



National Association of Wetland Managers

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

February 15, 2024

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Submitted via WetlandRegulatoryComments@dec.ny.gov

Re: Advanced Notice of Proposed Rule Making (ANPRM) 6 NYCRR Part 664, Freshwater Wetlands Regulations.

To the New York State Department of Environmental
Conservation:

The National Association of Wetland Managers (NAWM) submits the following comments in response to the above referenced ANPRM concerning the proposed potential revisions to regulation 6 NYCRR Part 664, governing freshwater wetlands.

NAWM (formerly The Association of State Wetland Managers) is a national 501(c)(3) professional organization established in 1983, with a mission to build capacity for state and tribal members and foster collaboration among the wetland community of practice by encouraging the application of sound science to wetland management and policy, promoting the protection and restoration of wetlands and related aquatic resources, and providing training and education for members and the general public.

NAWM supports the Department of Environmental Conservation’s (DEC) efforts to update and clarify regulation 6 NYCRR Part 664, pertaining to freshwater wetlands. This Advanced Notice of Proposed Rule Making (ANPRM) is an important step in engaging stakeholders and receiving comments which will help inform the development of amendments to the Freshwater Wetlands Act (FWA). The recent U.S. Supreme Court (SCOTUS) ruling in *Sackett v. U.S. Environmental Protection Agency* has limited the geographic scope of the federal governments regulatory authority to protect wetlands under the Clean Water Act (CWA). As a result of this reduction in regulatory authority at the federal level it is important for State and Tribal governments to review their current regulatory scope and amend regulations to afford protections to these valuable aquatic resources. This request for input prior to the development and publication of amended

regulations will assist the DEC in assuring protections for valuable wetland resources which provide broad benefits to the public including maintaining water quality and quantity, providing resiliency buffers, and promoting healthy ecosystems.

The following are NAWM's comments to the eight (8) Sections of the ANPRM for which DEC is seeking feedback. We understand that this request is a "feedback-gathering" process and not a regulatory procedural one. However, it is hoped that DEC, should it proceed with rulemaking, will consider all comments received by stakeholders in the development of a clear, resource protective, regulation.

Introduction:

NAWM supports the three (3) proposed fundamental changes to the Freshwater Wetlands Act, Article 24 of the Environmental Conservation Law (ECL) being proposed.

1. **Phasing out of regulatory wetlands maps** – Historic mapping efforts have typically been based on high altitude imagery and their use as a regulatory demarcation contains inherent errors as a result of the scale of the mapping. New geospatial data is more refined, limits errors of scale, incorporates more recent land use changes, and can be used in combination with multiple sources to create refined mapping capabilities creating a platform which is more reliable and one which is updated at a much greater frequency. Also, these resources are widely available web-based platforms which can be utilized by individuals and consultants reviewing potential regulated wetland locations.
2. **Adding a class of wetlands of "unusual importance"** – Recognizing the unique functions of specific wetlands allows DEC to implement a more critical review of project proposals which may impact these important resources and raise awareness of their presence to potential applicants. This review can weigh the functions and values of these aquatic resources against the proposal and ultimately affect the outcome of the permit review process and any mitigatory requirements should impacts be authorized.
3. **Decreasing the default threshold from 12.4 acres to 7.4 acres** – Reductions in regulatory thresholds are supported by NAWM as more protective of wetlands, helping to maintain their functions on the landscape. NAWM would suggest that this proposed limit be supported by data and a rationale as to why this limit was selected in any future rule making effort. Size is only one factor in determining a wetland's "value" from the functions of the system and its benefits to the public and ecosystem. Many other factors need to be considered when determining regulatory thresholds including the potential effects of the loss of unregulated wetlands. This is particularly true in light of the recent limitations imposed by SCOTUS on the federal CWA which may no longer provide a backstop to the State freshwater wetlands program for certain wetlands systems.

Questions for which feedback is requested:

1. Wetlands of Unusual Importance – Significant Flooding (ECL § 24-0107)

- a) What specifically could DEC do to improve the three criteria used to determine wetlands of unusual importance in watersheds with significant flooding?

The current proposal appears to only be protective of those wetlands which lie within 4 km of an area identified by the U.S. Census Bureau as “Urban” and have 2% or more impervious surface and less than 5% classified as “storage zones” at the 12-digit HUC scale. This is very limiting in its applicability and does not account for those areas which are affected by flooding as a result of the loss of storage capacity within the watershed outside of the defined “urban” locations. It would also be informative to indicate how these criteria are compatible with, or needed in addition to, existing municipal stormwater regulations. It may be better to base the criteria on stream and river gauge data analysis and flooding resulting from a particular storm event classification (i.e. a 10-year flood event). Using alternative criteria based on flooding events could still be protective of urban areas while also be beneficial to those communities outside of this classification, but which may be affected by flooding and benefit from additional wetlands resource protections. Also, basing the qualification on 2% impervious surface does not account for other surface permeability rates which affect runoff and does not account for topographic influences on flow volumes and velocities. Any estimates of storage zones should only be calculated in flood zones or floodways such as the 500-year flood zone as defined by the Federal Emergency Management Agency (FEMA) since the effectiveness of the storage capacity by these resources on flood events may be diminished outside of these areas. The U.S. Geological Survey and FEMA have geospatial and stream gauge tools which could assist in refining flooding and flood storage analysis to identify 12-digit HUC’s which experience “significant flooding” as well as other satellite and aerial photography resources. The ANPR proposal does not indicate if there is a size threshold for wetlands which qualify under these criteria and should be defined, even if there is no minimal requirement.

2. Wetlands of Unusual Importance - Rare Animals (ECL § 24-0107)
 - a) Do you have any specific concerns with any of these criteria?

NAWM does not have any specific concerns with these criteria as proposed. It seems that this category of wetlands is closely related to those identified in category number 5 which are defined as Class 1 wetlands. Therefore, could the criteria for these 2 categories of important wetlands be combined in order to provide clarity to the public on those wetland types having special criteria related to threatened and endangered species? Is there a size/threshold limitation related to this category?

3. Wetlands of Unusual Importance – Vernal Pools (ECL § 24-0107)
 - a) Do you have any specific concerns regarding any of the six criteria for identifying vernal pools known to be productive for amphibian breeding?

NAWM does not have any concerns regarding the six criteria for identification of amphibian breeding usage.

- b) Do you have any specific concerns regarding the notification and documentation requirements set forth in item b) above?

NAWM supports the protection of vernal pools and the important role which they play in amphibian reproduction. The criteria proposed are very prescriptive and would only be able to be analyzed post breeding events prior to hatching. It is unclear if these criteria are meant to be informative to the public on how the website identified in Section (b) was populated or if the property owner would need to undertake an amphibian egg mass survey to determine if the vernal pool being analyzed was a regulated "Wetlands of Unusual Importance". If the determining factor for regulation under this section is identification of the resource on the department's website, then that is the primary factor for which the regulated community needs to be responsible for conducting an examination to make a determination. The current language seems to indicate that the department is responsible for making the determination of amphibian usage of a vernal pool and entering it onto the website; if this is not correct then clarification is needed. Also, Section (b) suggests that the website indicating locations of identified amphibian usage meeting these criteria has not yet been created. If this is correct, then an estimated date of finalization and population of information should be included, particularly if this is the method which the public will be using to determine if a vernal pool resource is regulated or not. If there are no size criteria for qualification, then that should be indicated.

4. Wetlands of Unusual Importance – Local or Regional Significance (ECL § 24-0107)
a) Do you have any specific concerns regarding the criteria to identify wetlands of local or regional significance?

NAWM does not have any specific concerns regarding the criteria to identify locally or regionally significant wetlands. It may be clarifying to define what is meant by "partially located" and provide a reference to the Adirondack Park wetlands regulations. Noteworthy to point out is that wetlands which are adjacent to, or drain into an area which meet these criteria, could influence wetland condition, and may warrant additional scrutiny during the permitting process for any potential effects to the identified "wetlands of unusual importance".

5. Wetlands of Unusual Importance – Class I Wetlands (ECL § 24-0107)
a) Do you have any specific concerns with any of the Class I characteristics?

Identifying special wetland types which require additional regulatory protection is an important part of a freshwater wetlands program. No specific concerns are raised by the proposed criteria. As identified in prior comments, some of these

criteria may be repetitive. NAWM recommends that classes of “wetlands of unusual importance” be only defined once with the specific criteria to qualify as such by avoiding any possible confusion. In addition, the qualifier of “Nutrient Poor Wetlands” may not be accurate for all the wetland communities identified and there might be a better way to describe the suite of wetland types listed; “rare or difficult to replace” may be an alternative. Many of these systems are underlain with organic soils; using or adding a soils criterion may be beneficial to the regulated community for identification purposes. The use of organic soils could also afford protections to those wetland systems which are difficult to replace but do not meet the specific criteria of the listed types. Wetlands underlain with organic soils have the added benefits of carbon storage/sequestration and may be valuable in adding to the class 1 wetlands category.

6. Extending Adjacent Areas (ECL § 24-0701(2))

a) Do you agree with this approach?

b) Are there other wetland types that the DEC should consider extending the adjacent area around?

NAWM is supportive of buffer zones for the protection of wetland systems and functions. The proposal to increase those areas to 300 feet for “Nutrient Poor Wetlands” will provide additional oversight to activities which could impact these systems. The systems identified as eligible to receive additional adjacent area oversight are sensitive to disturbance, sedimentation, and nutrient loadings. See section 5 comments for additional input related to the definition of “Nutrient Poor Wetlands” and the recommendation to expand the system included by incorporating the use of an organic soil criterion.

7. Jurisdictional Determination Procedure (ECL § 24-0703)

a) How could the process of jurisdictional determinations be improved or clarified?

The procedural language in the section could be clarified. It is not clear if the determination process described in criteria (a) requiring a wetlands delineation is the same process identified in criteria (b) or separate. If a delineation is required prior to receiving a regulatory determination from DEC, is the expectation that this is performed by the “person” or the Department? If delineations are to be undertaken by the “person” or their consultant, then the procedural manual for delineating state regulated wetlands should be referenced. If DEC is the party responsible for conducting the wetlands delineation, then criteria (b) should supersede (a). However, if there is a potential for either of these scenarios to be applicable then this section needs to clearly articulate when each is applicable. Criteria (c) seems to be unnecessarily binding on the department with weather/ground conditions being a sole modifier to the 90-day time frame. It is unclear whether the assumption is “no-jurisdiction” should the department fail to act within the allotted 90-day window and therefore, a project proponent may proceed. This should be clarified so that the regulated community are aware of the

consequences of the DEC's failure to act. It is recommended that procedures are put in place to allow the department to administratively extend the 90-day period for reasons other than the "weather or ground conditions" including completeness of the request, failure of project proponents to respond, and departmental workloads as examples. Strict reliance on a negative jurisdictional determination for purposes of regulatory enforcement may be creating a very broad defense, "complete" as indicated, when other factors may influence the underlying analysis which could invalidate the original determination. While it is understandable that the department wishes to provide a sense of assurance to project proponents, the language suggested may be overly broad and binding on the State. If there is a time frame for validity of approved wetlands delineations or "jurisdictional determination", this should be indicated in this section.

8. Jurisdictional Determination Review (ECL § 24-0703(5))

a) How could the process of review of jurisdictional determinations be improved or clarified?

Criteria (b) of this section discusses the need for a verified delineation or wetlands identification. It is unclear whether the process of delineation or identification is undertaken by the project proponent and/or their consultant or if this is a DEC only responsibility. If this is the process identified in Section 7 then that should be noted and referenced in the criteria. Is there an arbitrator for the appeals process or a landowner elevation method should they disagree with the department's findings of the appeal request? This should be indicated to inform the regulated community of potential avenues of recourse post-appeal.

NAWM thanks the DEC for an opportunity to provide feedback in this ANPRM for the proposed amendments to the NY Freshwater Wetlands Act. As indicated, we are supportive of this effort, and have provided feedback to help clarify the proposed revisions and project proponent requirements. This is an opportunity for the State to strengthen their existing regulations and afford additional protections to "wetlands of unusual importance". The functions of these systems provide value to the citizens of New York State and provide both societal and environmental benefits which are worthy of protection. Should you have any questions or seek clarification please contact Jeff Lapp, Senior Science Policy Advisor, at jeff@nawm.org.

Sincerely,



Marla J. Stelk
Executive Director

Cc: NAWM Board of Directors