

Questions and Answers on Amendments to the Freshwater Wetlands Act

6 NYCRR Part 664 Aug 14, 2024

Beginning January 1, 2025, amendments to the Freshwater Wetlands Act will take effect. DEC 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 to implement these changes. DEC has received the following questions regarding these amendments. This document will be updated as more questions are received during this comment period.

General

1.) Q: What are the practical implications of the four classifications?

A: Wetland classifications relate to Permit Issuance Standards found under 6 NYCRR Part 663: Freshwater Wetlands Requirements Regulations. Classifications are applied as DEC reviews project proposals with Class I wetlands having the highest level of restrictions and Class IV having less restrictions on activities that may be permitted as project proposals are reviewed for permitting purposes. The levels of restriction are found in 6 NYCRR Part 663.4 and 663.5.

2.) Q: How will a landowner determine if they have regulated wetlands on their property?

A: The changes to the Freshwater Wetlands Act that take effect in 2025 will result in changes to the process for stakeholders to determine if regulated wetlands are located on a parcel. Until 2025, regulated wetlands must be shown on regulatory maps. In 2025, regulatory maps will be replaced with informational maps. While informational maps will be available on DEC's website during fall 2024, stakeholders will need to contact the Bureau of Ecosystem Health in Albany for a jurisdictional determination of whether a parcel is regulated. DEC is developing protocols for conducting jurisdictional determinations. Responses to the Advance Notice of Proposed Rulemaking that was circulated in January 2024 are being used to inform development of the formal regulatory proposal that will clarify provisions contained in changes to the Freshwater Wetlands Act.

3.) Q: Why will DEC regulate adjacent areas within 100 feet of the wetland?

A: DEC has always regulated a 100-foot adjacent area to buffer state jurisdictional wetlands regulated under the Freshwater Wetlands Act. This buffer zone serves to protect and preserve the functions and benefits of state jurisdictional wetlands as impacts within 100 feet of wetlands often result in impacts to the wetlands themselves.

4.) Q: Will a link to state maps be provided?

A: DEC is currently working with the Cornell University Institute for Resource Information Sciences (IRIS) to model freshwater wetlands throughout the state. Once complete, the modeled freshwater wetland "informational maps" will be accessible through DEC's Environmental Resource Mapper or the DEC infoLocator. Initially, the informational maps will only depict the extent of freshwater wetlands according to how they were modeled. Please note that the Freshwater Wetland Informational Maps will serve for informational purposes only: their mapped extent will not dictate the extent of jurisdiction and will serve as one remote data source among many that will be used by DEC in making remote jurisdictional determinations. The extent of state freshwater wetland jurisdictional protection will be determined according to field conditions identified through wetland delineations conducted by DEC or verified by DEC following delineation by qualified consultants in the field.

Unusual Importance Criteria

5.) Q: Does a wetland need to be located within 2.48 miles of an Urban Area, or are wetlands that fall within that Urban Area buffer or Urban Area boundaries themselves jurisdictional?

A: There are two "unusual importance" regulations that address this question: 1. According to statutory changes to Article 24, wetlands that are entirely or partially within urban areas identified by the US Census Bureau will be jurisdictional under the state Freshwater Wetlands Protection Program as of January 1, 2025. 2. The 2.48-mile

distance in the draft regulations pertains to wetlands that fall within USGS HUC 12 watersheds that are within a 2.48-mile urban buffer. However, under the draft regulations, only wetlands that fall within HUC 12 watersheds that also meet two additional criteria will be jurisdictional. In addition to falling within a HUC 12 watershed that's 2.48 miles (4 km) or less from a US census bureau designated urban area, the wetlands must fall within a HUC 12 watershed having 2% or greater impervious surface, and less than 5% floodwater storage capacity. In summary, according to the proposed regulations, only wetlands meeting all three of these criteria will be state jurisdictional.

- 6.) Q: What resources can a citizen use to determine if a wetland is in a Critical Environmental Area, or if that area has specific protection by a local government?
A: Critical Environmental Areas may be viewed using the DECinfo Locator mapping tool accessed here: <https://gisservices.dec.ny.gov/gis/dil/>. Alternatively, Geographic Information Systems (GIS) Critical Environmental Area data may be downloaded via the NYS GIS Clearinghouse by following this link: <https://data.gis.ny.gov/datasets/225ec0de95304801a898597699226f3e/explore>
- 7.) Q: Who determines whether an area contains habitat for an essential behavior of a species, and how will such determinations be made remotely?
A: Defined under 6 NYCRR Part 182, "essential behavior" includes behaviors associated with breeding, hibernation, reproduction, feeding, sheltering, migration and overwintering. For jurisdictional purposes, DEC determines whether habitat is occupied based on whether there are verified reports of a protected species engaging in one or more essential behaviors in the freshwater wetland in question. The review process is data driven in that the jurisdictional determination team in DEC's central office will review existing survey data points in relation to the wetland areas being reviewed as jurisdictional determinations are made.
- 8.) Q: How will vernal pools be regulated on private land? *How does DEC anticipate these criteria to be carried out in a pragmatic way?
A: State regulation of vernal pools on private lands will largely be voluntary because any vernal pool must be in DEC's Productive Vernal Pool database as a pool "known to be productive for amphibian breeding" to be jurisdictional under the Freshwater Wetlands Protection Program. DEC's Productive Vernal Pools database will only include pools that a qualified ecologist has predetermined to be productive based on egg mass counts of specific target species within the Hudson-Mohawk, Great Lakes, Lower Hudson – New York City – Long Island, Adirondack, and Southern Tier regions of the state. If a vernal pool is not listed on DEC's Productive Vernal Pools database at the time a jurisdictional determination is being made, it has not been documented as being productive according to proposed criteria and will therefore be non-jurisdictional.

Projects in the Pipeline

- 9.) Q: If wetlands on a parcel with proposed development received a jurisdictional determination (JD) by DEC in 2024, but no necessary permits have been either applied for or granted by 12/31/24, do the new regs apply to that parcel as of 1/1/25?
A: If there is just a JD and nothing further then the new regulations will apply to any wetlands on the parcel meeting the proposed jurisdictional criteria. If issued a "confirmed complete" status on an application, then the new regulation won't apply until the expiration of the permit. For more details, contact deppermitting@dec.ny.gov

Determination

- 10.)Q: How will people submit requests for Jurisdictional Determinations?
A: All parties wishing to receive a jurisdictional determination for a given parcel or group of parcels will submit their request electronically through DEC's website. The program and process that DEC will use to receive, process, and respond to jurisdictional determination requests is currently under development.

11.)Q: What sort of timeline/turnaround can we expect for the remote determination and subsequent delineation or verification of wetland delineation reports?

A: With no means of accurately predicting the volume of jurisdictional determination requests the department will receive, we do not currently have a way of estimating a general timeline within which determinations will typically be made. The proposed regulations provide the department with 90 days following receipt of a jurisdictional determination request to satisfy the request unless weather or on-site ground conditions prevent the department from making a determination within the standard timeframe. In such cases, the department will notify the requestor of the need for an extension and reason(s) for the extension. According to the proposed regulations, if the department fails to meet the 90-day timeframe or provide a notification of an extension, the requestor can submit a notice of the failure to the department via certified mail with their name and copy of any materials sent with the initial request. If the department then fails to respond with a determination within 10 business days of such notice, state freshwater wetland jurisdiction for the subject parcel will be waived for a period of five years beginning on the date following the tenth business day.

Lakes and Submergent Vegetation

12.)Q: What areas of lakes will DEC regulate?

A: The Freshwater Wetlands Act states that contiguous areas of wetland vegetation, including submergent vegetation, that meet the minimum acreage 12.4 acres or greater will be regulated from January 1, 2025, until December 31, 2027. January 1, 2028, the default size threshold of regulated wetlands will decrease from 12.4 acres to 7.4 acres. The law regulates certain activities located in the wetland and adjacent areas within 100 feet of the wetland. The precise extent of regulated wetlands in and near a lake will be guided by yet-to-be-finalized regulations.

13.)Q: How will the new regulations impact what can be done to manage aquatic vegetation in lakes?

A: DEC has long regulated herbicide applications in lakes, while vegetation harvesting has only been regulated in or near mapped areas of wetlands. Beginning in 2025, these activities will be regulated by the Freshwater Wetlands Act on portions of the lakes that are currently functioning as wetland with submergent vegetation beds that meet the wetland size criteria of greater than 12.4 acres.

14.)Q: How will the new regulations impact using herbicides to control nuisance aquatic vegetation and invasive species?

A: Herbicide treatments and vegetation harvesting are regulated activities pursuant to the Freshwater Wetlands Act and supporting regulations. Proposals to conduct these activities require a freshwater wetlands permit and must ultimately meet DEC's permit issuance standards. DEC will be working with lake stakeholders to develop freshwater wetlands general permits that provide an efficient path for landowners in all municipalities surrounding the lake to comply with the new wetland's regulations. Regardless of multiyear general permits to address wetlands permitting requirements, herbicide treatments will continue to require 6 NYCRR Part 327 pesticide application permits annually.

15.)Q: Will DEC issue multiyear freshwater wetland permits?

A: Individual and general freshwater wetland permits can be valid for multiple years. However, applications of herbicides in regulated wetlands within a lake will require both a wetland's permit and a pesticides permit. Since New York State's pesticide laws prohibit multiyear permits, herbicides permits must be obtained yearly.