



**WHITEMAN
OSTERMAN
& HANNA LLP**
ATTORNEYS AT LAW

Recent Changes in State and Federal Freshwater Wetlands Laws

Terresa Bakner
Whiteman Osterman & Hanna LLP

New York State Builders Association
September 10, 2024
(Capital Region District Focused)

DISCLAIMER: This is an outline of issues and potential issues and is not intended as legal advice; this presentation is no substitute for legal advice and analysis from experienced counsel for your municipality.



Unlike the federal program for protection of wetlands (i.e. Waters of the US), the State program found in Environmental Conservation law Article 24 for the protection of Freshwater Wetlands has been remarkably consistent and unchangeable since the regulations were adopted in the 1980s.

-----Only officially mapped wetlands 12.4 acres in size or larger were regulated. In very rare cases wetlands of unusual local importance were also mapped.

In 2022, however, the State Legislature and the Governor adopted some major changes to the State Freshwater Wetlands Law.



These changes are as follows:

- As of January 1, 2023 – Increasing permit application fees;
- As of January 1, 2025—Eliminating the NYS Freshwater Wetlands Mapping procedures and regulatory jurisdiction—i.e. no longer limiting DEC jurisdiction to mapped wetlands;
- As of January 1, 2025—Small wetlands (of any size) considered of “unusual importance” will be regulated if they meet one of 11 newly-established criteria in the law;
- As of January 1, 2028—The default size threshold from regulated wetlands will be 7.4 acres (not 12.4 acres).

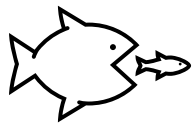


NYSDEC staff are in the process of finalizing new amendments to the regulations which must be in place by January 1, 2025 based on the direction in the 2022 Legislation.

NYSDEC first issued an Advanced Notice of Proposed Rule Making (ANPRM) for Potential Revisions to Freshwater Wetlands Regulations—6 NYCRR Part 664.

Proposed NEW regulations

After collecting and considering
the comments received during
the Notice of Advanced Rulemaking
DEC staff have now issued
Draft New Regulations for public comment



Proposed Regulations

- The proposed regulations and the deadline for public comment as well as opportunities to participate in public hearings (virtually and in person) are found on the NYSDEC website.
- Google NYSDEC proposed wetlands regulations.
- Submit comments on the proposed regulations.

Proposed Regulations

▪ **How to Submit Comments on the Draft Freshwater Wetland Regulations**

▪ DEC encourages the public to comment on the proposed freshwater wetland regulations. **Comments will be accepted through September 19, 2024**, and can be submitted via e-mail

to WetlandRegulatoryComments@dec.ny.gov (subject: “Wetlands Part 664 Comments”) or via mail to NYSDEC, Attn: Roy Jacobson, Jr., 5th Floor, 625 Broadway, Albany, NY 12233-4756.

▪ The public can also provide comments during virtual and in-person public hearings. The **virtual public hearings are scheduled for September 10 at 1 p.m. and 6 p.m.** An **in-person public hearing is scheduled for September 12 at 1 p.m.** at the DEC office at 625 Broadway, Albany, NY.

▪ The draft proposed regulations, guidance for submitting public comment, and registration for the public hearings [can be found on DEC’s website](#).



Rebuttable Presumption—the Legislature has decided not to provide advanced regulatory notice of the boundaries of NYSDEC wetlands—i.e. regulatory maps with notice mailed to landowners when the map is created or amended. Instead the program will operate like the federal wetlands program.

If you have a “wetland” on your property that may be regulated by the State the presumption is rebuttable.

No future regulatory mapping of wetlands-no advanced notice to landowners.

The landowner has to prove to the NYSDEC that the wetland on or near their property is NOT regulated by NYSDEC.



Practically speaking if you have a freshwater wetlands on your property or adjacent to your property you will be required to obtain a delineation from a wetlands biologist and to have NYSDEC wetlands staff confirm that the wetland is or is not regulated by the State.

This is similar to the process for federal wetlands, however, it is complicated by the fact that the State also regulates the 100 foot upland adjacent area surrounding the wetland.



What are wetlands of “unusual importance”, i.e. wetlands of **any size** below 12.4 acres that may be regulated by NYSDEC?

Remember all of these wetlands of any size also have at least a 100 feet regulated adjacent area surrounding the wetlands.

They are freshwater wetlands that have at least ONE of the following characteristics as determined by NYSDEC staff.



- The freshwater wetland 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;
- It is located within or adjacent to an urban area, as defined by the United States census bureau;
- It contains a plant species occurring in fewer than thirty-five sites statewide or having fewer than five thousand individuals statewide;



- 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;
- It is classified by the department as a Class I wetlands;
- It was previously classified and mapped by the department as a wetlands of unusual local importance;
- It is a vernal pool that is known to be productive for amphibian breeding;



- 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;
- It was previously mapped by the department as a wetlands on or before December thirty-first, two thousand twenty-four;
- It has wetlands functions and values that are of local or regional significance; or
- It is determined by the commissioner to be of significant importance to protecting the state's water quality.

Proposed Regulations

- The preceding slides relate to the legislation amending ECL Article 24
- —with proposed new regulations DEC has set forth how they intend to implement the 2022 Legislation:

Class 1 wetlands

- Habitat for an essential behavior of a State or federal threatened or endangered species (animal or plant)
- Significant Coastal and Fish & Wildlife Habitat Area
- Tidally Influenced-but not regulated by ECL Article 25
- Contiguous to ECL Article 25 tidal wetlands
- A wetlands plant community that is critically impaired
- A nutrient poor wetland (bogs and fens)
- Within a FEMA Floodway
- Contiguous to A, AA, AA-S, A-S, or N surface waters
- ALL Class1 wetlands are regulated by DEC no matter how big or small they are.

Class 2-4 wetlands

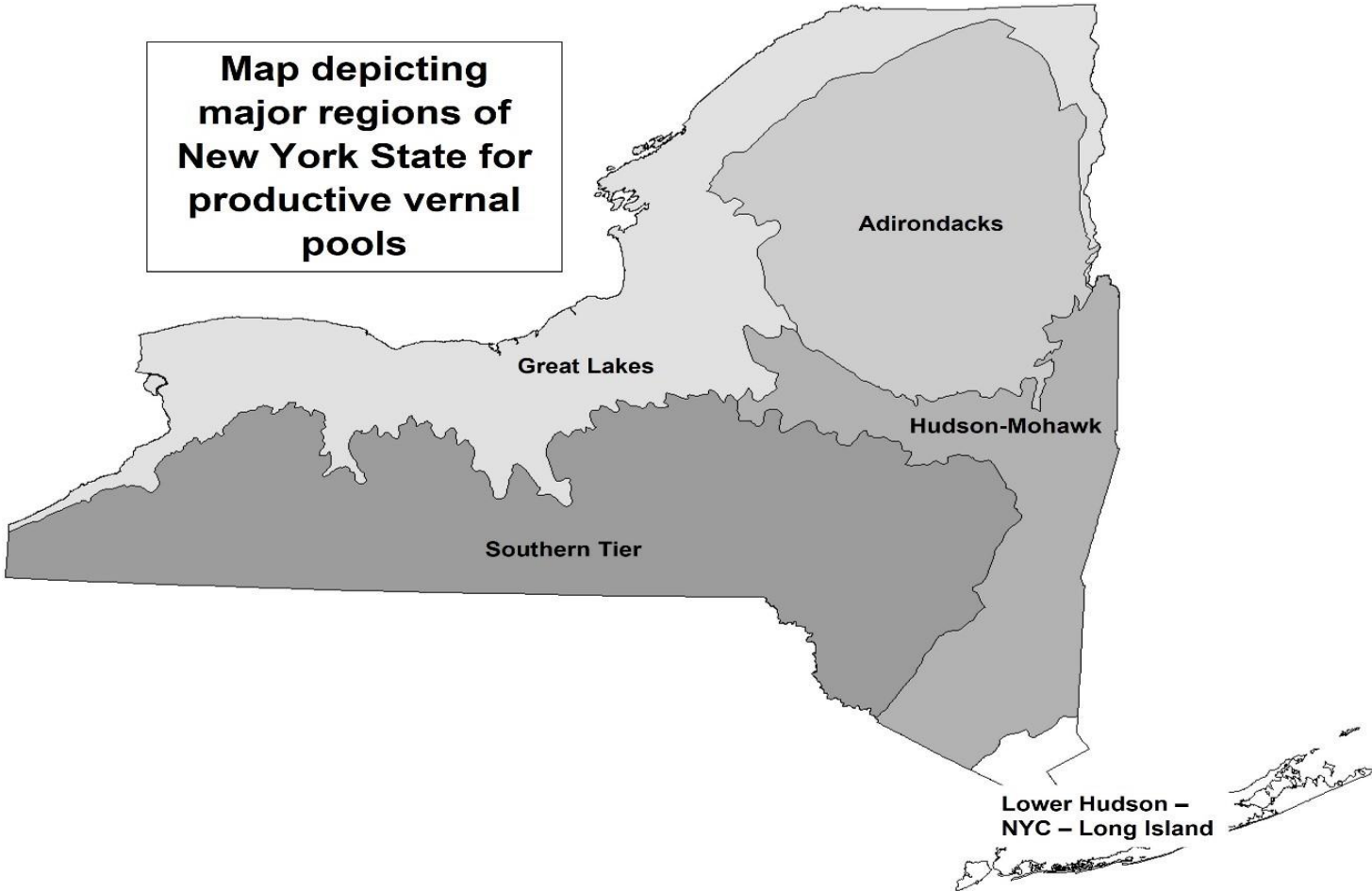
- The revised Part 664 would include all 4 classifications of wetlands.
- While the definition of wetlands classes 2 through 4 are changed somewhat—they are not considered wetlands of unusual importance.

Vernal Pools

Vernal Pools—a vernal pool known to be productive for amphibian breeding—COUNT THE EGG MASSES –

- a) In the Hudson-Mohawk Region, 55 or more spotted Salamander egg masses or 30 or more wood Frog Masses;
- b) 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 Masses;
- c) one or more egg masses or larvae of Jefferson Salamander, Blue-Spotted Salamander, or hybrids (goes up to 20 depending upon location) and one or more egg masses or larvae of the Eastern Tiger or Marbled Salamander
- d) DEC will keep a list of such vernal pools and publish the list and any updates in ENB

**Map depicting
major regions of
New York State for
productive vernal
pools**



Other than Class 1

- Significant Flooding. The FWW is in a 12-digit HUC meeting all 3 criteria—2% or more impervious surface, less than 5% of surface area is lakes, ponds, reservoirs or wetlands, and it is within an urban area or within 2.48 miles of one.
- Within or adjacent to an Urban area as defined and identified by the US Census Bureau.
- Wetlands of Unusual Local Importance—Previously Designated by Local Municipalities.

Proposed Regulations

- Rare Animals including habitats where essential behaviors occur—Threatened and Endangered Species, Species of special concern, species of greatest conservation need. Lists found in Part 182 and in the CFR Part 17—EAF Mapper
- Vernal Pools (will also have an 800 feet buffer) a pool known to be productive for amphibian breeding—DEC will keep a list and update it by publication in the ENB.

Proposed Regulations

- Floodways as shown on the FEMA maps
- Previously mapped wetlands on or before December 31, 2024 and which contain wetlands characteristics described in section 24-0107(a) of the FWW Act.
- Wetlands determined to be of local or regional significance because they are within a Critical Environmental Area or within the APA boundaries.
- Important for the Protection of NYS's water quality-based on substantial evidence decided by DEC Commissioner.

Proposed Regulations

- New Procedures for JDs—burden is on property owner. All requests go to DEC central office initially to evaluate new mapping produced by Cornell and other documentation of criteria.
- If you receive a positive determination then you request DEC Regional staff to go to site.
- DEC Regional staff has at least 90 days to confirm a JD or provide notification of an extension—if no response then further 10 day letter may result in waiver.
- A JD is good for 5 years.

Proposed Regulations

- A positive JD determination can be appealed by the landowner. It stays in place while the appeal occurs.
- First step is initial consultation, then submission of a complete appeal within 120 days of initial consultation.
- DEC is required to decide appeal within 60 days if another field visit is necessary they can extend for an additional 30 days. Very limited, technical grounds for appeal.



Prior to 2022 the State Freshwater Wetlands program was relatively constant and yielded predictable results.

With the Legislative changes and the new category of regulated wetlands-wetlands of unusual importance—uncertainty is injected into decisions to purchase property, seasonal delays are likely to occur and it is not at all clear that NYSDEC has **sufficient resources** to implement the new program.



Grandfathered Projects:

The Law provides that only projects that have **a building permit** or, if no building permit is required for a project, **have commenced construction or the use**, in order to avoid the need to obtain a Freshwater Wetlands permit where the wetlands on site have become “regulated”.

The regulations provide for a more expanded grandfathering of certain projects.

Proposed Regulations

- The regulations provide for an extension of time to complete a project under certain limited circumstances:
- Where a property owner or applicant received, prior to January 1, 2025, either a FWW permit or a letter from DEC notifying them that their application was complete, the project may proceed under the FWW jurisdictional determination issued by the department prior to January 1, 2025, until expiration of the FWW permit.

Proposed Regulations

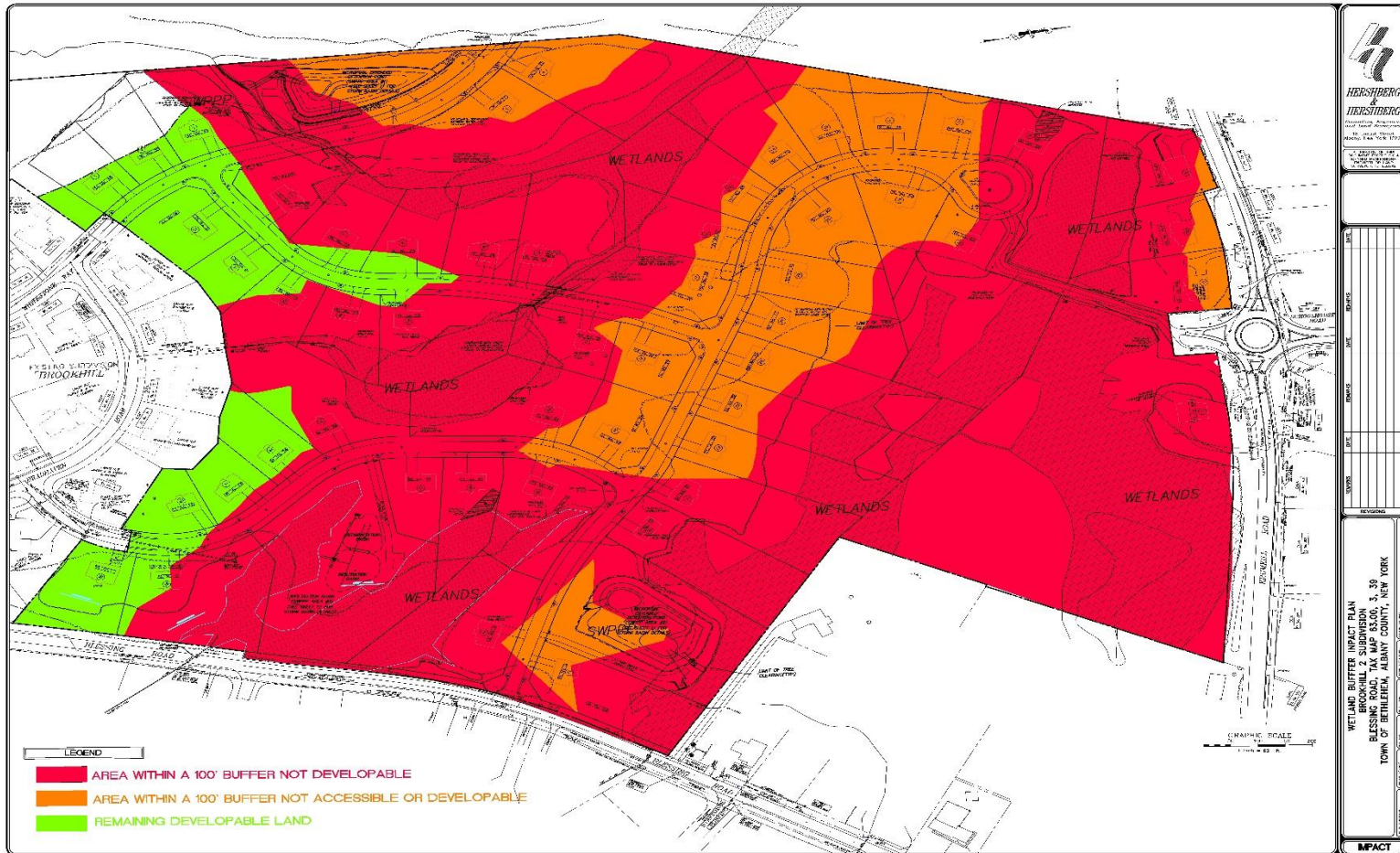
- Second way to have more time to complete project:
- Where a property owner has commenced or plans to commence a project on a parcel that did not previously require a FWW permit prior to 1/1/25 and
- 1) has a FEIS which has been accepted by the lead agency; or 2) has received a negative declaration for a Type 1 action; or 3) has received written site plan approval from a local government for the project;
- THEN.....

Proposed Regulations

- THEN the regulations do not apply until—
- July 1, 2028 for projects determined to be Major projects pursuant to 6 NYCRR section 621.4;
- OR
- January 1, 2027, for projects determined to be Minor Projects pursuant to 6 NYCRR section 621.4.

Project Example

**WHITEMAN
OSTERMAN
& HANNA LLP**
ATTORNEYS AT LAW





By January 1, 2028,

The threshold for wetlands regulated by ECL Article 24 will decrease from 12.4 acres to 7.4 acres for all wetlands—even those that do not qualify as “wetlands of unusual importance.”

WHAT IS AWOTUS...

- NOW FOR BETTER NEWS
- At the Federal Level of Government....

The History of WOTUS

- Waters of the United States include wetlands, streams, rivers, lakes and ponds—
- Under the US Constitution WOTUS must have some connection to federal authority—
 - Traditionally Navigable Waters
 - Boundary Waters
 - Interstate Commerce
 - Migratory species of wildlife

WOTUS

- The federal legislation—the Clean Water Act (and its predecessors) are briefly worded and have a long history of being interpreted by executive actions—like the adoption of regulations, executive orders and guidance.
- Up until the 1980s the US ACOE had a very restrained view of its regulatory authority in this area.

WOTUS

- This USACOE restrained view of its jurisdiction expanded through judicial review and USEPA pressure (Riverside Bayview Homes Inc. (1985)) from the 1980s to the first US Supreme Court Case that limited the definition of WOTUS—
- SWANCC (2001) and then...
- Rapanos/Caraballo (2007) and now...
- Sackett (Frequent Flyers) (May 2023)

WOTUS

- Although Congress has not amended Section 404 of the Clean Water Act—the USEPA and the USACOE have worked with the past three Presidents to adopt regulations which has just spawned more litigation
- Pre-2015 Regulations
- 2015 Obama Regulations
- 2020 Trump Regulations
- 2022 Biden Regulations
- 2023 Biden Regulations “Redo”—post Sackett

WOTUS in 2024

- What is the regulated public left with to try to determine whether that wet spot in your backyard is regulated by the federal government—
- Sackett Decision—for a wetland to be regulated it must be immediately adjacent to and indistinguishable from a surface water that is connected to a Traditionally Navigable water. The Significant Nexus test articulated in Rapanos is GONE.

WOTUS

- The Biden 2023 regulations (August Federal Register) parrot the language in the Sackett case.
- It is important to note that both the Sackett case and the regulations have language that makes it clear that intermittent streams that are seasonally dry may still serve as connecting surface waters.
- Some EPA agency personnel are trying to push this language to include ephemeral surface waters which will only result in more litigation.

WOTUS

Practically speaking how do you find out if that wet spot is a WOTUS.

1. Review the Sackett Case and the 2023 Biden Regulations;
2. Review the USACOE and USEPA Guidance:
 - “ September 27, 2023, Jt Coordination Memo to the Field between the USACOE and the USEPA;”
3. Hire an experienced wetlands delineator;
4. Make a request for an AJD to the USACOE.

WOTUS

Remember three important issues:

- 1) Make sure the lack of connection of the wetlands to the surface water is documented.
- 2) Make sure you are requesting an AJD which can be appealed.
- 3) Remember that if the situation is controversial the USEPA may become involved and the USEPA, under those situations, will use the Jt. Memo. Procedures and its authority under Section 404c of the Clean Water Act to make the FINAL DETERMINATION.



**WHITEMAN
OSTERMAN
& HANNA LLP**
ATTORNEYS AT LAW

Comments or Questions?

Contact:

Terresa Bakner (tbakner@woh.com)

**Whiteman Osterman & Hanna LLP
One Commerce Plaza, Suite 1900
Albany, N.Y. 12260
518-487-7600
www.woh.com**

DISCLAIMER: This is an outline of issues and potential issues and is not intended as legal advice; this presentation is no substitute for legal advice and analysis from experienced counsel for your municipality.