

## NYSDEC Issues Guidance to Address the Annulment of Regulations under the New York Freshwater Wetlands Act



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### **Key Takeaways**

- In April 2026, a New York court annulled NYSDEC's new freshwater wetlands regulations (promulgated under the 2022 Amendments to the Freshwater Wetlands Act) on SEQRA grounds, creating significant jurisdictional uncertainty.
- NYSDEC has sought to provide clarity by issuing guidance in May 2026 clarifying how it will exercise its freshwater wetland jurisdiction (which more closely resembles its past regulatory practices) while new regulations are developed.
- Developers and municipalities should reassess any NYSDEC jurisdictional determinations issued under the now-annulled regulations, monitor the rulemaking process, and engage NYSDEC where uncertainty regarding potential wetland jurisdiction exists under the May 2026 guidance.

On April 8, 2026, the New York Supreme Court, Albany County, in a stunning decision, annulled the New York State Department of Environmental Conservation's ("NYSDEC") regulations (at 6 NYCRR Part 664) promulgated under the 2022 Amendments to the New York Freshwater Wetlands Act for failure to comply with the N.Y. State Environmental Quality Review Act ("SEQRA"). The State chose not to appeal the Court's ruling by the May 11, 2026, deadline, leaving developers, municipalities, and the broader regulated community to face significant uncertainties – i.e., annulment of the NYSDEC's regulations with the 2022 Amendments to the Act remaining intact.

In May 2026, NYSDEC took a significant step toward addressing these uncertainties by issuing guidance on how it will exercise its freshwater wetlands jurisdiction following the Court's decision. The guidance narrows the scope of NYSDEC's asserted jurisdiction during the interim period—providing a measure of regulatory clarity for landowners, developers, and municipalities—while NYSDEC undertakes the process of promulgating new regulations. This alert summarizes the Court's decision, NYSDEC's responsive guidance, and the practical implications for the regulated community.

## **Background**

In 1975, the Freshwater Wetlands Act (the "Act") was enacted to "preserve, protect and conserve freshwater wetlands" while balancing economic and social development. Under the original statutory framework, only wetlands shown on NYSDEC's official Freshwater Wetland Maps were subject to regulation, and jurisdiction was further limited to wetlands of 12.4 acres or larger.

In 2022, the Legislature amended the Act (effective January 1, 2025) to fundamentally expand NYSDEC's wetlands jurisdiction. Key changes included: (i) eliminating the requirement that wetlands appear on NYSDEC's Freshwater Wetland Maps to be regulated; (ii) reclassifying the Maps as informational only; (iii) creating a rebuttable presumption that any area meeting the statutory definition of a "freshwater wetland" is regulated; (iv) requiring a wetland delineation or verification performed or approved by NYSDEC to identify regulated boundaries; and (v) defining 11 categories of wetlands of "Unusual Importance," subject to regulation regardless of size.

By NYSDEC's estimates, the 2022 Amendments to the Act, and NYSDEC's regulations thereunder, would have substantially expanded NYSDEC's jurisdiction over more than one million additional acres of wetlands. While wetlands regulation is important for environmental resource protection, it also has broad economic implications, rendering development projects in and around regulated wetlands either infeasible, far more costly, and/or subject to greater litigation risks.

## **The Litigation**

Four separate actions were brought by property owners, business and development interests, and municipalities seeking to invalidate the new wetlands law and regulations. The Court rejected all facial constitutional and non-SEQRA statutory challenges, but annulled the regulations on SEQRA grounds because NYSDEC failed to (i) identify relevant areas of environmental concern, (ii) take a "hard look" at whether Part 664 may "have a significant adverse impact on the environment," and (iii) provide a "reasoned elaboration" for its negative declaration.

## **NYSDEC'S May 2026 Guidance**

Striking down NYSDEC's regulations while upholding the 2022 Amendments created a jurisdictional gap. In May 2026, NYSDEC issued guidance clarifying how it will exercise its freshwater wetlands jurisdiction in the wake of the Court's decision. Most significantly, under the guidance:

- NYSDEC will restrict its jurisdiction to: (1) freshwater wetlands that are 12.4 acres or greater in size (regardless of whether they were previously mapped) and (2) freshwater wetlands mapped by NYSDEC prior to January 1, 2025 ("Previously Mapped"), including wetlands designated as Unusual Local Importance ("ULI").
- NYSDEC will not assert jurisdiction over wetlands meeting the 2022 Amendments' "Unusual Importance" criteria unless those wetlands were Previously Mapped or designated as ULI.
- NYSDEC will continue to regulate a 100-foot adjacent area surrounding all jurisdictional wetlands.
- Positive determinations under jurisdictional determinations issued between January 1, 2025, and April 8, 2026, remain in effect if the wetlands were Previously Mapped or are 12.4 acres or greater; however, determinations based solely on Unusual Importance criteria will require reassessment by NYSDEC.

NYSDEC has indicated that it will propose new regulations, with opportunities for public review and comment, in an effort to restore its expanded wetlands jurisdiction. Given the need for a comprehensive SEQRA process—likely requiring preparation of an Environmental Impact Statement—new regulations could take several years to promulgate.

### **Practical Implications for Developers and Municipalities**

The May 2026 guidance provides meaningful clarity, but developers, municipalities, and other stakeholders should consider the following:

- **Narrowed Jurisdiction.** Projects on sites involving wetlands that are less than 12.4 acres and were not Previously Mapped may no longer require Article 24 permitting from NYSDEC. Developers with pending applications must determine whether their projects remain subject to jurisdiction in light of the NYSDEC Guidance.
- **Reassessment of Existing Jurisdictional Determinations.** Parties that received positive jurisdictional determinations between January 1, 2025, and April 8, 2026, based on Unusual Importance criteria, should submit a Reassessment of Jurisdictional Determination Request through NYSDEC's website to determine whether their sites remain jurisdictional.
- **Transition Period Eliminated—But Grandfathering May Apply.** The regulatory transition period is no longer in effect. However, applicants who received written confirmation of transition-period eligibility should retain that documentation, as NYSDEC has indicated it will honor those commitments.
- **Engage NYSDEC Early.** NYSDEC is accepting and processing jurisdictional determination requests and conducting delineations for regulated wetlands. Landowners and developers with projects in or near potential wetland areas should engage with NYSDEC early to obtain jurisdictional clarity before committing significant

resources to project planning.

- **Monitor Rulemaking.** Because NYSDEC intends to propose new regulations that could significantly re-expand its jurisdiction, developers and municipalities should monitor the rulemaking process and consider participating in the public comment period to protect their interests.

Developers, municipalities, and landowners with projects in or near freshwater wetlands should assess how NYSDEC's May 2026 guidance affects their permits and jurisdictional determinations before committing further resources to project planning. Contact Lippes Mathias environment and energy team member Ian A. Shavtiz to evaluate your exposure and position your project for the regulatory changes ahead.