

A vertical photograph of a city skyline at night, featuring several illuminated skyscrapers and a bridge over a body of water. The image is positioned on the left side of the slide, partially overlapping a red banner.

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# Recent Changes in State and Federal Freshwater Wetlands Laws

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DISCLAIMER: This is an outline of issues and potential issues and is not intended as legal advice; this presentation is no substitute for legal advice and analysis from experienced counsel for your municipality.



Unlike the federal program for protection of wetlands (i.e. Waters of the US), the State program found in Environmental Conservation law Article 24 for the protection of Freshwater Wetlands has been remarkably consistent and unchangeable since the regulations were adopted in the 1980s.

-----Only officially mapped wetlands 12.4 acres in size or larger were regulated. In very rare cases wetlands of unusual local importance were also mapped.

In 2022, however, the State Legislature and the Governor adopted some major changes to the State Freshwater Wetlands Law.



These changes are as follows:

- As of January 1, 2023 – Increasing permit application fees;
- As of January 1, 2025—Eliminating the NYS Freshwater Wetlands Mapping procedures and regulatory jurisdiction— i.e. no longer limiting DEC jurisdiction to mapped wetlands;
- As of January 1, 2025—Small wetlands (of any size) considered of “unusual importance” will be regulated if they meet one of 11 newly-established criteria in the law;
- As of January 1, 2028—The default size threshold from regulated wetlands will be 7.4 acres (not 12.4 acres).



NYSDEC staff are in the process of drafting new regulations which must be in place by January 1, 2025 based on the direction in the 2022 Legislation.

NYSDEC issued an Advanced Notice of Proposed Rule Making (ANPRM) for Potential Revisions to Freshwater Wetlands Regulations—6 NYCRR Part 664.

# Advanced Notice of Proposed Rule-Making

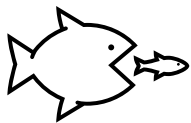
**Comments are due on the ANPRM FEBRUARY 17, 2024**

Stakeholder Meetings in Person or Virtually Have not been Announced.

**The official draft regulations will be required to go through the SAPA process.**

**The ANPRM can be found at <https://on.ny.gov/3NAMsK5> or on the NYSDEC website.**

Roy (“JR”) Jacobson at NYS DEC Central Office Fish and Wildlife is in the process of developing the regulations and Robert O’Connor in counsel’s office is assisting.





Rebuttable Presumption—the Legislature has decided not to provide advanced regulatory notice of the boundaries of NYSDEC wetlands—i.e. regulatory maps with notice mailed to landowners when the map is created or amended. Instead the program will operate like the federal wetlands program.

If you have a “wetland” on your property that may be regulated by the State the presumption is rebuttable.

The landowner has to prove to the NYSDEC that the wetland on or near their property is NOT regulated by NYSDEC.



Practically speaking if you have a freshwater wetlands on your property or adjacent to your property you will be required to obtain a delineation from a wetlands biologist and to have NYSDEC wetlands staff confirm that the wetland is or is not regulated by the State.

This is similar to the process for federal wetlands, however, it is complicated by the fact that the State also regulates the 100 foot upland adjacent area surrounding the wetland.



What are wetlands of “unusual importance”, i.e. wetlands of **any size** below 12.4 acres that may be regulated by NYSDEC?

They are freshwater wetlands that have at least ONE of the following characteristics as determined by NYSDEC staff.





- The freshwater wetland is located in a watershed that has experienced significant flooding in the past, or is expected to experience significant flooding in the future from severe storm events related to climate change;
- It is located within or adjacent to an urban area, as defined by the United States census bureau;
- It contains a plant species occurring in fewer than thirty-five sites statewide or having fewer than five thousand individuals statewide;



- It contains habitat for an essential behavior of an endangered or threatened species or a species of special concern as defined under section 11-0535 of this chapter or listed as a species of greatest conservation need in New York's wildlife action plan;
- It is classified by the department as a Class I wetlands;
- It was previously classified and mapped by the department as a wetlands of unusual local importance;
- It is a vernal pool that is known to be productive for amphibian breeding;



- It 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;
- It was previously mapped by the department as a wetlands on or before December thirty-first, two thousand twenty-four;
- It has wetlands functions and values that are of local or regional significance; or
- It is determined by the commissioner to be of significant importance to protecting the state's water quality.

# ANPRM

- The preceding slides relate to the Amendments to ECL Article 24—With the ANPRM DEC has indicated how the regulations may take shape in key areas:
- Flooding, Class 1 Wetlands, Rare Animals, Vernal Pools, Critical Environmental Areas, APA, Nutrient Poor Wetlands & extending the buffer to 300 feet,

# ANPRM—Class 1 wetlands

- Habitat for an essential behavior of a State or federal threatened or endangered species (animal or plant)
- Significant Coastal and Fish & Wildlife Habitat Area
- Tidally Influenced-but not regulated by ECL Article 25
- Contiguous to ECL Article 25 tidal wetlands
- A wetlands plant community that is critically impaired
- A nutrient poor wetland (bogs and fens)
- Within a FEMA Floodway
- Contiguous to A, AA, AA-S, A-S, or N surface waters
- ALL Class 1 wetlands are regulated by DEC no matter how big or small they are.

# ANPRM-Class 2-4 wetlands

- The revised Part 664 would include all 4 classifications of wetlands.
- While the definition of wetlands classes 2 through 4 are changed somewhat—they are not considered wetlands of unusual importance.

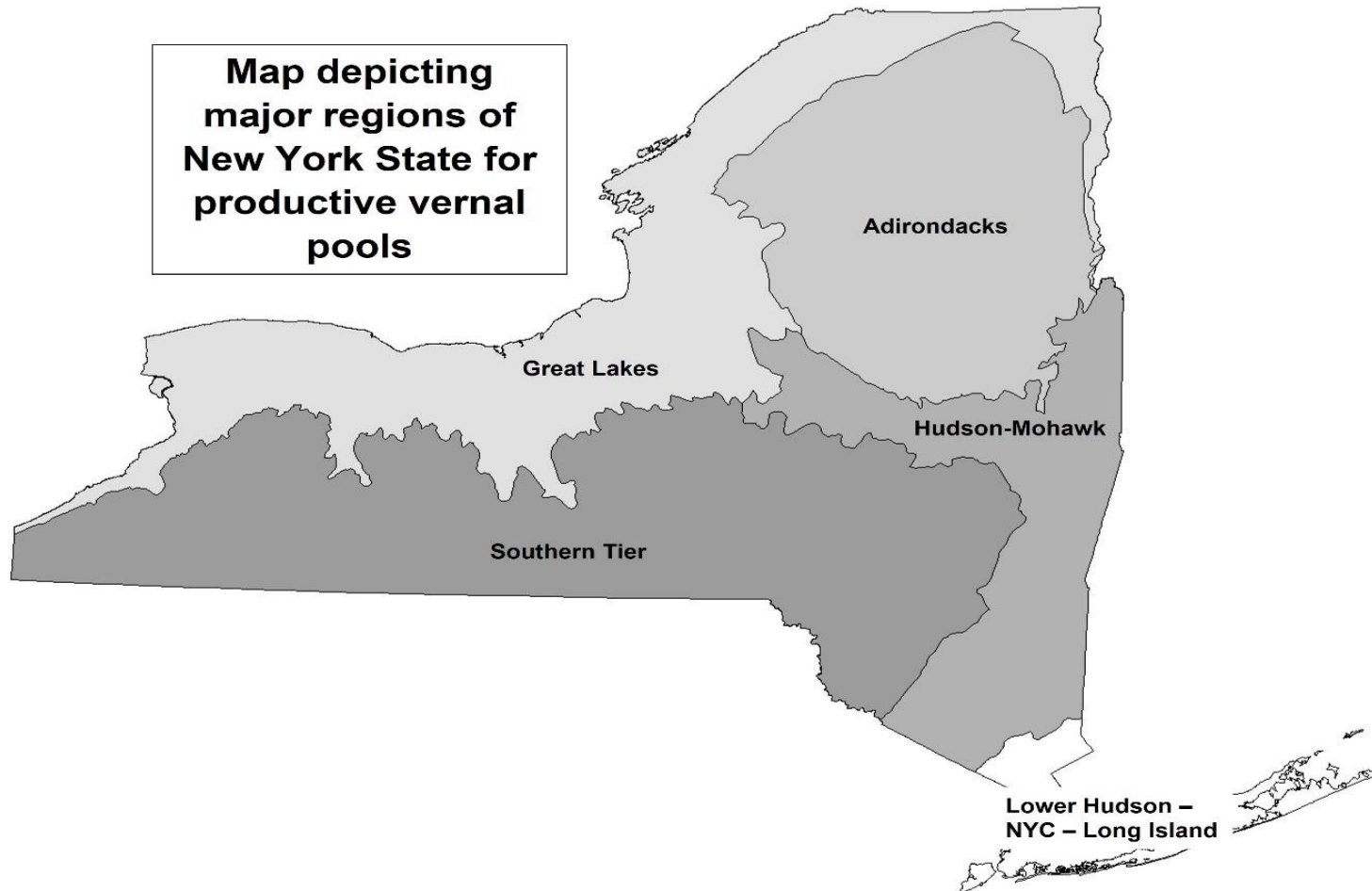
# ANPRM—Vernal Pools

Vernal Pools—a vernal pool known to be productive for amphibian breeding—COUNT THE EGG MASSES –

- a) In the Hudson-Mohawk Region, 55 or more spotted Salamander egg masses or 30 or more wood Frog Masses;
- b) In the lower Hudson NYC Long Island, Adirondack and Southern Tier Regions, 10 or more Spotted Salamander egg masses or 15 or more Wood Frog Masses;
- c) one or more egg masses or larvae of Jefferson Salamander, Blue-Spotted Salamander, or hybrids (goes up to 20 depending upon location) and one or more egg masses or larvae of the Eastern Tiger or Marbled Salamander
- d) DEC will keep a list of such vernal pools and publish the list and any updates in ENB

# ANPRM

**Map depicting  
major regions of  
New York State for  
productive vernal  
pools**





# ANPRM—Other than Class 1

- Wetlands of Unusual Local Importance—Previously Designated by Local Municipalities
- Important for Protection of NYS’s Water Quality. A freshwater wetlands shall be regulated if it is of significant importance to protecting the State’s water quality based on substantial evidence as determined by the Commissioner in writing. Needs justification based on WQ standards in Parts 703 or 704 and the determination is to be posted on DEC’s website.

# ANPRM--

- New Procedures for JDs—burden is on property owner.
- DEC has at least 90 days to confirm a JD, may be indefinitely longer based upon the time of year.
- It is not clear that only a property owner can request a JD from DEC (trespass issue/landowner permission).
- A negative JD is good for 5 years/ not clear how long a positive JD is good for—sign off on drawings?

# ANPRM

- Appealing JDs by DEC
- Procedure for doing so is unclear
- Grounds are limited
- Who can appeal is not clear
- Appeals must be within 120 days of an initial consultation with DEC
- DEC has 60 days to issue a decision AFTER RECEIPT of A **COMPLETE** JD APPEAL APPLICATION



Prior to 2022 the State Freshwater Wetlands program was relatively constant and yielded predictable results.

With the Legislative changes and the new category of regulated wetlands-wetlands of unusual importance—uncertainty is injected into decisions to purchase property, seasonal delays are likely to occur and it is not at all clear that NYSDEC has **sufficient resources** to implement the new program.



## Grandfathered Projects:

The Law provides that only projects that have **a building permit** or, if no building permit is required for a project, **have commenced construction or the use**, in order to avoid the need to obtain a Freshwater Wetlands permit where the wetlands on site have become “regulated”.

**This will be very challenging for multi-year projects.**



By January 1, 2028,

The threshold for wetlands regulated by ECL Article 24 will decrease from 12.4 acres to 7.4 acres for all wetlands—even those that do not qualify as “wetlands of unusual importance.”

# WHAT IS AWOTUS...

- NOW FOR BETTER NEWS
- At the Federal Level of Government....

# The History of WOTUS

- Waters of the United States include wetlands, streams, rivers, lakes and ponds—
  
- Under the US Constitution WOTUS must have some connection to federal authority—
  - Traditionally Navigable Waters
  - Boundary Waters
  - Interstate Commerce
  - Migratory species of wildlife



# WOTUS

- The federal legislation—the Clean Water Act (and its predecessors) are briefly worded and have a long history of being interpreted by executive actions—like the adoption of regulations, executive orders and guidance.
- Up until the 1980s the US ACOE had a very restrained view of its regulatory authority in this area.

# WOTUS

- This USACOE restrained view of its jurisdiction expanded through judicial review and USEPA pressure (Riverside Bayview Homes Inc. (1985)) from the 1980s to the first US Supreme Court Case that limited the definition of WOTUS—
- SWANCC (2001) and then...
- Rapanos/Caraballo (2007) and now...
- Sackett (Frequent Flyers) (May 2023)

# WOTUS

- Although Congress has not amended Section 404 of the Clean Water Act—the USEPA and the USACOE have worked with the past three Presidents to adopt regulations which has just spawned more litigation
- Pre-2015 Regulations
- 2015 Obama Regulations
- 2020 Trump Regulations
- 2022 Biden Regulations
- 2023 Biden Regulations “Redo”—post Sackett

# WOTUS in 2024

- What is the regulated public left with to try to determine whether that wet spot in your backyard is regulated by the federal government—
- Sackett Decision—for a wetland to be regulated it must be immediately adjacent to and indistinguishable from a surface water that is connected to a Traditionally Navigable water. The Significant Nexus test articulated in Rapanos is GONE.

# WOTUS

- The Biden 2023 regulations (August Federal Register) parrot the language in the Sackett case.
- It is important to note that both the Sackett case and the regulations have language that makes it clear that intermittent streams that are seasonally dry may still serve as connecting surface waters.
- Some EPA agency personnel are trying to push this language to include ephemeral surface waters which will only result in more litigation.

# WOTUS

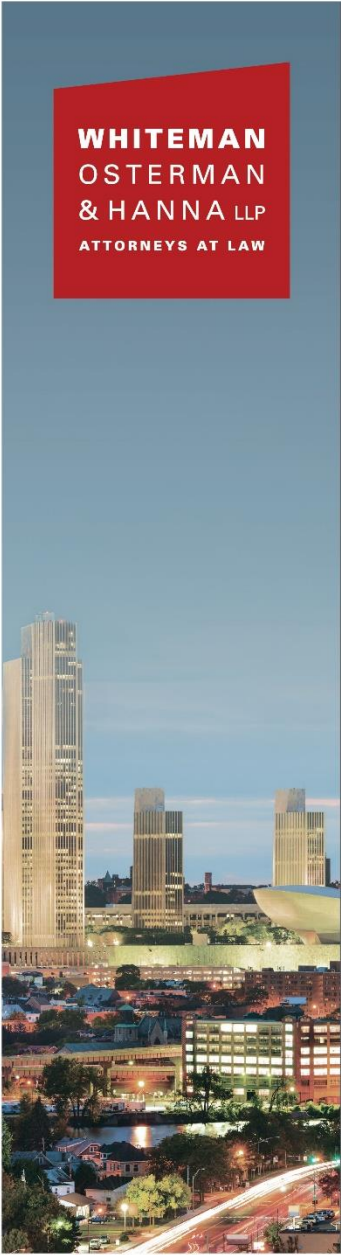
Practically speaking how do you find out if that wet spot is a WOTUS.

1. Review the Sackett Case and the 2023 Biden Regulations;
2. Review the USACOE and USEPA Guidance:
  - “September 27, 2023, Jt Coordination Memo to the Field between the USACOE and the USEPA;”
3. Hire an experienced wetlands delineator;
4. Make a request for an AJD to the USACOE.

# WOTUS

Remember three important issues:

- 1) Make sure the lack of connection of the wetlands to the surface water is documented.
- 2) Make sure you are requesting an AJD which can be appealed.
- 3) Remember that if the situation is controversial the USEPA may become involved and the USEPA, under those situations, will use the Jt. Memo. Procedures and its authority under Section 404c of the Clean Water Act to make the FINAL DETERMINATION.



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# Comments or Questions?

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