

NYDEC Expands its Jurisdiction over Wetlands

February 21, 2025
By Matthew Karmel



Expansive changes to New York's Freshwater Wetlands Permitting Program took effect on January 1, 2025, increasing regulated freshwater wetlands. The changes came after the New York State Department of Environmental Conservation (NYDEC) enacted new regulations which amended its Freshwater Wetlands Jurisdiction and Classification rules. The updated rules are expected to protect an additional one million acres of wetlands by 2028. The changes come after New York's legislature modified the Freshwater Wetlands Act (the "FWA") in 2022 to make several changes to the way the Freshwater Wetlands Program is to be administered for those in need of Freshwater Permit prior to conducting certain activities in a protected wetland or adjacent area. Such activities include, but are not limited to, the excavation or grading of soil, the modification or construction of buildings, septic systems, bulkheads, dikes or dams, and the application of pesticides in wetlands.

NYDEC announced that the changes provide increased protections for wetlands that will help the New York adapt to increased flooding risk associated with the changing climate and conserve critically important natural resources, including threatened and endangered species and the wetlands that they inhabit. These environmental benefits result from NYDEC expanding the areas that are subject to its regulations and the requirement to obtain jurisdictional determinations and/or Freshwater Wetland permits for projects located in such areas.

The newly enacted regulations take effect in two stages. The first, which became active on January 1, 2025, expands the areas that fall within the definition of "Wetlands of Unusual Importance." This includes wetlands in urban and flood-prone areas, wetlands inhabited by rare plants or animals, wetlands important to water quality, and vernal pools. The second stage begins on January 1, 2028, and reduces the size of wetland areas that trigger NYDEC's jurisdiction from 12.4 acres to 7.4 acres. Individuals in New York can be assured that this expansion in jurisdiction will increase the number of permits needed under the FWA.

Another significant change is that property owners must now apply to NYDEC for a jurisdictional determination to ascertain:

- whether their land contains either state-regulated freshwater wetlands or state-regulated adjacent areas (a "parcel jurisdictional determination") and/or
- whether a proposed activity on a parcel subject to NYSDEC freshwater wetlands regulation requires a permit (a "project jurisdictional determination").

Simply, the new regulations not only require significantly more project developers to work with the DEC to determine if their project impacts freshwater wetlands but also require landowners who are planning activity on their property to obtain a determination from NYDEC as to whether freshwater wetlands are located on any portion of their property.

In order to allow for a more just transition for permittees, certain projects are exempt from the new requirements until either January 1, 2027 or July 1, 2028, depending on the type of project. The revised regulations become applicable on January 1, 2027, for “minor” projects (as defined in 6 NYCRR § 621.4) or on July 1, 2028, for “major” projects, provided that such projects had achieved certain developmental thresholds before January 1, 2025.

In addition to the finalized 2025 regulations, in order to ease the enhanced permitting burdens, DEC has published a statewide draft general permit for public comment (GP-0-25-003). This can be found on DEC’s Freshwater Wetlands General Permit website, for various activities in State-regulated freshwater wetlands (the “Permit”). The General Permit is proposed to be issued for the following:

- Repair, replacement, or removal of existing structures and facilities.
- Construction or modification of various residential, commercial, industrial, or public structures.
- Temporary installation of access roads and laydown areas.
- Cutting trees and vegetation.
- Drilling test wells.
- Routine beach maintenance and replenishment.

The comment period runs until January 27, 2025.

Considering these changes to the Freshwater Wetland Program, it is imperative that new or expanding project applicants work with experienced wetland permitting attorneys in order to avoid project delays and/or assessment penalties.