioner in writing. The Commissioner’s written determination shall describe the underlying reasons why the wetland is of significant importance to protecting the State’s water quality. This may include a description of why the wetland is of significant importance in preventing exceedances of any water quality standards or guidance values derived pursuant to 6 NYCRR Part 702. The Commissioner’s determinations shall be posted on the department’s website.

D. Extend Adjacent Areas

Since the initial enactment of the Act in 1975, the department has been

authorized to regulate activities that occur within a freshwater wetland and within the 100-foot adjacent area surrounding the wetland boundary. The department may regulate upland adjacent area beyond 100 feet "where necessary to protect and preserve the wetland" (ECL 24-0701(2)). Under the current regulatory structure, the adjacent areas of individual wetlands were extended in limited instances as part of the original mapping process. The department proposes a transparent and consistent approach that would extend the adjacent areas for a specific distance for nutrient poor wetlands and productive vernal pools.

The proposed regulations would extend the adjacent area of Nutrient Poor Wetlands to 300 feet (91.4 meters). Nutrient Poor Wetlands are defined as one of 20 wetland plant communities following the New York Natural Heritage classification system,[6] and include bogs, fens, and other peatlands.[7] These wetlands are nutrient poor and highly sensitive to nutrient inputs associated with development.[8] Direct

[6] Edinger, G. J., D. J. Evans, S. Gebauer, T. G. Howard, D. M. Hunt, A. M. Olivero. 2014. Ecological communities of New York state, Second edition. New York Natural Heritage Program, Albany, New York, USA.

[7] Nutrient poor wetlands are limited to the following: 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, sea level fen, sedge meadow

[8] Schneider, R. L. 1994. Environmental controls of plant species diversity in coastal plain pondshore communities. Dissertation, Cornell University, Ithaca, New York, USA;
Sorrie, B. A. 1994. Coastal plain ponds in New England. Biological Conservation 68:225-233;
Grigal, D. F., & Brooks, K. N. 1997. Forest management impacts on undrained peatlands in North America. Pages 369-384 *in* C. C. Trettin, M. F. Jurgensen, D. F. Grigal, M. R. Gale, and J. K. Jeglum (Eds.), Northern forested wetlands: ecology and management. CRC Press, Boca Raton, Florida, USA;
Sperduto, D. D., W. F. Nichols, and J. Cleavitt. 2000. Bogs and fens of New Hampshire. New Hampshire Natural Heritage Inventory, Concord, New Hampshire, USA;
Damman, A. W. H., and T. W. French. 1987. The ecology of peat bogs of the glaciated northeastern United States: a community profile. US Fish and Wildlife Service Biological Report 87(7.16), Washington, D.C., USA;
Hruby, T. 2014. Washington state wetland rating system for Western Washington: 2014 Update. Publication #14-06-029. Washington Department of Ecology, Olympia, Washington, USA.

impacts are typically most harmful within 300 feet of these nutrient poor wetlands.[9] Therefore, the department is proposing a 300-foot adjacent area to assure that potential impacts on these sensitive wetlands can be evaluated through the permit review process.

The proposed regulations would extend the adjacent areas to 800 feet (243.9 meters) for vernal pools known to the department to be productive for amphibian breeding. The extension of the adjacent area is necessary to protect the long-term viability of amphibians breeding in the productive vernal pools because these species spend most of their lives in upland areas and can travel a great distance from the vernal pool during the non-breeding season. The department's review of scientific literature indicates that the standard 100-foot adjacent area is insufficient to maintain populations of breeding amphibians, even if all development activities were prohibited within 100 feet of the vernal pool.[10] The department is proposing to establish an 800-foot adjacent area for productive vernal pools based on the median distance encompassing the core habitat requirements from 7 studies of vernal pool breeding salamanders that occur in New York (Table 1). While the analysis only focused on salamanders, the Department proposes an 800-foot adjacent area to provide adequate upland habitat requirements for other amphibians breeding in productive vernal pools.

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[9] Sperduto, D. D., W. F. Nichols, and J. Cleavitt. 2000. Bogs and fens of New Hampshire. New Hampshire Natural Heritage Inventory, Concord, New Hampshire, USA.

[10] Semlitsch, R. D., and J. R. Bodie. 2003. Biological criteria for buffer zones around wetlands and riparian habitats for amphibians and reptiles. Conservation Biology 17:1219-1228;
Harper, E. B., T. A. G. Rittenhouse, and R. D. Semlitsch. 2008. Demographic consequences of terrestrial habitat loss for pool-breeding amphibians: Predicting extinction risks associated with inadequate size of buffer zones. Conservation Biology 22:1205-1215.

Table 1. Distances from vernal pools encompassing the core habitat requirements for breeding salamanders.	
Study	Distance (ft)
Madison, D. M. 1997. The emigration of radio-implanted spotted salamanders, Ambystoma maculatum. Journal of Herpetology 31:542-551.	525
Madison, D. M., and L. Farrand III. 1998. Habitat use during breeding and emigration in radio-implanted tiger salamanders, Ambystoma tigrinum. Copeia 1998:402-410.	804
Semlitsch, R. D. 1998. Biological delineation of terrestrial buffer zones for pond-breeding salamanders. Conservation Biology 12:1113-1119.	538
Faccio, S. D. 2003. Post breeding emigration and habitat use by Jefferson and spotted salamanders in Vermont. Journal of Herpetology 37:479-489.	574
Rittenhouse, T. A. G., and R. D. Semlitsch. 2007. Distribution of amphibians in terrestrial habitat surrounding wetlands. Wetlands 27:153-161.	961
Scott, D. E., M. J. Komoroski, D. A. Croshaw, and P. M. Dixon. 2013. Terrestrial distribution of pond-breeding salamanders around an isolated wetland. Ecology 94:2537-2546.	1142
Van Drunen, S. G., J. E. Linton, J. P. Bogart, J. McCarter, H. Fotherby, A. Sandilands, and D. R. Norris. 2020. Estimating critical habitat based on year-round movements of endangered Jefferson salamander (Ambystoma jeffersonianum) and their unisexual dependents. Canadian Journal of Zoology 98:117-126.	1302
Average =	835
Median =	804

E. Treatment of Two Wetlands

The department is proposing to continue its long-standing practice of classifying and regulating two or more freshwater wetlands as a single wetland if they are no more than 50 meters (approximately 164 feet) apart. However, this rule would specify that the wetlands must be hydrologically connected, either on the surface or sub-surface. This change is designed to provide clarity for the regulated community and department staff conducting jurisdictional determinations.

F. Jurisdictional Determination Procedure

Any person wishing to obtain a jurisdictional determination as to whether a parcel or parcels contain State jurisdictional freshwater wetlands, or regulated adjacent areas, may submit a formal jurisdictional determination request to the department according to instructions that the department will provide on its website. Under the proposed jurisdictional determination procedure, requests will be received, reviewed, and answered by a team of ecologists in the department's Central Office in Albany, New York. Department staff will remotely identify the presence or absence of jurisdictional wetlands or adjacent areas within and on indicated parcels and assign appropriate classifications according to wetland characteristics. Department staff will complete these tasks using GIS to review informational freshwater wetlands mapping models prepared by Cornell University's Institute for Resource Information Sciences (IRIS), currently State-mapped wetlands (ECL 24-0301), National Wetlands Inventory, National Land Cover Data (USGS), Gridded Soil Survey Geographic mapping (USDA) and many additional spatial data sources.

In addition to a determination as to whether a parcel contains a regulated wetland, any landowner who has been issued a positive jurisdictional determination from the department may also request a determination as to whether a permit is required for a proposed activity within the regulated wetland(s) identified on the subject parcel. As provided in the proposed regulations, this type of request must include site specific development plans and a delineation of any wetlands on the parcel, subject to verification by the department. A requestor who does not already have a delineation of the regulated wetlands on the site may request such a delineation from the department

at no cost. Following a determination that the proposed development plans require a permit, the requestor is strongly encouraged to contact the appropriate regional permit administrator for a preapplication conference to discuss how to obtain a permit prior to conducting any regulated activity identified in 6 NYCRR 663.4(d) on the subject parcel.

Upon receipt of a jurisdictional determination request, the proposal provides the department with 90 days to respond, in writing, as to the jurisdictional status and classification of wetlands present, factors supporting the determination, and if requested, whether proposed activities would require a permit. However, if weather or ground conditions prevent the department from making a jurisdictional determination as to whether proposed activities fall within jurisdictional wetlands or regulated adjacent areas within the 90-day period, the proposal enables the department to extend such period until a field determination can be made. If the department fails to provide a definite answer in writing, or an extension, within 90 days of the receipt of a request for a jurisdictional determination, the requestor may make notice of that failure by certified mail, return receipts requested, addressed to the Director of the Division of Fish and Wildlife, New York State Department of Environmental Conservation, Division of Fish and Wildlife, 625 Broadway, Albany, NY 12233-1750. If the department fails to provide a definite answer within 10 business days of the receipt of such notice, freshwater wetland jurisdiction for the subject parcel shall be deemed waived and such waiver shall serve as a complete defense to the enforcement of the Act for a period of five years.

To ensure the public is provided with the opportunity to seek clarity, and that jurisdictional determination methods are transparent, proposed regulations include a jurisdictional determination appeals process beginning with an on-site consultation and

wetland delineation. Those wishing to contest positive determinations after the initial on-site consultation may apply for an appeal within 120 days. The acceptable grounds for appeal are missing technical information, incorrect application of jurisdictional criteria, or erroneous applications of the department's freshwater wetlands program guidance. The proposal provides the department with 60 days to review and respond to such appeals.

G. Transition Period

This rule making proposes a transition period, during which time, projects that achieved certain development thresholds before January 1, 2025, may continue without a new jurisdictional determination. This provides for the fair, expeditious, and thorough administrative review of freshwater wetlands permits, consistent with ECL § 70-0103 (Uniform Procedures), and properly balances environmental and economic interests, consistent with ECL § 24-0103. This transition period would be time limited and based on the scope of the project and the threshold achieved. Projects requiring a freshwater wetlands permit, under the existing regulatory provisions, may proceed without a new jurisdictional determination until expiration of the issued permit. After the permit expires, applicants will need a new jurisdictional determination that incorporates all the regulatory provisions described in this rule making prior to applying for a new permit. Projects that do not require a freshwater wetlands permit, under the existing regulatory provisions, may proceed without a new freshwater wetlands jurisdictional determination after January 1, 2025, for either 3.5 or 2 years if they meet at least one of the three thresholds in proposed 6 NYCRR 664.1 (c) and (d). Applicants will need a new jurisdictional determination that incorporates all the regulatory provisions described in this rule making: 1) following the designated time frame or 2) if their project does not

meet one of the three thresholds.

The development thresholds for the proposed transition period are based on information that the department gathered during a two-step outreach effort at annual meetings of the New York State Wetlands Forum (NYSWF). The annual meetings of the NYSWF bring together consultants, researchers, and government officials working in New York to discuss wetlands science, management, and regulation. In the first step, the department polled more than 200 participants at the 2023 annual meeting to obtain data on average time frames for various aspects of the development process and on potential thresholds that could be used during a transition period immediately following January 2025. In the second step, the department presented draft timelines and thresholds being considered for the transition period to more than 300 participants at the 2024 annual meeting for comment and suggestions. The proposed transition period incorporates suggestions the department received at both the 2023 and 2024 annual meetings of the NYSWF.

4. Costs:

The proposed regulation does not directly result in additional costs to the regulated community or local governments because the rule only clarifies the types and extent of wetlands that will be regulated by the department pursuant to the 2022 amendments to the Act. The regulated community, including local governments, will not be required to expend any additional costs unless they seek to conduct a development activity within a regulated freshwater wetland or regulated adjacent area. The following analysis of costs focuses on potential indirect costs and potential cost savings from regulating these wetlands.

Indirect Costs to Regulated Parties

Application fees for freshwater wetlands permits are an indirect cost of this proposed regulation and will vary depending on the scope of the project. Fees for the modification of an existing permit are $100 and the fee for a new permit to build a single-family dwelling is $300. Application fees for more complicated and costly projects are larger, with multiple new single-family dwellings or a new multiple family dwelling requiring a $500 fee, while fees for new commercial or industrial structures or improvements are $1000. These application fees are well within the typical costs of land development projects. The proposed regulation will increase the acreage of wetlands regulated under the Act and the total number of permit applications. Based on estimates calculated using State mapped wetlands combined with National Wetlands Inventory mapping, the acreage of State jurisdictional wetlands will approximately double by 2028 when the threshold is reduced from 12.4 acres to 7.4 acres. Based on this estimate, the department anticipates a comparable increase in wetland permitting from the current 10-year average of 1,320 per year to approximately 2,600 per year. This increase in permitting workload is an indirect cost of this rule making to State agencies and other regulated entities.

Another potential indirect cost of this rule making for the regulated community is the cost of delineating the precise boundary of regulated wetlands. However, regulated parties will not have to incur delineation costs. Landowners, other persons, or official bodies, having good cause, may submit written requests for the department to perform wetland delineations at no cost, pursuant to ECL § 24-0301(2). Regulated parties with large and complicated development projects that impact regulated wetlands may prefer

to hire professional consulting firms to assist in wetland delineation and all the other aspects of the land development process. These projects usually require professional services because they typically involve federal permitting and may require highly technical mitigation plans to compensate for losses of wetlands.

Cost Savings

Freshwater wetlands provide many benefits to New Yorkers. The purpose of this rule making is to implement amendments to the Act that expand protections to previously unprotected wetlands throughout the State, in part, so New York would be prepared for more frequent and intense storm events resulting from a changing climate. Protecting additional wetlands pursuant to this rule will help to reduce costs from flood damage on landowners, municipalities, and businesses and will assist with protecting drinking water quality.

Wetlands are known to mitigate impacts of storm surges, rapid snowmelt, and other extreme weather events as they provide natural reservoirs with floodwater buffering capacity and slow surface water movement.[11] Extreme weather associated with climate change has been felt throughout the State from storm events including Hurricane Irene, Tropical Storm Lee, Hurricane Sandy, and recurring flash flooding in the Mohawk Valley. In the 2023 “New York’s Local Governments Adapting to Climate Change” report on 95 Climate Smart Communities, prepared by the Office of the New York State Comptroller, municipalities cited flooding as the single most common primary climate risk addressed, reporting a total of $1.15 billion in actual and anticipated expenditures between 2017 and 2026 for projects related to building flood resiliency or

[11] Taylor, C. A., and H. Druckenmiller. 2022. Wetlands, flooding, and the Clean Water Act. American Economic Review 112:1334-1363.

addressing flood impacts.[12] According to New York State Division of Homeland Security and Emergency Services, New York State has lost approximately $26 billion to flooding over the past decade.[13] The department anticipates that expanding protections for New York State wetlands will increase public safety and reduce flooding associated costs for landowners, municipalities and the business community.

One of the primary benefits and functions of freshwater wetlands is the preservation of surface water quality. As freshwater wetlands desynchronize surface water flows by intercepting large volumes of water during storm events, they also mitigate sediment load and trap contaminants that would otherwise impact water quality downstream. Through their retention of nutrients, metals, and pesticides, wetlands conserve water quality and aquatic habitat at lower elevations within watersheds.[14] Nutrient inputs, stemming from runoff, can have a significant impact on municipal water treatment budgets, with costs ranging from $20 to $36 per million gallons treated.[15] Based on United States Department of Agriculture analysis examining the cost-effectiveness of freshwater wetland protection and restoration, wetlands of 10 acres or more have the capacity to remove 11 to 1,800 pounds of nitrogen per acre on an annual basis. This clearly illustrates one of many tangible cost-benefit savings gained through

[12] Office of the New York State Comptroller. 2023. New York's local governments adapting to climate change: challenges, solutions, and costs. Office of the New York State Comptroller, Albany, New York, USA

[13] Division of Homeland Security and Emergency Services. 2023. Flood Damage In New York State. New York State Hazard Mitigation Plan, Albany, New York, USA.

[14] Alexander, L. C. 2015. Science at the boundaries: scientific support for the Clean Water Rule. Freshwater Science 34:1588-1594.

[15] Ribaudo, M., J. Delgado, L. Hansen, M. Livingston, R. Mosheim, and J. Williamson. 2011. Nitrogen in agricultural systems: implications for conservation policy. Economic Research Report No. 127. United States Department of Agriculture, Washington D.C., USA.

wetland preservation.[16]

5. Local government mandates:

This rule making will not impose any additional mandates for local governments.

6. Paperwork:

This rule making does not include any requirement to submit a report, any form, or other paperwork to the department.

7. Duplication:

This proposal does not duplicate any State or Federal requirement.

8. Alternatives:

The purpose of this rule making is to implement amendments to the Act adopted on April 9, 2022. These changes fundamentally altered the statutory framework of the Act, and this action is necessary to clarify statutory provisions and guide the department's implementation of the changes to the Act that take effect January 1, 2025. Thus, a no action alternative was never considered.

As part of stakeholder outreach, the department considered a slightly modified version of the regulations proposed in this Notice of Proposed Rule Making. Based on stakeholder input received in response to the ANPRM, the department decided to include in the proposed regulations: 1) a transition period for when new jurisdictional determinations would be required for projects which are still in development when the statutory changes take effect on January 1, 2025; 2) a process for when the department

[16] Hansen, L., D. Hellerstein, M. Ribaudo, J. Williamson, D. Nulph, C. Loesch, and W. Crumpton. 2015. Targeting investments to cost effectively restore and protect wetland ecosystems: some economic insights. Economic Research Report Number 183. United States Department of Agriculture, Washington D.C., USA.

misses the 90-day deadline for jurisdictional determinations; and 3) changes in the egg mass counts for vernal pools in the Hudson-Mohawk region of New York State and an extended adjacent area surrounding vernal pools known to be productive for amphibian breeding.

9. Federal standards:

Federal wetland protections are implemented pursuant to Section 404 of the Clean Water Act (CWA), which authorizes the EPA and U.S. Army Corp. of Engineers (USACE) to regulate the discharge of dredged or fill material into Waters of the United States (WOTUS). Under CWA, Federal regulation of freshwater wetlands is limited in scope to only include wetlands sharing continuous surface connection to WOTUS. Some wetlands in New York State are subject to Federal protection and regulated by the department. However, the department's jurisdiction to regulate freshwater wetlands pursuant to the Act is independent of the CWA and any Federal standards.

10. Compliance schedule:

This rule may be adopted following a sixty-day public comment period and a public hearing after publication in the State Register. The statutory amendments that this rule proposes to implement will become effective on January 1, 2025. Regulated parties must comply immediately beginning on the rule's proposed effective date of January 1, 2025. Regulated parties will be notified of the changes to the regulations in the State Register, through the department's Environmental Notice Bulletin, and in virtual informational webinars that the department plans to hold as part of continued education and outreach efforts.