

Summary of the Regulatory Impact Statement on 6 NYCRR Part 664

1. Statutory Authority and Legislative Objectives

The Department of Environmental Conservation (department) is proposing to repeal 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 purpose of these regulations is to implement amendments to the Freshwater Wetlands Act (the Act) that take effect January 1, 2025. 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, authorizing the department to adopt regulations implementing the Act.

3. Needs and Benefits

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. In addition, revisions to the Act establish clear jurisdictional criteria providing protections for wetlands of unusual importance.

In preparation of these regulations, the department conducted a comprehensive two-phase outreach plan to engage stakeholders. Phase 1 focused on raising general awareness about wetlands, explaining the statutory changes enacted in 2022, and soliciting input before the department developed proposed regulatory language. Phase

2 focused on seeking specific stakeholder input on potential regulatory criteria and language through an Advanced Notice of Proposed Rule Making (ANPRM).

The proposed regulations include seven key components for implementing the statutory changes.

A. Expanded Definitions

This section provides 36 definitions for terms used throughout the rest of the regulation.

B. Simplified Classification System

The proposed regulations describe 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.

C. Unusual Importance Wetlands

The proposed regulations clarify the statutory provisions for the regulation of wetlands of less than the standard 12.4 acre (2025) or 7.4 acre (2028) thresholds if they meet at least one of 11 criteria identified in ECL 24-0108(9). Five of the 11 criteria require no clarification in regulation while the remaining six criteria could benefit from further clarification.

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.” Through an iterative process, the department used professional judgement and concluded that watersheds having 2% or greater

impervious surface and less than 5% landcover of lakes, ponds, reservoirs, or wetlands, present significant flooding risk when these metrics coincide within areas within 4-kilometers of an urban area.

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.” This rule proposes to focus regulatory attention on species of greatest conservation need listed in the 2015 New York State Wildlife Action Plan (SWAP) with a moderate to very high threat to wetland species from habitat loss.

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 developed the list of Class I wetlands based on their ecological importance, benefits to New Yorkers, and need of protection. This rule making proposes to establish nine Class I characteristics.

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.” The department is proposing 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. Minimum egg mass counts vary across five unique geographic regions across the State.

ECL § 24-0107(9)(j) provides that a wetland regardless of size shall be regulated if “it has wetland functions and values that are of local or regional significance.” The

proposed regulations include two criteria for wetlands of local and regional significance. To protect wetlands that span the boundary of the Adirondack Park, the department is proposing to regulate wetlands that are partially located within the Adirondack Park and under the jurisdiction of the Adirondack Park Agency. In addition, the department proposes to regulate freshwater wetlands of any size when 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 Area

The proposed regulations would extend the regulated 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, and include bogs, fens, and other peatlands. These wetlands are nutrient poor

and thus highly sensitive to nutrient inputs associated with development. Since direct impacts are typically most harmful within 300 feet of these wetlands, 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 be productive for amphibian breeding as described in Part 664.6(g). The extension of the adjacent area is necessary to protect the long-term viability of amphibians breeding in the productive vernal pools. 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.

E. Treatment of Two Wetlands

The department is proposing to continue the 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 will provide clarity for the regulated community and department staff conducting jurisdictional determinations.

F. Jurisdictional Determination Procedure

The proposed regulations provide a process for landowners to obtain jurisdictional determinations and delineations of regulated wetlands. It sets a deadline of 90 days for making determinations and provides a process for landowners to notify the department if that deadline is missed. Once notified of the missed deadline via certified

mail, the department has 10 business days to provide the jurisdictional determination or the jurisdiction would be waived for 5 years.

The proposed regulations also include a jurisdictional determination appeals process beginning with an on-site consultation and wetland delineation. For those still wishing to contest positive determinations, provisions are included enabling them to apply for an appeal within 120 days following field consultations if the basis of their appeal cites missing technical information, incorrect application of jurisdictional criteria, or erroneous applications of the department's freshwater wetlands program guidance. The proposal provides the department 60 days to review and respond to such appeals.

G. Transition Period

To provide for the fair, expeditious and thorough administrative review of freshwater wetlands permits, consistent with ECL § 70-0103, Uniform Procedures, and to balance environmental and economic interests, consistent with ECL § 24-0103, this rule making 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 between 3.5 and 2 years.

4. Costs

The proposed rule does not directly impose additional costs to the regulated community, State agencies, or local governments because the rule only clarifies the types and extent of wetlands that will be regulated by the department pursuant to the Act. Small businesses, State agencies and local governments will not be required to

expend any additional costs unless they seek to conduct a development activity within a regulated wetland or regulated adjacent area.

Indirect costs to regulated parties, local governments, and State agencies will increase since the acreage of State jurisdictional wetlands will approximately double by 2028 when threshold is reduced from 12.4 acres to 7.4 acres, resulting in an increase in permit applications and application fees collected by the department. To ease the burden on regulated entities, this regulation requires the department to provide jurisdictional determinations and wetland delineations free of charge. However, regulated parties with large and complicated development projects may prefer to hire professional consulting firms to assist in wetland delineation and all the other aspects of the land development process.

Protecting additional wetlands may help to reduce costs from flood damage on landowners, municipalities, and businesses since wetlands provide natural reservoirs that can hold floodwater and reduce the impact of extreme weather events that have costs New Yorkers more than \$26 billion over the past decade.

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

This proposed 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. Therefore, a no action alternative was never considered. However, based on stakeholder input from the ANPRM, the department decided to modify the original proposal to include: 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, a process for when the department misses the 90-day deadline for jurisdictional determinations, 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 Environmental Protection Agency 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.