

# STATE OF NEW YORK

5116--A

2021-2022 Regular Sessions

## IN SENATE

February 24, 2021

Introduced by Sens. HARCKHAM, HOYLMAN, KAVANAGH, LIU -- read twice and ordered printed, and when printed to be committed to the Committee on Environmental Conservation -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the environmental conservation law, in relation to freshwater wetlands; and to repeal certain provisions of such law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Subdivisions 2, 3 and 7 of section 24-0105 of the environ-  
2 mental conservation law, as added by chapter 614 of the laws of 1975,  
3 subdivision 7 as renumbered by chapter 654 of the laws of 1977, are  
4 amended to read as follows:

5 2. Considerable acreage of freshwater wetlands in the state of New  
6 York has been lost, despoiled or impaired by unregulated draining,  
7 dredging, filling, excavating, building, pollution or other [~~acts~~]  
8 ~~activities~~ inconsistent with the natural uses of such areas. [~~Other~~  
9 ~~freshwater~~] Freshwater wetlands are in jeopardy of being lost, despoiled  
10 or impaired by such [~~unrelated—acts~~] activities and because of the  
11 recent curtailment of federal wetland protections.

12 3. Recurrent flooding aggravated or caused by the loss of freshwater  
13 wetlands has serious effects upon natural ecosystems. The increasing  
14 severity and duration of storm-related flooding due to climate change,  
15 which has caused billions of dollars of property damage in the state,  
16 makes protection of all freshwater wetlands in the state of vital impor-  
17 tance.

18 7. Any loss of freshwater wetlands deprives the people of the state of  
19 some or all of the many and multiple benefits to be derived from  
20 wetlands, to wit:

21 (a) flood and storm control by the hydrologic absorption and storage  
22 capacity of freshwater wetlands;

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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(b) wildlife habitat by providing breeding, nesting and feeding grounds and cover for many forms of wildlife, wildfowl and shorebirds, including migratory wildfowl and rare, endangered or threatened species [~~such as the bald eagle and osprey~~];

(c) protection of subsurface water resources and provision for valuable watersheds and recharging ground water supplies;

(d) recreation by providing areas for hunting, fishing, boating, hiking, bird watching, photography, camping and other uses;

(e) pollution treatment by serving as biological and chemical oxidation basins;

(f) erosion control by serving as sedimentation areas and filtering basins, absorbing silt and organic matter and protecting channels and harbors;

(g) education and scientific research by providing readily accessible outdoor bio-physical laboratories, living classrooms and vast training and education resources; ~~and~~

(h) open space and aesthetic appreciation by providing often the only remaining open areas along crowded river fronts and coastal Great Lakes regions; ~~and~~

(i) sources of nutrients in freshwater food cycles and nursery grounds and sanctuaries for freshwater fish~~[-]~~;

(j) preservation of plant species that are rare, endangered or threatened, or exploitably vulnerable as defined in section 9-1503 of this chapter; and

(k) preservation of communities of plants and animals that are deemed by the commissioner to be rare in the state or in a region of the state.

§ 2. The opening paragraph of subdivision 1, paragraphs (c) and (d) of subdivision 1, and subdivisions 2, 3 and 8 of section 24-0107 of the environmental conservation law, as amended by chapter 654 of the laws of 1977, are amended and a new subdivision 9 is added to read as follows:

"Freshwater wetlands" means lands and waters of the state [~~as shown on the freshwater wetlands map~~] that have an area of at least twelve and four-tenths acres or, if less than twelve and four-tenths acres in size, are of unusual importance and which contain any or all of the following:

(c) lands and waters substantially enclosed by aquatic or semi-aquatic vegetation as set forth in paragraph (a) of this subdivision or by dead vegetation as set forth in paragraph (b) of this subdivision, the regulation of which is necessary to protect and preserve the aquatic and semi-aquatic vegetation; and

(d) the waters overlying the areas set forth in paragraphs (a) and (b) of this subdivision and the lands underlying paragraph (c) of this subdivision.

2. "Freshwater wetlands map" shall mean a map promulgated by the department pursuant to section 24-0301 of this article on which are indicated the boundaries of any freshwater wetlands. Freshwater wetland maps will serve the purpose of educating the public on the approximate location of wetlands, are for educational purposes only, and are not controlling for purposes of determining if a wetlands permit is required pursuant to section 24-0701 of this article. Notwithstanding the other provisions of this subdivision, any delineation of a freshwater wetland boundary filed after January first, two thousand twenty-three shall be controlling for a period of ten years after the date of such filing.

3. "Boundaries of a freshwater wetland" shall mean the outer limit of the vegetation specified in paragraphs (a) and (b) of subdivision one of this section [~~24-0107~~] and of the lands and waters specified in paragraph (c) of such subdivision.

8. "Pollution" shall mean the presence in the environment of ~~[man-induced]~~ human-induced conditions or contaminants in quantities or characteristics which are or may be injurious to human, plant or wildlife, or other animal life or to property.

9. "Unusual importance" shall mean a freshwater wetland, regardless of size, that possesses one or more of the following characteristics as determined by the department:

(a) it is located in an area designated as a special flood hazard area on the most current federal emergency management agency flood insurance rate map that has experienced significant flooding in the past;

(b) it is located within a city having a population of one million or more;

(c) it contains occupied habitat or 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 and/or listed as a species of greatest conservation need in New York's wildlife action plan;

(d) it is classified by the department as a Class I wetland; or

(e) it is classified by the department as a Class II wetland and the department determines based on criteria established by regulation that its wetland functions and values are of local or regional significance.

§ 3. Subdivisions 1, 2, 3, 4 and 5 of section 24-0301 of the environmental conservation law are REPEALED.

§ 4. Subdivisions 6, 7 and 8 of section 24-0301 of the environmental conservation law, subdivision 6 as amended by chapter 16 of the laws of 2010 and subdivision 7 as amended and subdivision 8 as added by chapter 654 of the laws of 1977, are amended to read as follows:

~~[6.] 1. Except as provided in subdivision [eight] three of this section, the commissioner shall supervise the maintenance of [such boundary] freshwater wetlands maps, which shall be available to the public [for inspection and examination at the regional office of the department in which the wetlands are wholly or partly located and in the office of the clerk of each county in which each such wetland or a portion thereof is located] on the department's website. The commissioner may, upon notice to the property owner or owners affected, readjust the map [thereafter to clarify the boundaries of the wetlands, to correct any errors on the map, to effect any additions, deletions or technical changes on the map, and to reflect changes as have occurred as a result of the granting of permits pursuant to section 24-0703 of this article, or natural changes which may have occurred through erosion, accretion, or otherwise. Notice of such readjustment shall be given in the same manner as set forth in subdivision five of this section for the promulgation of final freshwater wetlands maps. In addition, at the time notice is provided pursuant to subdivision five of this section, the commissioner shall update any digital image of the map posted on the department's website to reflect such readjustment]~~ at any time prior to the filing of the delineation of a freshwater wetland boundary to more accurately depict the approximate location of wetlands.

~~[7.] 2. Except as provided in subdivision [eight] three of this section, the commissioner may, upon his own initiative, and shall, upon a written request by a landowner whose land or a portion thereof may be included within a wetland, or upon the written request of another person or persons or an official body whose interests are shown to be affected, cause to be delineated [more precisely] the boundary line or lines of a freshwater wetland or a portion thereof~~ and the regulated freshwater wetland adjacent area as set forth in subdivision two of section 24-0701

1 ~~of this article. [Such more precise delineation of a freshwater wetland~~  
2 ~~boundary line or lines shall be of appropriate scale and sufficient~~  
3 ~~clarity to permit the ready identification of individual buildings and~~  
4 ~~of other major man-made structures or facilities or significant~~  
5 ~~geographical features with respect to the boundary of any freshwater~~  
6 ~~wetland.]~~ The commissioner shall ~~[undertake to delineate the boundary of~~  
7 ~~a particular wetland or wetlands, or a particular part of the boundary~~  
8 ~~thereof only upon a showing by the applicant therefor of good cause for~~  
9 ~~such more precise delineation and the establishment of such more precise~~  
10 ~~line]~~ file any delineation of a wetland boundary made or accepted by the  
11 department and such delineation shall be effective and binding for a  
12 period of ten years from the date such delineation is filed.

13 ~~[8-]~~ 3. The supervision of the maintenance of any freshwater wetlands  
14 map or portion thereof applicable to wetlands within the Adirondack  
15 park, the readjustment and precise delineation of wetland boundary lines  
16 and the other functions and duties ascribed to the commissioner by  
17 subdivisions ~~[six and seven]~~ one and two of this section shall be  
18 performed by the Adirondack park agency, which shall make such maps  
19 available ~~[for public inspection and examination at its headquarters]~~ on  
20 the agency's website.

21 § 5. Subdivisions 1, 2 and 4 of section 24-0701 of the environmental  
22 conservation law, subdivisions 1 and 2 as amended by chapter 654 of the  
23 laws of 1977 and subdivision 4 as amended by chapter 697 of the laws of  
24 1979, are amended to read as follows:

25 1. ~~[After issuance of the official freshwater wetlands map of the~~  
26 ~~state, or of any selected section or region thereof, any]~~ Any person  
27 desiring to conduct on freshwater wetlands ~~[as so designated thereon]~~ or  
28 on the regulated freshwater wetland adjacent area as set forth in subdi-  
29 vision two of this section any of the regulated activities set forth in  
30 subdivision two of this section must obtain a permit as provided in this  
31 title.

32 2. Activities subject to regulation shall include any form of drain-  
33 ing, dredging, excavation, removal of soil, mud, sand, shells, gravel or  
34 other aggregate from any freshwater wetland, either directly or indi-  
35 rectly; and any form of dumping, filling, or depositing of any soil,  
36 stones, sand, gravel, mud, rubbish or fill of any kind, either directly  
37 or indirectly; erecting any structures, roads, the driving of pilings,  
38 or placing of any other obstructions whether or not changing the ebb and  
39 flow of the water; any form of pollution, including but not limited to,  
40 installing a septic tank, running a sewer outfall, discharging sewage  
41 treatment effluent or other liquid wastes into or so as to drain into a  
42 freshwater wetland; and any other activity which substantially impairs  
43 any of the several functions served by freshwater wetlands or the bene-  
44 fits derived therefrom which are set forth in section 24-0105 of this  
45 article. These activities are subject to regulation whether or not they  
46 occur upon the wetland itself, if they impinge upon or otherwise  
47 substantially affect the wetlands and are located: (a) not more than one  
48 hundred feet from the boundary of [such] a wetland: (i) that has an area  
49 of at least twelve and four-tenths acres; (ii) that is a wetland of  
50 unusual importance and has an area of at least ten acres; or (iii) that  
51 is classified as a Class I wetland by the department and has an area of  
52 at least five acres; (b) not more than fifty feet from the boundary of a  
53 wetland if it is a wetland of unusual importance and has an area of at  
54 least five acres and less than ten acres; and (c) not more than twenty-  
55 five feet from the boundary of a wetland if it is a wetland of unusual  
56 importance and has an area of less than five acres. Provided, that a

greater distance from any such wetland may be regulated pursuant to this article by the appropriate local government or by the department, which ever has jurisdiction over such wetland, where necessary to protect and preserve the wetland.

4. ~~[The]~~ On lands in active agricultural use, the activities of farmers and other landowners in grazing and watering livestock, making reasonable use of water resources, harvesting natural products of the wetlands, selectively cutting timber, draining land or wetlands for growing agricultural products and otherwise engaging in the use of wetlands or other land for growing agricultural products shall be excluded from regulated activities and shall not require a permit under subdivision one ~~[hereof]~~ of this section, except that structures not required for enhancement or maintenance of the agricultural productivity of the land and any filling activities shall not be excluded hereunder, and provided that the use of land ~~[designated as a freshwater wetland upon the freshwater wetlands map at the effective date thereof]~~ that meets the definition of a freshwater wetland in section 24-0107 of this article for uses other than those referred to in this subdivision shall be subject to the provisions of this article.

§ 6. Subdivision 5 of section 24-0703 of the environmental conservation law, as amended by section 38 of part D of chapter 60 of the laws of 2012, is amended to read as follows:

5. ~~[Prior to the promulgation of the final freshwater wetlands map in a particular area and the implementation of a freshwater wetlands protection law or ordinance, no person shall conduct, or cause to be conducted, any activity for which a permit is required under section 24-0701 of this title on any freshwater wetland unless he has obtained a permit from the commissioner under this section.]~~ Any person may inquire of the department as to whether or not a given parcel of land ~~[will be designated]~~ includes a freshwater wetland subject to regulation or a regulated freshwater wetland adjacent area and whether a permit under subdivision one of this section is required for a proposed activity. The department shall give a definite answer in writing within ~~[thirty]~~ sixty days of such request as to ~~[whether]~~ the status of such parcel ~~[will or will not be so designated]~~ and whether a permit is required for the proposed activity. Provided that, in the event that weather or ground conditions prevent the department from making a determination within ~~[thirty]~~ sixty days, it may extend such period until a determination can be made. Such answer in the affirmative shall be reviewable; such an answer in the negative shall be a complete defense to the enforcement of this article as to such parcel of land for a period of ten years from the date the department issues the negative answer. ~~[The commissioner may by regulation adopted after public hearing exempt categories or classes of wetlands or individual wetlands which he determines not to be critical to the furtherance of the policies and purposes of this article.]~~

§ 7. Subdivision 1 of section 24-0901 of the environmental conservation law, as added by chapter 614 of the laws of 1975, is amended to read as follows:

1. ~~[Upon completion of the freshwater wetlands map, the]~~ The commissioner shall confer with local government officials in each region in which the inventory has been conducted to establish a program for the protection of the freshwater wetlands of the state.

§ 8. Subdivisions 1 and 5 of section 24-0903 of the environmental conservation law, as added by chapter 614 of the laws of 1975, are amended to read as follows:

1 1. [~~Upon completion of the freshwater wetlands map of the state, or of~~  
2 ~~any selected section or region thereof, the~~] The commissioner shall  
3 [~~proceed to~~] classify freshwater wetlands so designated thereon accord-  
4 ing to their most appropriate uses, in light of the values set forth in  
5 section 24-0105 of this article and the present conditions of such  
6 wetlands. The commissioner shall determine what uses of such wetlands  
7 are most compatible with the foregoing and shall prepare minimum land  
8 use regulations to permit only such compatible uses. The classifications  
9 may cover freshwater wetlands in more than one governmental subdivision.  
10 Permits pursuant to section 24-0701 of this article are required whether  
11 or not a classification has been promulgated.

12 5. Prior to the adoption of any land use regulations governing fresh-  
13 water wetlands, the commissioner shall hold a public hearing thereon in  
14 the area in which the affected freshwater wetlands are located, and give  
15 fifteen days prior notice thereof by posting on the department's website  
16 or by publication at least once in a newspaper having general circu-  
17 lation in the area of the local government involved. The commissioner  
18 shall promulgate the regulations within thirty days of such hearing and  
19 post such order on the department's website or publish such order [~~at~~  
20 ~~least once~~] in a newspaper having general circulation in the area of the  
21 local government affected and make such plan available for public  
22 inspection and review; such order shall not take effect until thirty  
23 days after the filing thereof with the clerk of the county in which such  
24 wetland is located.

25 § 9. Paragraph (c) of subdivision 8 of section 70-0117 of the environ-  
26 mental conservation law, as added by section 1 of part AAA of chapter 59  
27 of the laws of 2009, is amended to read as follows:

28 (c) [~~All fees~~] Fees collected pursuant to [~~this~~] paragraph (a) of this  
29 subdivision shall be deposited into the environmental protection fund  
30 pursuant to section ninety-two-s of the state finance law. Fees  
31 collected pursuant to paragraph (b) of this subdivision shall be depos-  
32 ited to the credit of the marine resources account of the conservation  
33 fund.

34 (d) Application fees required pursuant to this subdivision will not be  
35 required for any state department.

36 § 10. Subdivisions 1 and 2 of section 71-2303 of the environmental  
37 conservation law, as amended by chapter 99 of the laws of 2010, are  
38 amended to read as follows:

39 1. Administrative sanctions. a. Any person who violates, disobeys or  
40 disregards any provision of article twenty-four, including title five  
41 and section 24-0507 thereof or any rule or regulation, local law or  
42 ordinance, permit or order issued pursuant thereto, shall be liable to  
43 the people of the state for a civil penalty of not to exceed eleven  
44 thousand dollars for every such violation and for each day every such  
45 violation occurs, to be assessed, after a hearing or opportunity to be  
46 heard upon due notice and with the rights to specification of the charg-  
47 es and representation by counsel at such hearing, by the commissioner or  
48 local government. Such penalty may be recovered in an action brought by  
49 the attorney general at the request and in the name of the commissioner  
50 or local government in any court of competent jurisdiction. Such civil  
51 penalty may be released or compromised by the commissioner or local  
52 government before the matter has been referred to the attorney general;  
53 and where such matter has been referred to the attorney general, any  
54 such penalty may be released or compromised and any action commenced to  
55 recover the same may be settled and discontinued by the attorney general  
56 with the consent of the commissioner or local government. In addition,

1 the commissioner or local government shall have power, following a hear-  
2 ing held in conformance with the procedures set forth in section 71-1709  
3 of this article, to direct the violator to cease ~~[his violation of]~~  
4 violating the act and to restore the affected freshwater wetland to its  
5 condition prior to the violation, insofar as that is possible within a  
6 reasonable time and under the supervision of the commissioner or local  
7 government. Any such order of the commissioner or local government shall  
8 be enforceable in an action brought by the attorney general at the  
9 request and in the name of the commissioner or local government in any  
10 court of competent jurisdiction. Any civil penalty or order issued by  
11 the commissioner or local government pursuant to this subdivision shall  
12 be reviewable in a proceeding pursuant to article seventy-eight of the  
13 civil practice law and rules.

14 b. Upon determining that significant damage to the functions and bene-  
15 fits of a freshwater wetland is occurring or is imminent as a result of  
16 any violation of article twenty-four of this chapter, including but not  
17 limited to (i) activity taking place requiring a permit under article  
18 twenty-four of this chapter but for which no permit has been granted or  
19 (ii) failure on the part of a permittee to adhere to permit conditions,  
20 the commissioner or local government shall have power to direct the  
21 violator to cease and desist from violating the act. In such cases the  
22 violator shall be provided an opportunity to be heard with ten days of  
23 receipt of the notice to cease and desist.

24 2. Criminal sanctions. Any person who violates any provision of arti-  
25 cle twenty-four of this chapter, including any rule or regulation, local  
26 law or ordinance, permit or order issued pursuant thereto, shall, in  
27 addition, for the first offense, be guilty of a violation punishable by  
28 a fine of not less than two thousand nor more than ~~[four]~~ five thousand  
29 dollars; for a second and each subsequent offense he shall be guilty of  
30 a misdemeanor punishable by a fine of not less than four thousand nor  
31 more than ~~[seven]~~ ten thousand dollars or a term of imprisonment of not  
32 less than fifteen days nor more than six months or both. Instead of  
33 these punishments, any offender may be punishable by being ordered by  
34 the court to restore the affected freshwater wetland to its condition  
35 prior to the offense, insofar as that is possible. The court shall spec-  
36 ify a reasonable time for the completion of such restoration, which  
37 shall be effected under the supervision of the commissioner or local  
38 government. Each offense shall be a separate and distinct offense and,  
39 in the case of a continuing offense, each day's continuance thereof  
40 shall be deemed a separate and distinct offense.

41 § 11. Subdivision 1 of section 71-2305 of the environmental conserva-  
42 tion law, as added by chapter 614 of the laws of 1975, is amended to  
43 read as follows:

44 1. The attorney general, upon his or her own initiative or upon  
45 complaint of the commissioner or local government, shall prosecute  
46 persons alleged to have violated ~~[any such order of the commissioner or~~  
47 ~~local government pursuant to]~~ article twenty-four of this chapter.

48 § 12. This act shall take effect immediately, provided, however, that  
49 sections two, three, four, five, six, seven and eight of this act shall  
50 take effect on January 1, 2023.