



Recent Changes in State Freshwater Wetlands Laws and Regulations

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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.



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 as part of the budget bill.



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).



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 be more similar to the federal wetlands program.

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

No future regulatory mapping of wetlands-no advanced notice to landowners.

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 in a new two-step process.

Remember NYS also regulates the 100-foot upland adjacent area surrounding the wetland—not just the wetlands itself.



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

Remember all of these wetlands of any size also have at least a 100-foot regulated adjacent area surrounding the wetlands.

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 that is utilized 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.

New FWW Regulations

- The preceding slides relate to the legislation amending ECL Article 24
- The new FWW regulations were published in the State Register on 12/31/24 and were posted on the DEC website with supporting materials.
- Overall few changes were made in response to public comments.

New FWW Regulations

- The State Register notes that the “Final rule as compared with last published rule: Non-substantial changes were made in sections 664.1(d), 664.2, 664.5(b),(d), 664.7, 664.9(a)-(c), 664.8(a)-(j) and 664.11.
- Today we will be discussing the new FWW regulations pointing out any relevant changes from the draft FWW regulations.

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

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 essentially the same as before.
- During the JD process DEC headquarters staff decides what classification applies to the State regulated freshwater wetland.

New FWW Regulations WUI

- VERNAL POOLS

- Vernal Pools—now no proscribed buffer beyond 100 feet but up to discretion of DEC staff to impose larger buffer.
- Vernal Pools are defined as known to be productive for amphibian breeding—Egg Mass criteria remains the same as in the proposed regulations.

WUI-Vernal Pools

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

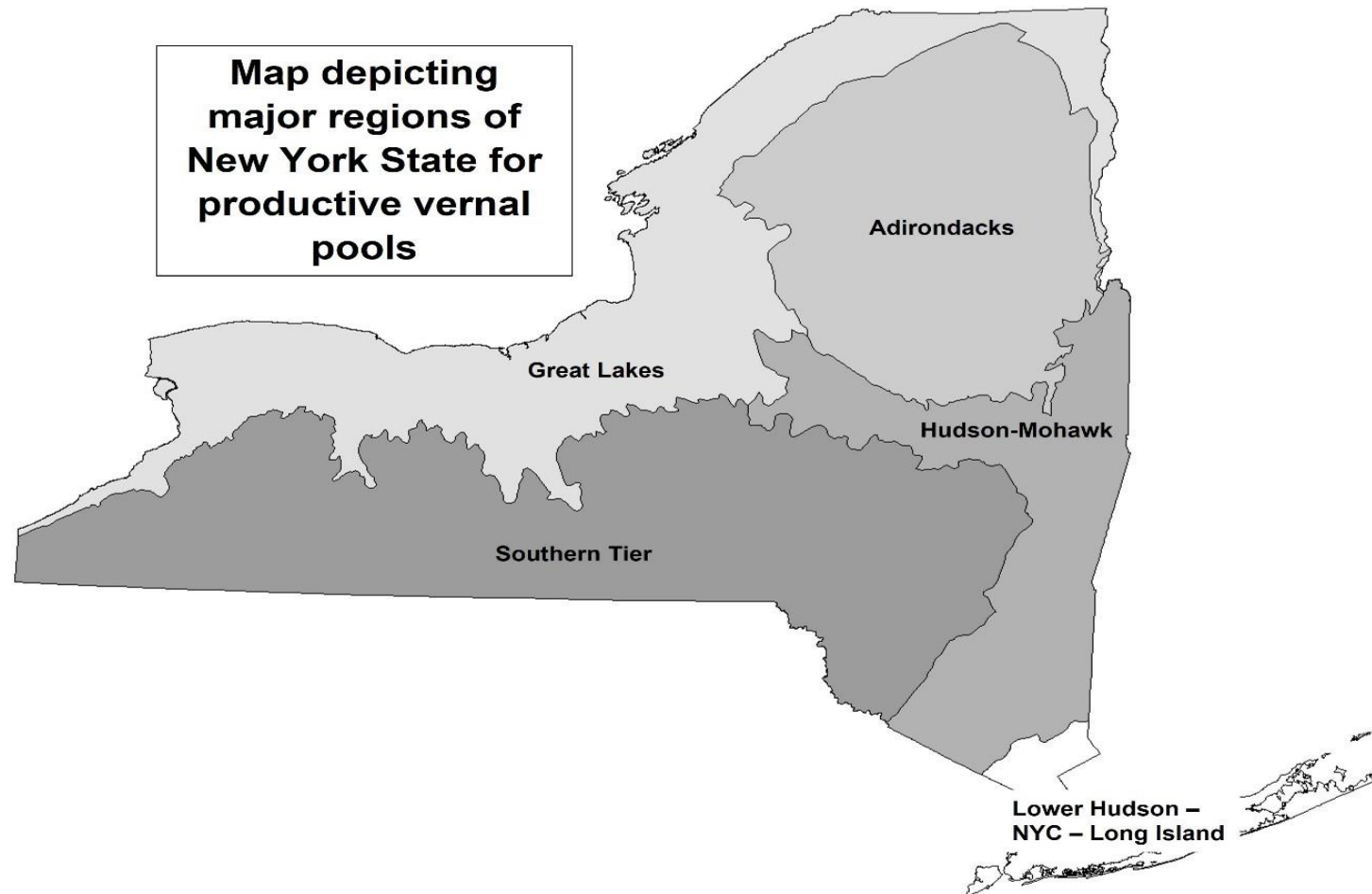
- a) In the Hudson-Mohawk Region, 25 or more spotted Salamander egg masses or 10 or more wood Frog Masses;
- b) In the Great Lakes Region, two or more Spotted Salamander or Wood Frog egg masses:
- c) In the lower Hudson NYC Long Island, Adirondack and Southern Tier Regions, 10 or more Spotted Salamander egg masses or 15 or more Wood Frog Masses;
- d) In the Lower Hudson-NYC-Long Island or Adirondacks Regions, one or more egg masses or larvae of Jefferson Salamander, Blue-Spotted Salamander, or hybrids of Jefferson and Blue-Spotted Salamander;

New FWW Wetlands-WUI-Vernal Pools

- e) In the Great Lakes, Southern Tier, or Hudson-Mohawk Regions, 20 or more egg masses or larvae of Jefferson Salamander, Blue-Spotted Salamander, or hybrids of Jefferson and Blue-Spotted Salamander;
- f) In any region, one or more egg masses or larvae of the Eastern Tiger or Marbled Salamander;
- DEC will keep a list of such vernal pools and publish the list and any updates in ENB (but not coordinates).

New FWW Regulations

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New FWW Wetlands-WUI

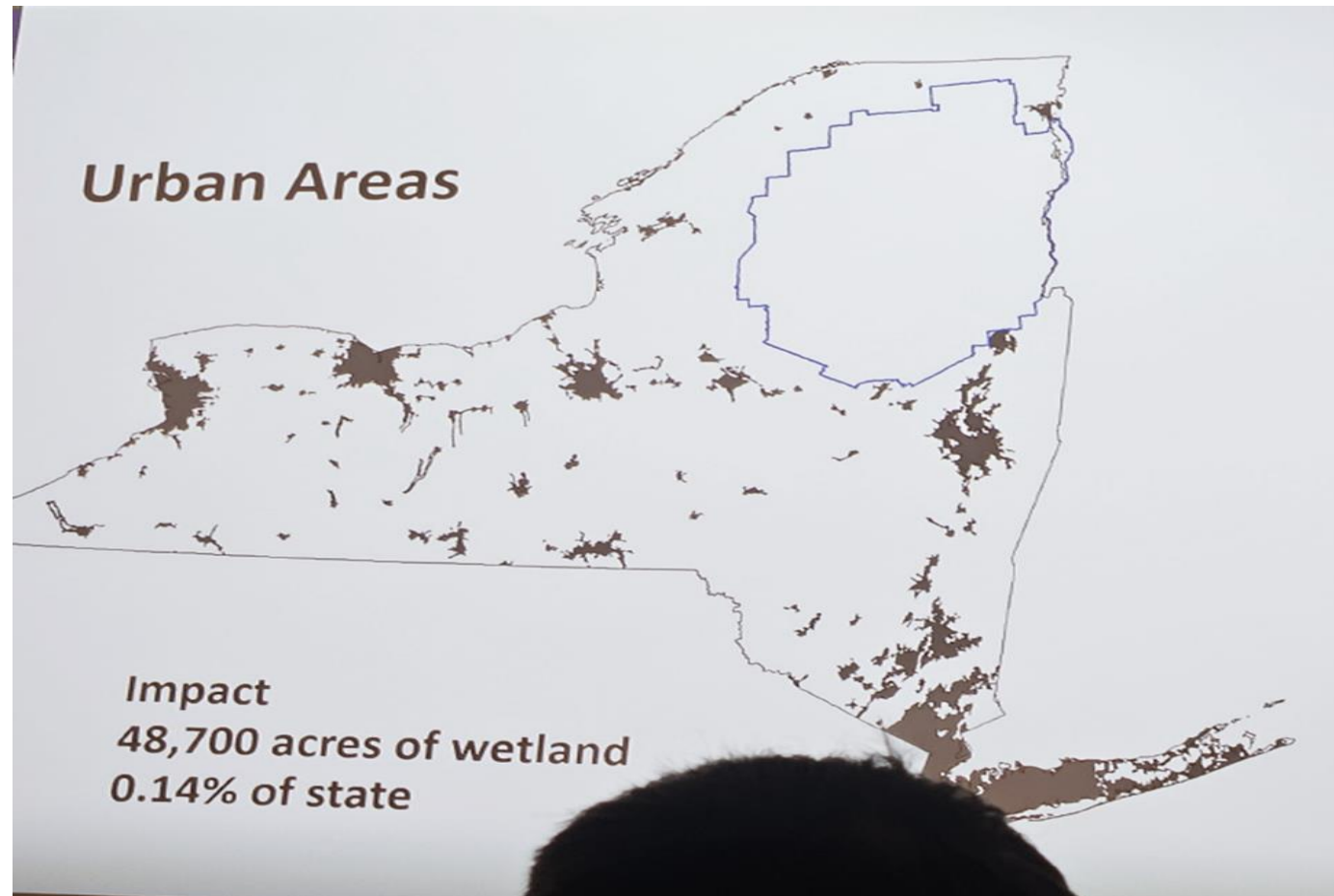
- Significant Flooding. The FWW is in a 12-digit HUC meeting all 3 criteria—2% or more impervious surface, less than 5% of surface area is lakes, ponds, reservoirs or wetlands, and it is within an urban area or within 2.48 miles of one.
- Within or adjacent to an Urban area as defined and identified by the US Census Bureau.
- Wetlands of Unusual Local Importance—Previously Designated by Local Municipalities.

WUI--HUCs with Flooding Concerns



New FWW Wetlands-WUI

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New FWW Regulation-WUI

- Rare Plants. It contains a plant species occurring in fewer than 35 sites statewide or having fewer than 5000 individuals statewide as documented by DEC
- Rare Animals. Containing habitat **utilized** for an essential behavior of Threatened and Endangered Species, Species of special concern, species of greatest conservation need. Lists found in Part 182 and in the CFR Part 17—EAF Mapper.
- NO LIST HOWEVER—next slide not included

The gray at the bottom are Blandings turtle and Seaside dragonlet.

20 <u>Wetland Dependent</u> SGCN Species w/ moderate to very high threats from habitat loss:					
Species	Primary habitat?	Breeding and/or nesting habitat?	Species	Primary habitat?	Breeding and/or nesting habitat?
American black duck	Y	Y – Both	Bog turtle	Y	Y – Both
Golden-winged warbler	Y	Y – Both	Eastern hog-nosed snake	N	N
Kentucky warbler	Y	Y – Both	Queen snake	Y	N
Louisiana waterthrush	Y	Y – Both	Spotted turtle	Y	Y – Breeding
Northern harrier	Y	Y – Both	Eastern cricket frog	Y	Y – Both
Northern pintail	Y	Y – Breeding	Atlantic coast leopard frog	Y	Y – Both
Sedge wren	Y	Y – Both	Northern metalmark	Y	N
Short-eared owl	Y	Y – Both	Four-spotted pennant	Y	Y – Both
Yellow-breasted chat	N	Y – Breeding	Double-ringed pennant	Y	Y – Both
Blanding's turtle	Y	Y – Breeding	Seaside dragonlet	Y	Y – Both

- Blanding's turtle Y Y-Breeding Seaside dragonlet Y Y-Both

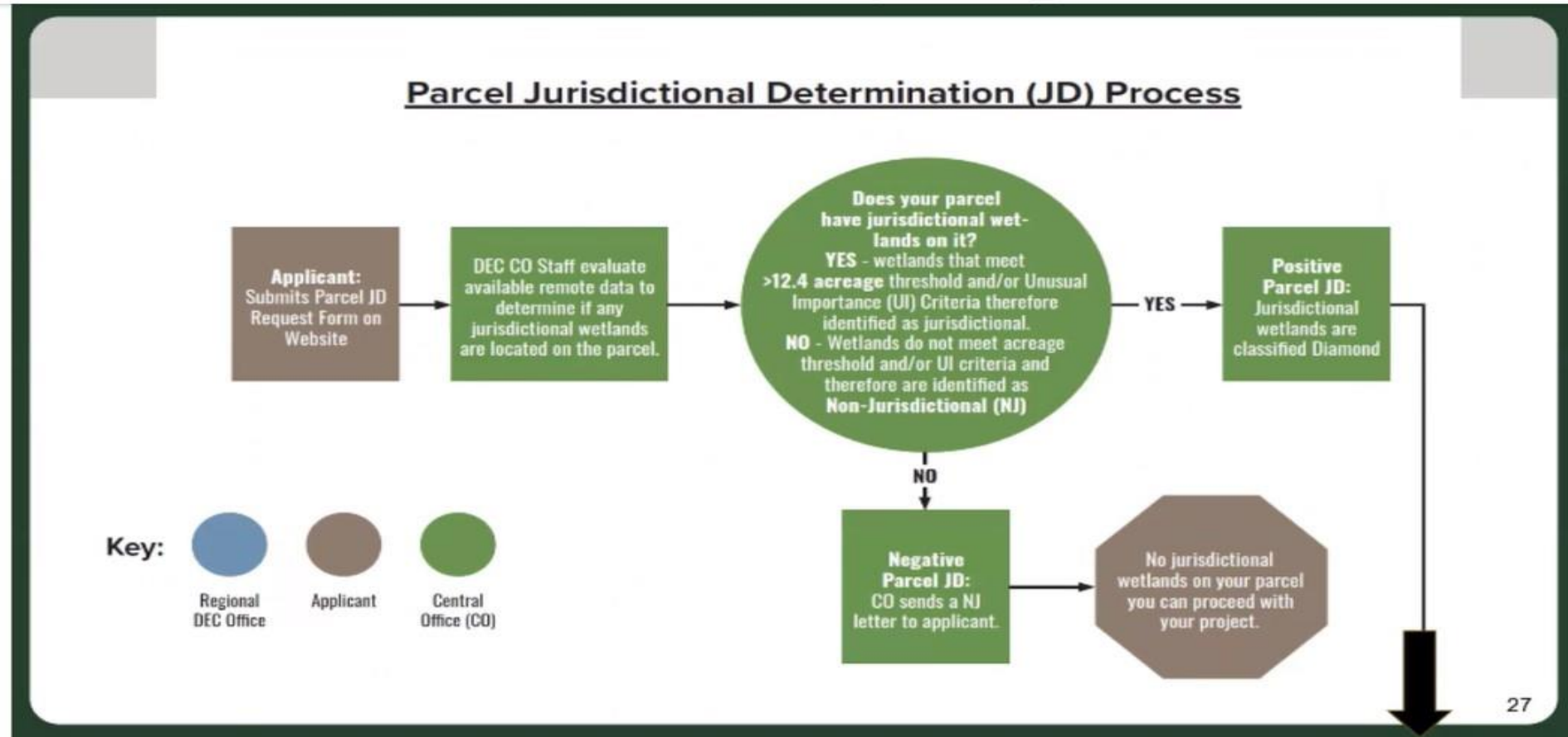
New FWW Regulations-ULI

- Floodways as shown on the FEMA maps
- Previously mapped wetlands on or before December 31, 2024 and which contain wetlands characteristics described in section 24-0107(a) of the FWW Act.
- Wetlands determined to be of local or regional significance because they are within a Critical Environmental Area or within the APA boundaries.
- Important for the Protection of NYS's water quality-based on substantial evidence decided by DEC Commissioner.

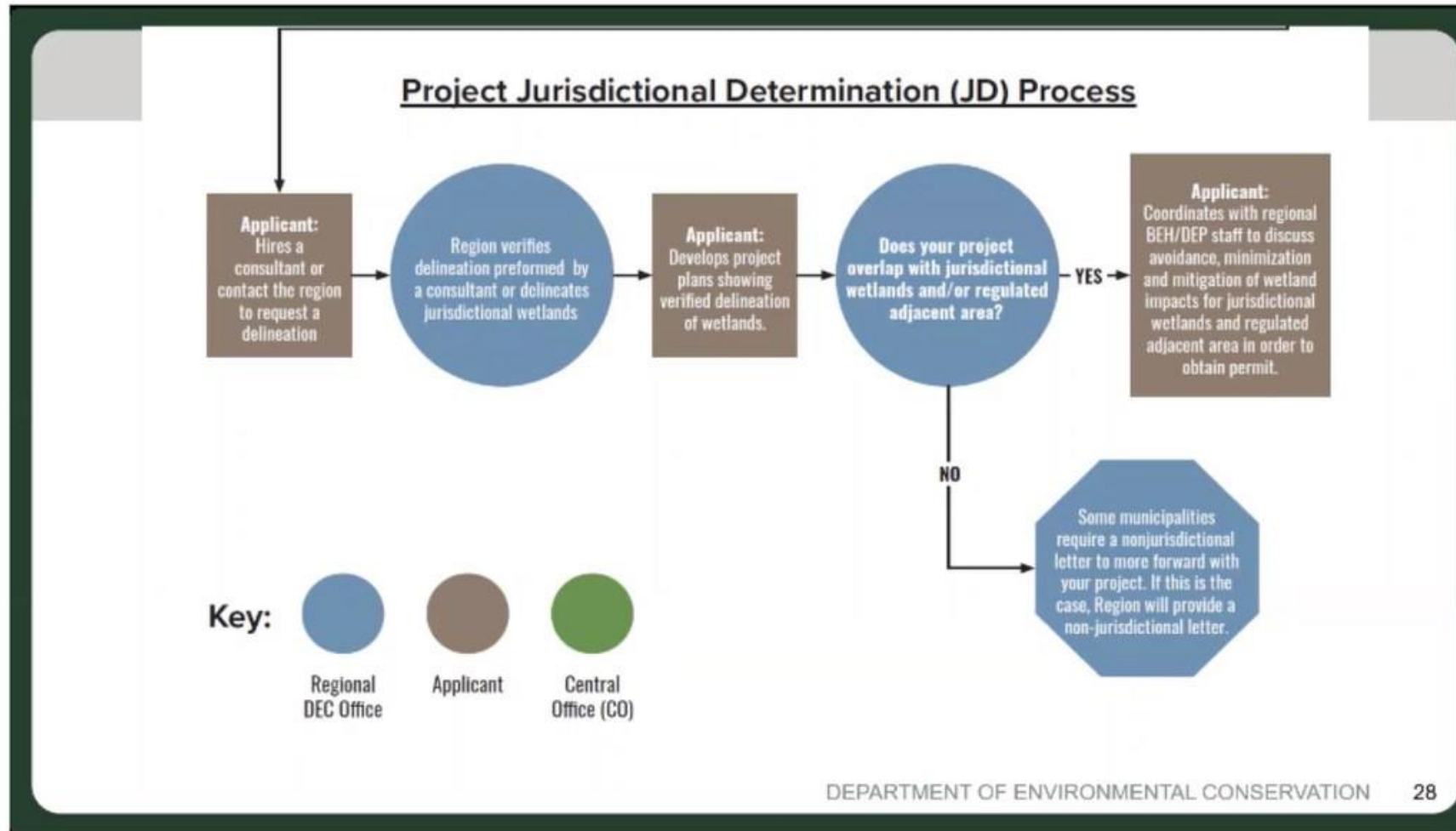
New FWW Regulations-JD

- New Procedures for JDs—burden is on property owner. All requests go to DEC central office initially to evaluate new mapping produced by Cornell and other documentation of criteria. Parcel JD and Project JD.
- If you receive a positive determination then you request DEC Regional staff to go to site.
- DEC Regional staff has at least 90 days to confirm a JD or provide notification of an extension—if no response then further 10 day letter may result in waiver.
- A JD is good for 5 years.

JD Process-Parcel



JD Process Project



New FWW Regulations

- A positive JD determination can be appealed by the landowner. It stays in place while the appeal occurs.
- First step is initial consultation, then submission of a complete appeal within 120 days of initial consultation.
- DEC is required to decide appeal within 60 days if another field visit is necessary they can extend for an additional 30 days. Very limited, technical grounds for appeal.



Grandfathered or Transitional 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”.

The regulations provide for a more expanded grandfathering of certain projects and do not repeat the provisions in the law.

New FWW Regulations--Grandfathering

- The regulations provide for an extension of time to complete a project under certain limited circumstances:
- Where a property owner or applicant received, prior to January 1, 2025, either a FWW permit or a letter from DEC notifying them that their application was complete, the project may proceed under the FWW jurisdictional determination issued by the department prior to January 1, 2025, until expiration of the FWW permit.

New FWW Regulations

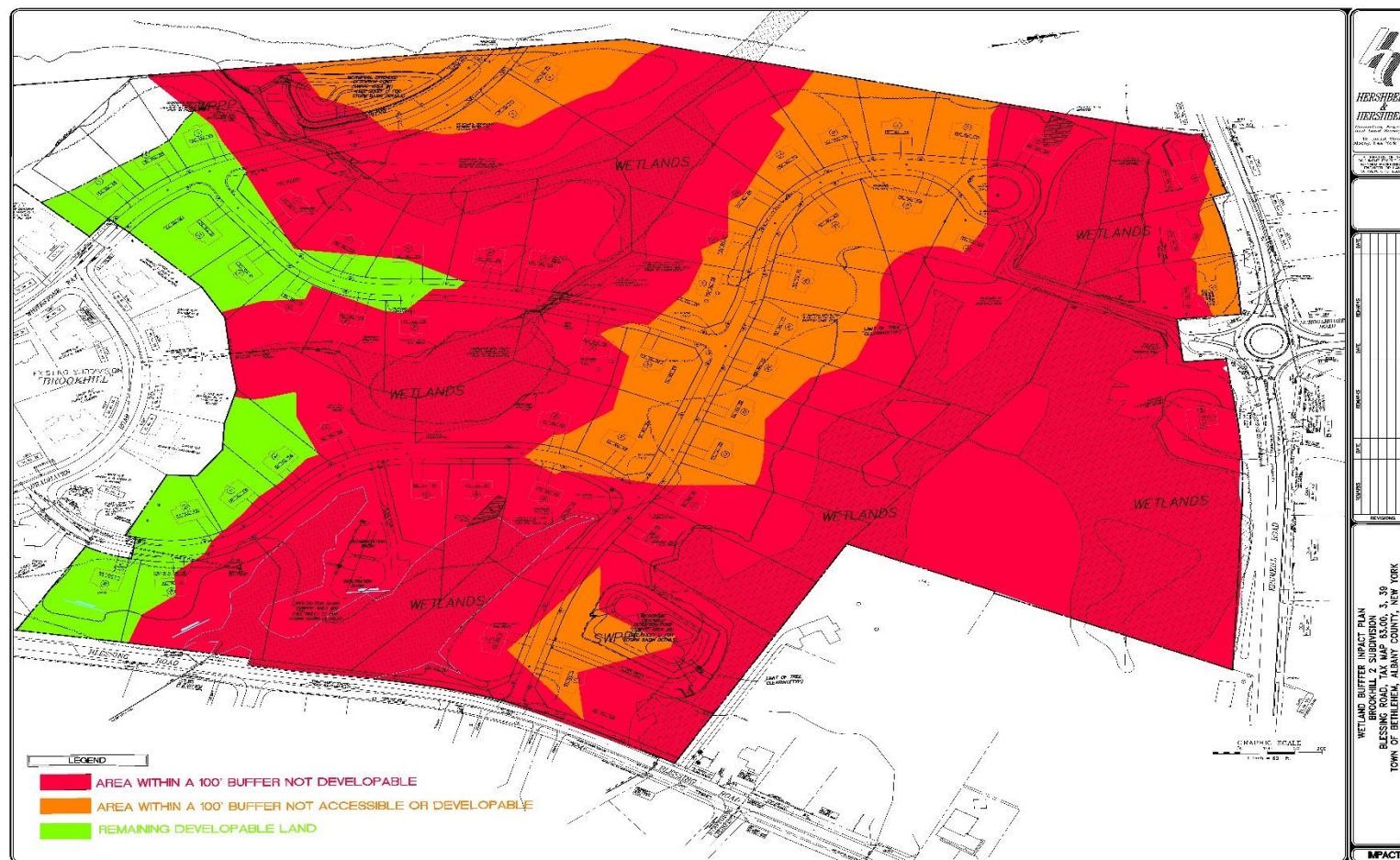
- Second way to have more time to complete project:
- Where a property owner has commenced or plans to commence a project on a parcel that did not previously require a FWW permit prior to 1/1/25 and
 - 1) has a FEIS which has been accepted by the lead agency; or 2) has received a negative declaration for a Type 1 or **unlisted** action; or 3) has received written site plan approval from a local government for the project;
- THEN.....

New FWW Regulations

- THEN the regulations do not apply until—
- July 1, 2028 for projects determined to be Major projects pursuant to 6 NYCRR section 621.4;
- OR
- January 1, 2027, for projects determined to be Minor Projects pursuant to 6 NYCRR section 621.4.

Project Example

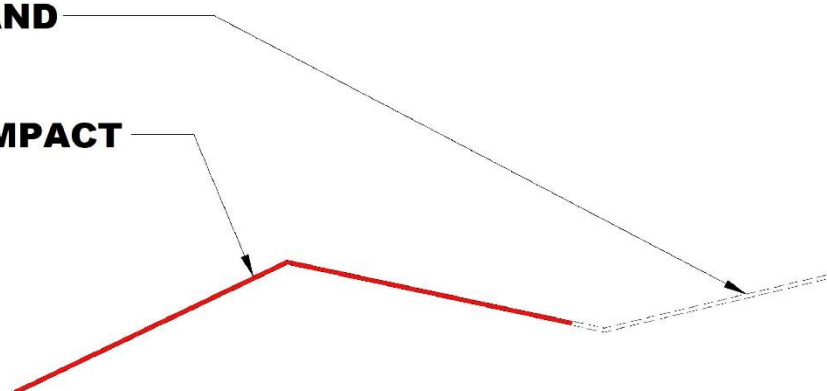
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LINEAR WETLAND

**LINEAR ACOE WETLAND
(4' WIDE)**

**PROPOSED DIRECT IMPACT
570' LINEAR FEET
0.05 ACRES**



LINEAR WETLAND

**LINEAR NYSDEC WETLAND
(4' WIDE)**

**PROPOSED DIRECT IMPACT
570' LINEAR FEET
0.05 ACRES**

**PROPOSED
BUFFER IMPACT
3 ACRES**

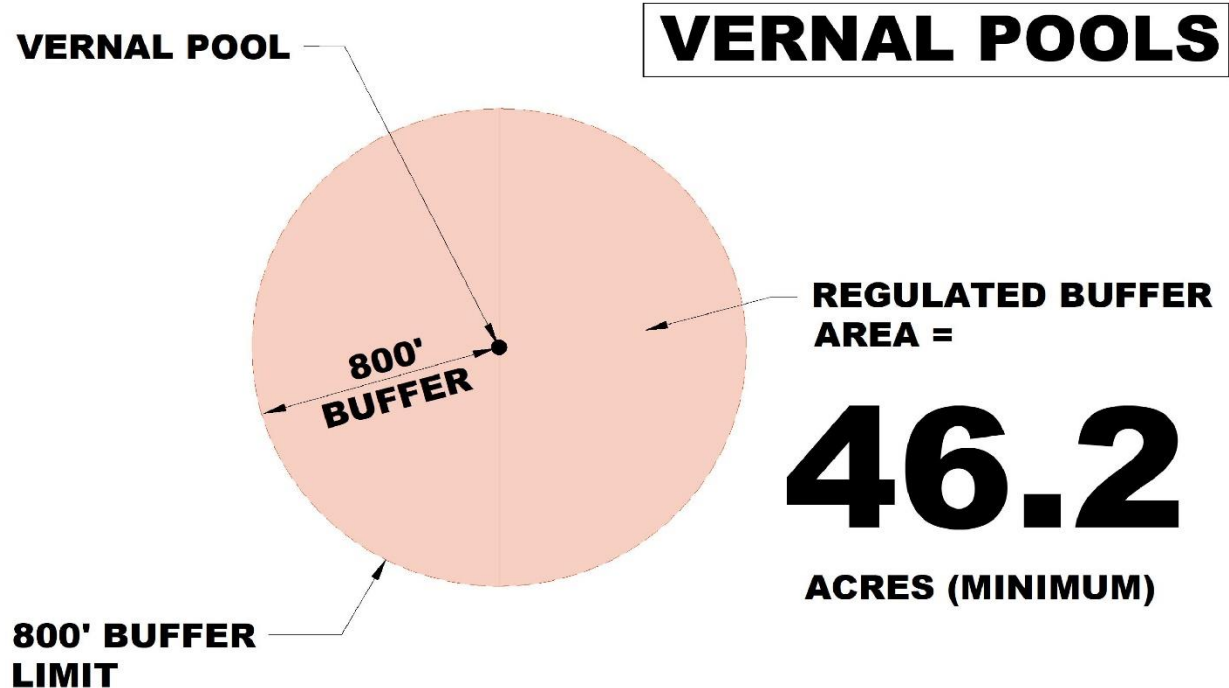
1_{Ac} / 220_{LF}
(MINIMUM)

**NYSDEC 100'
BUFFER LIMITS**

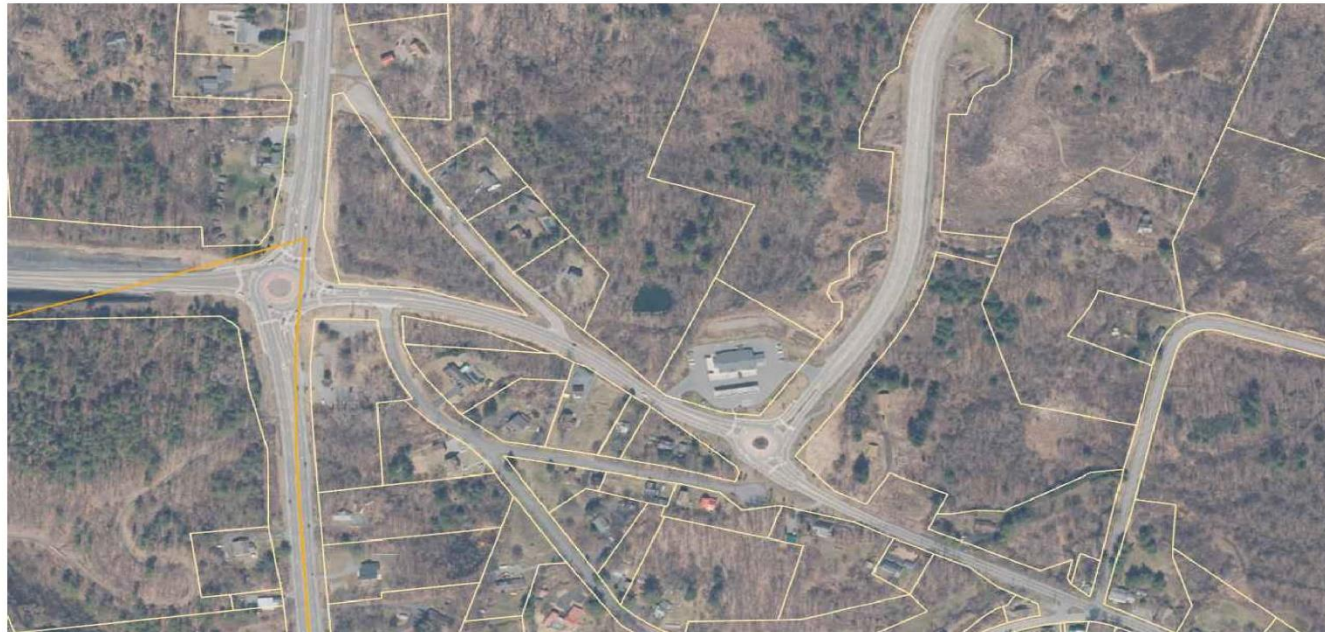


LINEAR WETLAND



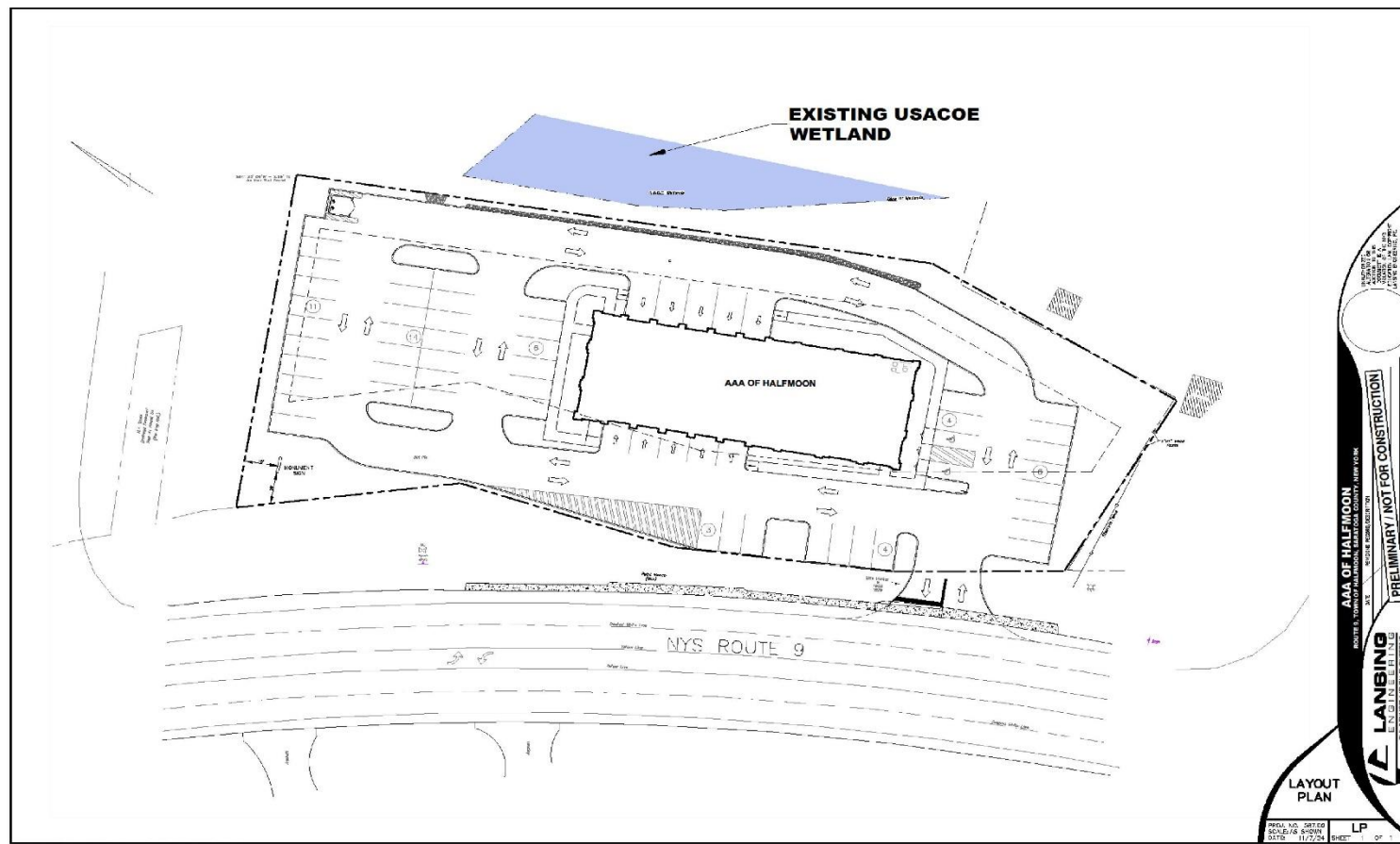


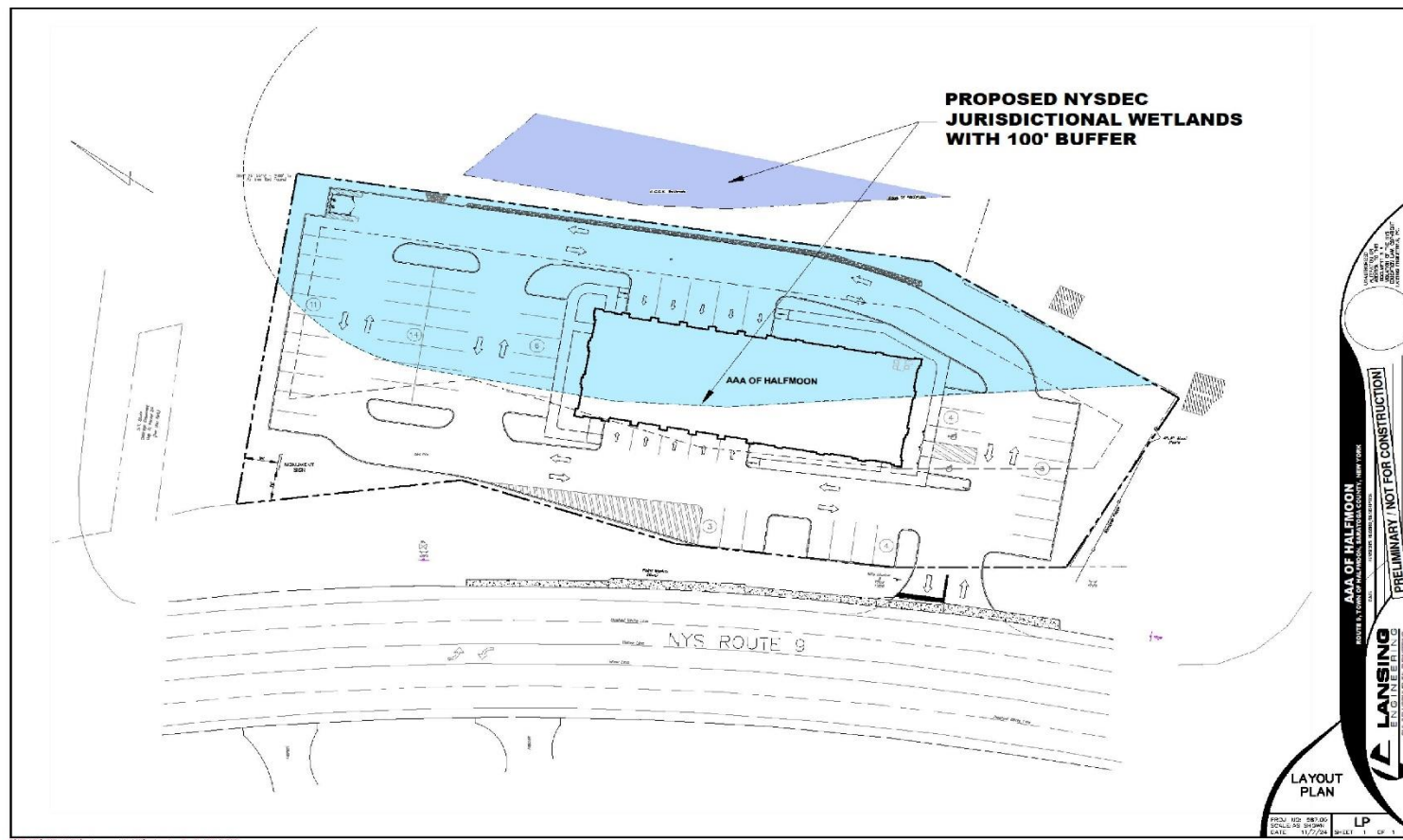
VERNAL POOLS



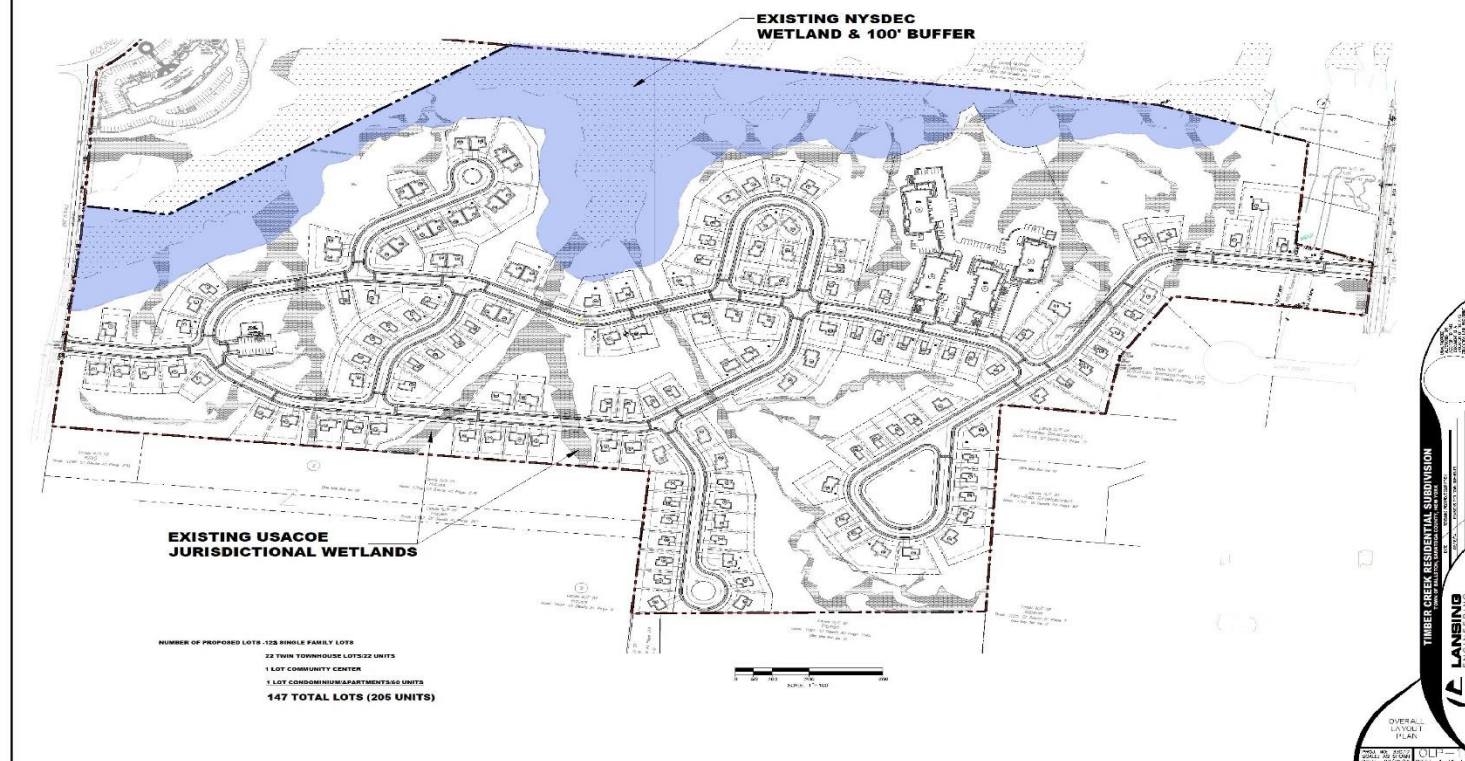
VERNAL POOLS







TIMBER CREEK RESIDENTIAL SUBDIVISION







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.”



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.

Proposed General Permit

- NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION General Permit Number GP-0-25-003 PERMIT Under the Environmental Conservation Law (ECL) GENERAL PERMIT GP-0-25-003 Freshwater Wetlands
- Authorized Activities:
 - 1. Repair, reconstruction, and/or replacement of existing functional structures and facilities in a freshwater wetland or freshwater wetland adjacent area, excluding drainage ditches and excluding septic systems in freshwater wetlands.
 - 2. Repair, reconstruction, and/or replacement of septic systems in wetland adjacent areas. Repair and replacement may not change design capacity but does allow for upgrades to an existing system to meet design standards.

Proposed General Permit

- 3. Construction and/or modification of the following residential, commercial, industrial, or public structures that results in permanent and/or temporary disturbance totaling no more than 1/10-acre to freshwater wetlands and totaling no more than 1/10-acre to freshwater wetland adjacent areas.
 - a. Utility lines from an existing distribution line to a structure including the following types of utilities:
 - i. Electric and gas utility lines less than one mile in length;
 - ii. Sewer and water lines; and
 - iii. Telecommunication lines (e.g., internet, telephone, etc.).
 - b. Dry hydrants for fire protection.
 - c. Elevated walkways or unenclosed platforms built on open-work supports (no-fill supports).

Proposed General Permits

- 4. Construction and/or modification of the following residential, commercial, industrial, or public structures that results in permanent and/or temporary disturbance totaling no more than 1/10-acre to freshwater wetland adjacent areas: a. Parking areas, driveways, pools, or accessory structures b. Water wells limited to serve an individual residence and not municipal or commercial wells c. Fencing installed at least 5 feet from the wetland boundary d. Infrastructure associated with single-family renewable energy projects including solar photovoltaics, solar water heating, geothermal systems, and battery energy storage systems.
- 5. Temporary access roads and/or laydown areas in the wetland adjacent area where no woody vegetation above 3 inches diameter at breast height is cleared.
- 6. Selective cutting, hazard tree removal, and/or removal of dead ash trees not including clear cutting. 7. Cutting of trees or other vegetation in the wetland adjacent area necessary to complete any other authorized activity in this permit within the disturbance thresholds identified, except where prohibited.

Proposed General Permit

- 6. Selective cutting, hazard tree removal, and/or removal of dead ash trees not including clear cutting.
- 7. Cutting of trees or other vegetation in the wetland adjacent area necessary to complete any other authorized activity in this permit within the disturbance thresholds identified, except where prohibited.
- EXCLUDED JURISDICTIONS--This General Permit is not applicable: • Within Sovereign Indian Nation territories in New York State; • Within areas under the jurisdictional authority of the Adirondack Park Agency; • Within areas designated as a Coastal Erosion Hazard Area; • For proposed activities that require a permit under 6 NYCRR Part 182; and • For sites undergoing remediation under 6 NYCRR Part 375 or sites adjacent to solid waste facilities.
- NOTE: Activities not identified above are not subject to or authorized by this General Permit and may require the issuance of an individual permit pursuant to appropriate regulatory jurisdictions. DEC retains the right to exclude a proposed activity from authorization under this General Permit, and to require the permittee to obtain an individual permit.

Proposed General Permit

- You have to submit a completed Joint Application Form and supporting documents to the Regional Permit Administrator—the Permit Administrator decides if your project qualifies and if you have demonstrated that you first avoided and then minimized any potential avoidable impacts.
- To commence work you need to have the countersigned permit. DEC can always require you to get an individual permit.

Proposed General Permit

- Comply with approved plans;
- If you need to make any changes in the project you have to go back to DEC and seek approval;
- Post construction submit photographs and notify DEC of project completion.
- All work must be done in a manner that minimizes adverse impacts to wetlands, wildlife, water quality, and natural resources.
- Tree removal restrictions—seasonal for our area no tree removal between April 1 and October 31.



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Comments or Questions?

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