



## CHAngemaker John Greaves, IV, CWS, CWB

### A Synopsis of Proposed Changes to New York's Freshwater Wetland Regulations

The New York State Freshwater Wetlands Act was passed in 1975 with the intent to preserve, protect and conserve freshwater wetlands and their benefits, consistent with the general welfare and beneficial economic, social, and agricultural development of the state. Currently, the state only regulates its larger wetlands (12.4 acres or larger) and “wetlands of unusual local importance (i.e., has critical habitat for threatened/endangered species, abuts a drinking water supply, etc.)” You might be asking yourself, what about the other wetlands?

Many of the smaller wetlands in New York have typically received protection from the federal government under the Clean Water Act (CWA), but the CWA typically only regulates waters that have a surface water connection to Traditional Navigable Waters (waters of the United States). The CWA protections typically do not extend to “isolated” wetlands that lack a surface water connection to other waterbodies. Therefore, not all wetlands are protected in New York.

As a result, and due to impacts prior to wetland regulations, New York has lost an estimated 60 percent of its wetlands. For comparison, it is estimated that 53 percent of the wetlands in the lower 48 states have been lost due to filling, dredging, draining, and other impacts. So, why is this important? Because wetlands provide significant ecological and anthropogenic functions and values such as flood and stormwater control, sediment and pollutant capture, carbon sequestration, water supply (groundwater recharge and discharge), water quality improvements, fish and wildlife habitat, important and complicated food chains, and opportunities for recreation, open space, scientific research, and education. Although these systems are important for ecological integrity and buffering the impacts of climate change, federal CWA protections are constantly challenged in the courts.



(800) 836-0817  
[CHASOLUTIONS.COM](http://CHASOLUTIONS.COM)  
#theCHAWay

On August 29, 2023, the “Revised Definition of Waters of the United States” rule was issued by the United States Environmental Protection Agency (EPA) and Department of the Army, and it became effective on September 8, 2023. That rule now excludes wetlands abutting streams that aren’t “relatively permanent” from federal protection. This can have huge implications for the fate of wetlands within states that rely on the CWA for the protection of all or part of its waters. For those states that value their wetland resources, greater state involvement in wetland protection is required.

New York State is beginning to address this regulatory shortfall by incorporating legislation to protect some of its smaller wetlands through the existing Article 24 Freshwater Wetlands Act. Current freshwater wetland mapping and wetland classification regulations identified in 6 NYCRR Part 664 will be replaced. Three major changes are proposed:

1. **Beginning January 1, 2025**, existing mapping depicting Department of Environmental Conservation (DEC)-regulated freshwater wetlands will become informational and will no longer limit DEC regulation to wetlands depicted on those maps. Wetlands meeting applicable criteria, as outlined below in “Classification Procedures,” will be regulated by NYSDEC and subject to permitting, regardless of whether they are illustrated on the wetland mapping. To determine if state-regulated freshwater

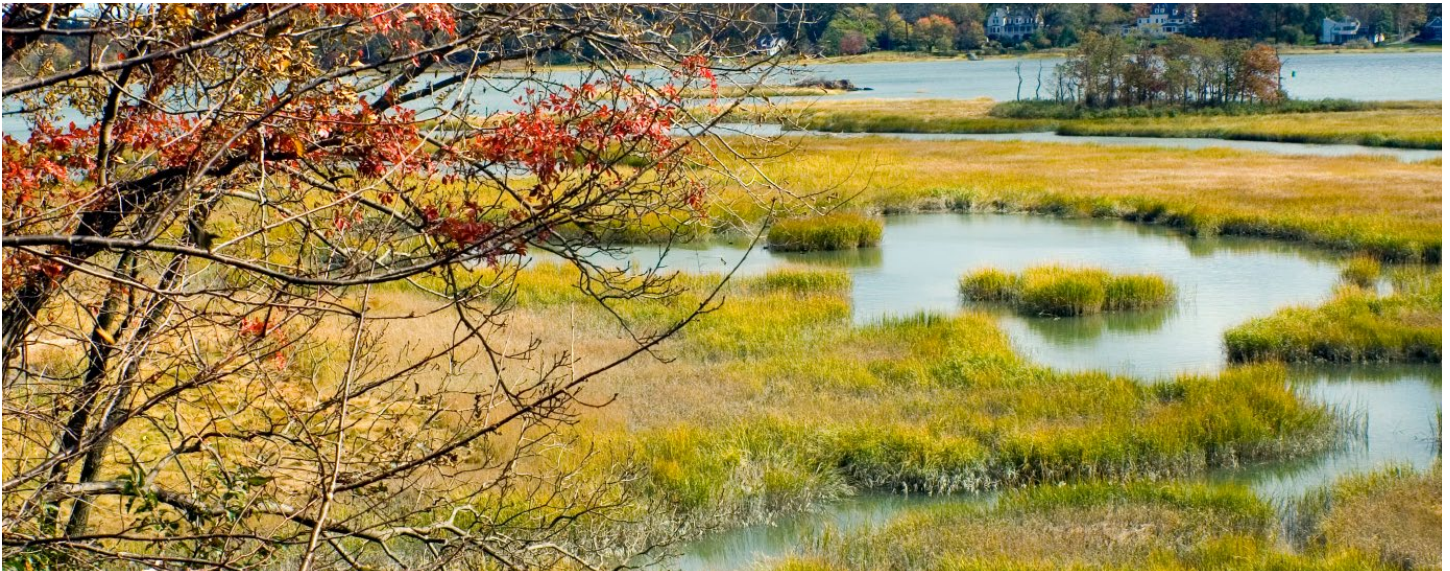
wetlands or their regulated adjacent areas are on a parcel, DEC will rely primarily on aerial imagery and remote data.

2. **Also, beginning January 1, 2025**, smaller wetlands of “unusual importance” will be regulated. To meet this designation, the wetlands must meet at least one of 11 newly established statutory criteria.
3. **Beginning in 2028**, wetlands 7.4 acres or larger will be regulated, which is down from the current threshold of 12.4 acres. The smaller wetlands of “unusual importance” will still be regulated if they meet one of the newly listed criteria.

### Classification Procedures

Each state-regulated wetland will continue to be classified by NYSDEC according to its ability to perform wetland functions and provide wetland benefits. The highest rank (and most protected) is Class I, with ranks descending to Class II, III and IV.

- **Class 1 Wetland** has any of the following characteristics, as documented by NYSDEC:
  - Contains habitat for an essential behavior of a species listed as endangered or threatened by NYS or the United States Department of the Interior.



- Contains an endangered or threatened plant species.
  - Falls within or is contiguous to a Significant Coastal Fish & Wildlife Habitat Area.
  - Is a tidally influenced wetland not regulated by the department pursuant to Article 25 (Tidal Wetlands) of the Environmental Conservation Law (ECL).
  - Is contiguous to a tidally influenced wetland regulated under Article 25 of the ECL.
  - Contains a wetland plant community identified as critically imperiled.
  - Is a nutrient-poor wetland.
  - Is located in an area designated as a floodway on the most current Digital Flood Insurance Rate Map (DFIRM) produced by the Federal Emergency Management Agency (FEMA).
  - Is contiguous to fresh surface waters having classifications of A, AA, AA-S, A-S, or N.
- Is contiguous to impaired surface waters found on New York State's most recent Clean Water Act Section 303(d) List of Impaired Waters.
  - Has all three wetland structural groups: woody, herbaceous, and open water.
  - Consists of floating and/or submerged aquatic vegetation (SAV) and is not dominated ( $\leq 50\%$ ) by invasive species.
  - Is located within or adjacent to an urban area as defined and identified by the United States Census Bureau in their most recent decennial census.
  - Is located in, or is partially located in, an area identified as a disadvantaged community as defined in the Climate Leadership and Community Protection Act (CLCPA).
  - Is located in, or is partially located in, an area identified as a Potential Environmental Justice Area.
- **Class 2 Wetland** has any of the following characteristics, as documented by NYSDEC:
    - Contains an occurrence of an animal species identified as 'critically imperiled' or 'imperiled.'
    - Contains habitat for an essential behavior of a species of special concern, or a species listed in the New York State Wildlife Action Plan (Sept. 2015) as a 'high priority' species of greatest conservation need.
    - Contains an occurrence of a plant species identified as 'critically imperiled' or 'imperiled.'
    - Is a Great Lakes Coastal Wetland that is not part of a Significant Coastal Fish & Wildlife Habitat area.
    - Is a vernal pool regulated pursuant to this Part.
    - Contains a wetland plant community identified as 'imperiled.'
    - Is located within a FEMA designated 100-year floodplain on the most current DFIRM.
    - Is within the boundary of an Environmental Protection Agency (EPA) identified Sole Source Aquifer.
    - Is contiguous to fresh surface waters having classifications of B.
    - Is contiguous to fresh surface waters assigned a standard of A(t), A(ts), AA(t), AA(ts), A-S(t), A-S(ts), AA-S(t), AA-S(ts), B(t), B(ts), C(t), or C(ts).



- **Class 3 Wetland** has any of the following characteristics, as documented by NYSDEC:
  - Contains an occurrence of an animal species identified as ‘vulnerable.’
  - Is located within a FEMA designated 500-year floodplain on the most current DFIRM produced by FEMA.
  - Is contiguous to fresh surface waters having classifications of C.
  - Contains shrub-swamp and forested cover type(s).
  - Is an emergent marsh or wet meadow and is not dominated by ( $\leq$  50%) invasive species.
  - Contains a wetland plant community identified as ‘vulnerable.’
  - Is in a town in which wetland acreage is less than one percent (1%) of the total acreage.
- **Class 4 Wetland** has any of the following characteristics, as documented by NYSDEC:
  - Is contiguous to fresh surface waters having classifications of D.
  - Consists of floating and/or submerged aquatic vegetation (SAV) and is dominated ( $>$  50%) by invasive species.
  - Is an emergent marsh or wet meadow and is dominated ( $>$  50%) by invasive species.
  - Is a wetland of “unusual importance.”
    - A freshwater wetland, regardless of size, is of ‘unusual importance’ and regulated if it possesses one or more of the following characteristics as determined by NYSDEC:
      - Significant Flooding. Wetland is located in a 12-digit Hydrologic Unit Code (HUC) that meets three specific listed criteria.
      - Urban Areas. Located within or adjacent to an Urban Area, as defined and identified by the United States Census Bureau.
      - Rare Plants. Contains a plant species occurring in fewer than thirty-five sites statewide or having fewer than five thousand individuals statewide, as documented by the department.
- Rare Animals. Meets one or more of the following criteria, as documented by the department.
  - Contains habitat for an essential behavior of a species listed as endangered, threatened, or special concern.
  - Contains habitat for an essential behavior of a species of greatest conservation need listed in the New York State Wildlife Action Plan (Sept. 2015).
- Is classified by the department as a Class I wetland.
- Unusual Local Importance. It was previously classified and mapped by the department as a wetland of unusual local importance.
- Vernal Pools. It is a vernal pool that is known to be productive for amphibian breeding (certain criteria need to be met).
- Floodways. It is located in an area designated as a floodway on the most current DFIRM produced by FEMA.
- Previously Mapped Wetlands. It was previously mapped by the department as a regulated wetland on or before December 31, 2024.
- Local or Regional Significance. It has wetland functions and values that are of local or regional significance because it meets one or more of the three listed criteria.

### Miscellaneous Provisions

In addition to the classification system above, there are miscellaneous provisions outlined in the proposed regulations that may affect wetland and/or adjacent area boundaries:

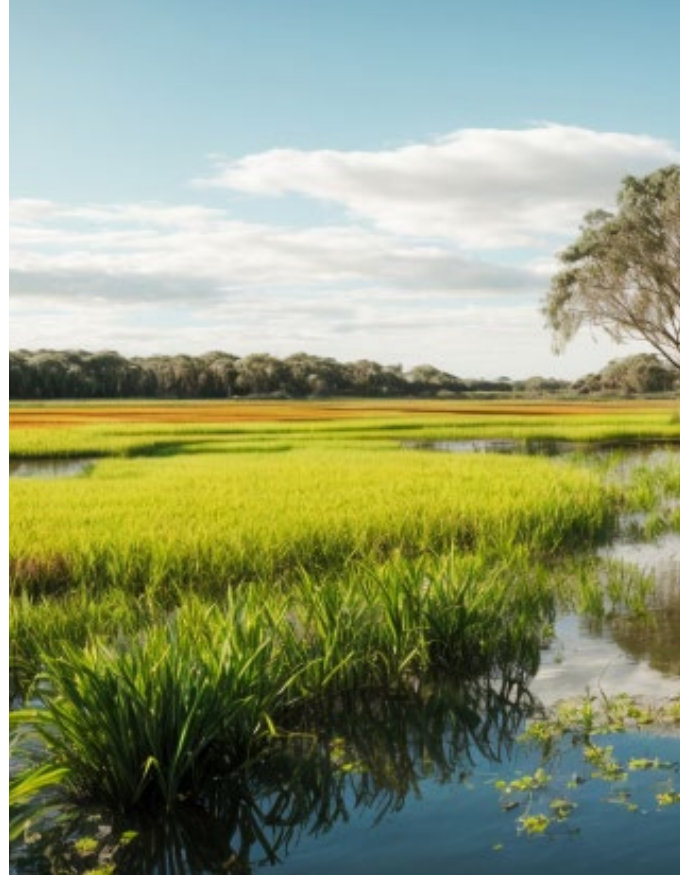
- Extending Adjacent Areas. The adjacent area of Nutrient Poor Wetlands documented by the department shall be extended to 300 feet (91.44 meters) to protect and preserve the wetland.
- Treatment of Two or More Areas as a Single Wetland. Two or more areas identified by the department as freshwater wetlands pursuant to this Part may be classified and regulated as a single wetland if they are hydrologically connected, either on the surface or sub-surface, and no more than 50 meters (approximately 164.04 feet) apart.

## Jurisdictional Determination Procedures

The proposed regulation changes also provide procedures for ascertaining a jurisdictional determination by the NYSDEC:

- Any person may submit to the department a request for a determination as to whether a given parcel of land includes freshwater wetlands or freshwater wetland adjacent areas subject to state regulation. Such request may also inquire as to whether a permit is required for a proposed activity, provided the person has submitted a verified wetland delineation and site-specific development plans to DEC.
- The department shall provide a definite answer in writing within 90 days of such request. However, it may extend such period until a determination can be made due to weather or ground conditions preventing the department from making a jurisdictional determination.
- Jurisdictional determinations, which are appealable, are valid for a period of five years from the date it is issued.

These proposed changes are a good first step toward protecting our wetlands, but every state needs to do more. The loss of wetlands in New York, as well as other states, is a concern for all of us and one that we should continue to monitor and address as we collaborate to build a more sustainable future.



### About the Author

John Greaves IV, CWS, CWB\*\*, Certified Senior Ecologist\*\*\* is a Senior Environmental Scientist at CHA Consulting, Inc. John has 20 years of professional experience in wildlife, vegetation, wetland delineation, ecological inventories, threatened and endangered species surveys, habitat creation, habitat management, wetland mitigation, stream assessment, environmental screenings, and environmental permitting. Specialties include identification and natural history of wildlife, vegetation and ecological communities, biodiversity, environmental impact assessment, and environmentally sensitive design. You can reach John at [JGreaves@chasolutions.com](mailto:JGreaves@chasolutions.com).

\*\*The Wildlife Society

\*\*\*Ecological Society of America