

2022

Legislature Expands State's Jurisdiction Over Freshwater Wetlands

Michael B. Gerrard
Columbia Law School, michael.gerrard@law.columbia.edu

Edward McTiernan
Arnold & Porter

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Environmental Law Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Michael B. Gerrard & Edward McTiernan, *Legislature Expands State's Jurisdiction Over Freshwater Wetlands*, 267(91) N.Y.L.J. (2022).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/3391

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu, rwitt@law.columbia.edu.

ENVIRONMENTAL LAW

Expert Analysis

Legislature Expands State's Jurisdiction Over Freshwater Wetlands

Regulation of wetlands is one of the most significant ways that the government controls land use. While federal jurisdiction over wetlands is buffeted by the political and judicial winds, the New York Legislature has just expanded considerably the authority of the State Department of Environmental Conservation (DEC) to protect these areas and inhibit development there.

Lands, commonly labelled as bogs, swamps or marshes, which are inundated with water frequently enough to develop particular soils, hydraulic regimes or vegetative communities are generally classified as “wetlands” under certain environmental laws. The Tidal Wetlands Act and Freshwater Wetlands Act, added to the New York Environmental Conservation Law (ECL) in 1973 and 1975

MICHAEL B. GERRARD is a professor and director of the Sabin Center for Climate Change Law at Columbia Law School, and senior counsel to Arnold & Porter. EDWARD MCTIERNAN is a partner with Arnold & Porter and former General Counsel of the New York State Department of Environmental Conservation.



By
**Michael B.
Gerrard**



And
**Edward
McTiernan**

respectively as ECL Articles 24 and 25, established it to be the public policy of the state to preserve wetlands by limiting their use and

The 2022 budget legislation expanded DEC's role by changing the definition of areas that constitute a regulated freshwater wetland.

development. The basic regulatory scheme in both laws is to minimize development in regulated wetlands and adjacent areas and to compensate for unavoidable losses.

Until now the Freshwater Wetlands Act only granted DEC authority to regulate wetlands of a certain size or importance. However, the 2022 budget legislation expanded DEC's role by changing the definition of areas

that constitute a regulated freshwater wetland. In this article we review this change and outline how it will be implemented.

Unusual Features of New York's 1975 Freshwater Wetlands Act

ECL Article 24 recognized that freshwater wetlands can provide extraordinary environmental benefits. However, as originally enacted, ECL §24-0301(1) limited the state permit program to freshwater wetlands of 12.4 acres (5 hectares) or greater, or to wetlands formally determined by DEC to be of “unusual local importance,” or of an acre or more within the Adirondack Park that are adjacent to a stream or lake. The statute also provided that in order to be regulated, freshwater wetlands must be mapped. As the Court of Appeals noted in *Drexler v. Town of New Castle*, 62 N.Y.2d 413, 417 (1984), “the statute defines ‘freshwater wetlands’ as only those lands and waters ‘shown on the freshwater wetlands map’ and it defines the ‘freshwater wetlands map’ as that ‘promulgated

by [DEC]['] Consequently, only those lands or waters satisfying either the size or the importance criterion are shown on the State-prepared map and constitute 'freshwater wetlands' within the meaning of the statute."

To further complicate matters, when it adopted the Freshwater Wetlands Act in 1975, the Legislature recognized that local governments had regulatory authority over freshwater wetlands under various land use laws. As a result, the statute basically granted local governments exclusive jurisdiction to regulate wetlands less than 12.4 acres and not deemed by DEC to be of "unusual local importance." A 1990 amendment to ECL §24-0509 granted local governments authority to exercise concurrent jurisdiction over freshwater wetlands, whether or not DEC is asserting its jurisdiction, provided that the local requirements are at least as stringent as the statewide statutes and regulations.

Mapping Freshwater Wetlands Has Proven To Be Cumbersome

The Freshwater Wetlands Act, as enacted in 1975, was designed to strike a balance between preservation and protection on the one hand, and reasonable economic use and development on the other. *Spears v. Berle*, 48 N.Y.2d 254, 260 (1979). Part of this balancing was reflected in the procedures imposed upon DEC for

mapping wetlands. These procedures are intended to ensure that maps are accurate and that property owners and local governments have ample notice and opportunity to comment on any proposal to designate land to be subject to this regulation.

Maps were generally prepared on a county-wide basis. DEC initiated the process of mapping using aerial photography, soil surveys and other wetlands inventories, followed by limited field verification. DEC then developed preliminary 1:24,000 scale maps which were distributed in draft to appropriate local governments. DEC was also required to notify affected landowners by certified mail, publish legal notice in two newspapers, and post notice in the *Environmental Notice Bulletin*. A public comment period on the accuracy of the maps was also required, and field visits were often deemed necessary to ensure accuracy. Only after DEC completed these steps could these jurisdictional maps be finalized and filed with county clerks. The wetlands mapping process proved to be very resource intensive for DEC, and as a result many freshwater wetlands maps are badly out of date.

Pressure To Amend the Freshwater Wetlands Act

New York's unique approach to regulating freshwater wetlands has long been a source of concern for various environmental organiza-

tions. These concerns increased in the early 2000s with the growing confusion over the authority of the U.S. Army Corps of Engineers to regulate wetlands under §404 of the Clean Water Act. The U.S. Supreme Court ruled in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) that the Clean Water Act did not cover isolated wetlands, and if it did, that could violate the Commerce Clause. Then in *Rapanos v. United States*, 547 U.S. 715 (2006), the court issued a highly fractured opinion whose effect was to further limit Corps jurisdiction. The Obama administration issued regulations adopting a fairly broad definition of regulated areas; those regulations were buffeted by numerous lawsuits, and the Trump administration repealed them. The Biden administration has started the process to expand the definition again. The Supreme Court has granted certiorari in a case, *Sackett v. Environmental Protection Agency*, that again raises the issue of the extent of federal jurisdiction over wetlands; it is now being briefed and will be argued in the fall. But despite these concerns about the rollback of federal protections, and pressure brought to bear by various organizations, the New York Legislature repeatedly failed to enact major reforms to the Freshwater Wetlands Act.

All of that changed when the Legislature passed, and on April 1, 2022, Gov. Kathy Hochul signed into law a massive budget bill, Chapter 58 of the Laws of 2022. Its Part QQ extensively amends the Freshwater Wetlands Law.

Section 2 of Part QQ removes the requirement that freshwater wetlands be mapped before they can be subject to regulation by DEC. It makes clear that DEC's existing maps "are not necessarily determinative as to whether a permit is required" to develop a potential freshwater wetland. From now on, DEC's wetlands maps are merely advisory and need not follow the prior map adoption and revision process. Moreover, the new law also establishes a rebuttable presumption that "mapped and unmapped" areas exhibiting wetlands characteristics are regulated freshwater wetlands. This presumption can be overcome by a field verification which is conducted by DEC or by a third party and approved by DEC. Such approvals are effective for five years.

As noted above, the prior law provided that, in order to be regulated by the state, a wetland must be either 12.4 acres in size or of "unusual local importance." The new law keeps the 12.4 acre figure but provides that a smaller wetland can be regulated if it is of "unusual importance," and it is sufficient to have any one of eleven listed characteristics, some of which

are quite broad. For example, any wetland "located within or adjacent to an urban area" is deemed of unusual importance. This is a considerable expansion of DEC authority.

Based upon this new law, DEC will need to revise its regulations to provide details about the process for verifying the presence of wetlands in the field. Because, with respect to delineation, the new law brings New York into line with federal practice and the procedures used in most other states, any reasonable delineation process should be familiar to many landowners and prospective developers and should not be controversial. However, regulations designed to implement DEC's new authority over freshwater wetlands of "unusual importance" regardless of their size could prove to be very controversial. Especially considering that federal authority over isolated wetlands is in flux, how DEC deals with de minimis wetlands areas, drainage ditches and similar man-made wetlands that fall within the various categories of unusual importance could prove to be very controversial.

The new law allows parties who dispute the designation of a wetland to present information to DEC that the area does not qualify. It allows "any person" to ask DEC whether a given parcel of land includes a freshwater wetland subject to regulation or a regulated adjacent area. DEC then has 90 days to provide a definite

answer (unless weather or ground conditions require more time). The new law also requires DEC to "accept information from federal government sources, other state sources, local governments, colleges, universities, environmental organizations or other private agencies, regarding the location of freshwater wetlands."

Other Applicable Laws

DEC's jurisdiction is not exclusive. Wetlands in New York continue to be subject to concurrent regulation by federal, state and local governments. In addition, development in and around wetlands can also be subject to review pursuant to a number of other state laws including, but not limited to, the State Environmental Quality Review Act, the Coastal Erosion Hazard Areas Act and the Adirondack Park Agency Act.