

ENVIRONMENTAL AND ENERGY INFORMATION MEMO

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NYSDEC Seeks Feedback on the Part 664 Freshwater Wetland Regulations

In January 2024, New York State Department of Environmental Conservation (DEC) released an Advanced Notice of Proposed Rulemaking (ANPR), which sought written stakeholder input as DEC began to develop regulations to, at least in part, implement the revisions to the Freshwater Wetlands Act passed by the legislature and signed by Gov. Hochul in 2022 (Chapter 58 of the Laws of 2022). On July 10, 2024, DEC released for public comment its Proposed Rulemaking for Potential Revisions to Freshwater Wetland Regulations (the Proposed Regulations). While the proposed regulations provide ample opportunity for expanded protections of wetlands, the proposed regulations also expand wetland jurisdictions throughout New York State.

Additional Wetland Protections

It is the policy of New York State to preserve, protect and conserve freshwater wetlands, and regulate the use of wetlands to secure the natural benefits. Freshwater wetlands can cleanse water within a system by filtering out natural and manmade pollutants. Regulation of wetlands is key in ensuring the benefits of freshwater wetlands. The proposed regulations expand the scope of DEC's jurisdiction over wetlands throughout New York State. This expansion has the potential to expand DEC's jurisdiction to include potentially hundreds of smaller freshwater wetlands that were not previously within DEC's jurisdiction. This expansion will be seen implemented through several routes. First, starting on Jan. 1, 2028, the minimum threshold for regulated wetlands will decrease to 7.4 acres. This is significantly smaller than the existing threshold of 12.4 acres. Second, wetlands of unusual importance will also be included within the DEC's jurisdiction. To qualify as a wetland of unusual importance, a wetland will only need to meet one of 11 identified characteristics. The expansion of DEC's jurisdiction will allow for additional protection and preservation of wetlands through New York State. This expansion could affect potential development projects and the costs associated with those projects because of additional mitigation implications.

90-Day Jurisdictional Determinations

The proposed regulations provide that the DEC shall provide a jurisdictional determination or a determination that a proposed activity requires a permit within 90 days of receipt of a request. However, this is not a definite time frame. The proposed regulations provide that DEC can extend this period due to weather or ground conditions. In New York State, it is likely that delay will occur between October and March when there is potential for snow cover. Delay due to weather conditions may extend the jurisdictional period well beyond the 90-day timeframe. This can lead to further delays in permitting projects. Once a determination is issued, an applicant may be required to apply for a general permit pursuant to 6 NYCRR Part 663 or, where a negative determination is issued, this may be used to provide a defense a positive determination for a period of five years from the date the DEC issued the negative determination.

Wetland of Unusual Importance

Jurisdictional determinations are made based on DEC analysis of several factors, which are laid out in Proposed Section 664.5. Freshwater wetland or wetland also includes any lands and waters smaller than 12.4 or 7.4 acres that are of "unusual importance" as determined by the DEC pursuant to the 11 characteristics noted in Proposed Section 664.6. The characteristics include, but are not limited to, significant flooding, rare plant, rare animals, vernal pools and floodways. The regulations define some

characteristics, but not all. A wetland need only possess one characteristic in order to qualify as a wetland of unusual characteristics subject to DEC jurisdiction. Application of this standard will lead to smaller wetlands being classified as jurisdictional wetlands. While this classification system will lead to the protection of additional wetlands, it can also increase responsibilities for both DEC and applicants due to the increased number of jurisdictional wetlands. DEC and applicants may be required to adjust their existing practices in order to implement the new regulations. In addition, both DEC and applicants will be required to work together to clarify the regulatory standards.

Potential Implications

While the regulations expand wetland protections, they also create potential confusion surrounding the wetland delineation process. The proposed regulations provide 11 characteristics to classify wetlands. However, they do not clarify all the applicable standards DEC personnel will use to evaluate these standards. While one goal of the proposed legislation is to create a more uniform system, the regulations will not aid in making the system predictable. One additional implication is delay in project completion. While there is a 90-day time frame for delineations, this period can be extended by DEC. The extension of a delineation period may result in a project proponent missing other agency mandated deadlines.

Future Steps

Comments on the proposed regulation must be submitted in writing and must be received by close of business on Sept. 19, 2024. Public hearings on the proposed regulations are scheduled virtually on Sept. 10, 2024, and in person on Sept. 12, 2024.

If you have any questions about this information memo, please contact [Julia O'Sullivan Poarch](#), any attorney in the [environmental and energy practice](#), or the Bond attorney with whom you are regularly in contact.

