STATE OF NEW YORK

7850

2021-2022 Regular Sessions

IN ASSEMBLY

May 27, 2021

Introduced by M. of A. ENGLEBRIGHT -- read once and referred to the Committee on Environmental Conservation

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:

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

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

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

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

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

(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~~];

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

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(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 and 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 two new subdivisions 9 and 10 are 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.**
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 contains occupied habitat or habitat for an essential behavior, as confirmed by the department, 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;

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

(d) 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; or

(e) it was previously classified and mapped by the department as a wetland of unusual local importance.

10. "Delineation" shall mean a precise description of a regulated freshwater wetland as defined in subdivisions one and three of this section, including the regulated adjacent area with sufficient scale and clarity to permit ready identification.

§ 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 in a form and manner to be determined by the department 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 or her 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 of this article. [~~Such more precise delineation of a~~

~~freshwater wetland boundary line or lines shall be of appropriate scale and sufficient clarity to permit the ready identification of individual buildings and of other major man-made structures or facilities or significant geographical features with respect to the boundary of any freshwater wetland.~~] The commissioner shall [~~undertake to delineate the boundary of a particular wetland or wetlands, or a particular part of the boundary thereof only upon a showing by the applicant therefor of good cause for such more precise delineation and the establishment of such more precise line~~] file any delineation of a wetland boundary made or accepted by the department and such delineation shall be effective and binding for a period of five years from the date such delineation is filed. The commissioner shall supervise the filing and maintenance of delineations, which shall be made available to the public on the department's website.

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

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

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

2. Activities subject to regulation shall include any form of draining, dredging, excavation, removal of soil, mud, sand, shells, gravel or other aggregate from any freshwater wetland, either directly or indirectly; and any form of dumping, filling, or depositing of any soil, stones, sand, gravel, mud, rubbish or fill of any kind, either directly or indirectly; erecting any structures, roads, the driving of pilings, or placing of any other obstructions whether or not changing the ebb and flow of the water; any form of pollution, including but not limited to, installing a septic tank, running a sewer outfall, discharging sewage treatment effluent or other liquid wastes into or so as to drain into a freshwater wetland; and any other activity which substantially impairs any of the several functions served by freshwater wetlands or the benefits derived therefrom which are set forth in section 24-0105 of this article. These activities are subject to regulation whether or not they occur upon the wetland itself, if they impinge upon or otherwise substantially affect the wetlands and are located: (a) not more than one hundred feet from the boundary of [~~such~~] a wetland: (i) that has an area of at least twelve and four-tenths acres; (ii) that is a wetland of unusual importance and has an area of at least ten acres; (iii) that is classified as a Class I wetland by the department and has an area of at least five acres; or (iv) that was previously classified and mapped by the department as a wetland of unusual local importance; (b) not more than fifty feet from the boundary of a wetland if it is a wetland of

unusual importance and has an area of at least five acres and less than ten acres; and (c) not more than twenty-five feet from the boundary of a wetland if it is a wetland of unusual 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, whichever has jurisdiction over such wetland, where necessary to protect and preserve the wetland.

4. [~~The~~] On lands in active agricultural or silvicultural 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 five 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. [~~Upon completion of the freshwater wetlands map of the state, or of any selected section or region thereof, the~~] **The** commissioner shall [~~proceed to~~] classify freshwater wetlands so designated thereon according to their most appropriate uses, in light of the values set forth in section 24-0105 of this article and the present conditions of such wetlands. The commissioner shall determine what uses of such wetlands are most compatible with the foregoing and shall prepare minimum land use regulations to permit only such compatible uses. The classifications may cover freshwater wetlands in more than one governmental subdivision. Permits pursuant to section 24-0701 of this article are required whether or not a classification has been promulgated.

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

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

(c) [~~All fees~~] **Fees** collected pursuant to [~~this~~] **paragraph (a) of this** subdivision shall be deposited [~~into~~] **to the credit of** the [~~environmental protection~~] **conservation** fund pursuant to section [~~ninety-two-s~~] **eighty-three** of the state finance law**. Fees collected pursuant to paragraph (b) of this subdivision shall be deposited to the credit of the marine resources account of the conservation fund.**

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

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

1. Administrative sanctions. **a.** Any person who violates, disobeys or disregards any provision of article twenty-four, including title five and section 24-0507 thereof or any rule or regulation, local law or ordinance, permit or order issued pursuant thereto, shall be liable to the people of the state for a civil penalty of not to exceed eleven thousand dollars for every such violation **and for each day every such violation occurs**, to be assessed, after a hearing or opportunity to be heard upon due notice and with the rights to specification of the charges and representation by counsel at such hearing, by the commissioner or local government. Such penalty may be recovered in an action brought by the attorney general at the request and in the name of the commissioner or local government in any court of competent jurisdiction. Such civil penalty may be released or compromised by the commissioner or local government before the matter has been referred to the attorney general; and where such matter has been referred to the attorney general, any

such penalty may be released or compromised and any action commenced to recover the same may be settled and discontinued by the attorney general with the consent of the commissioner or local government. In addition, the commissioner or local government shall have power, following a hearing held in conformance with the procedures set forth in section 71-1709 of this article, to direct the violator to cease [~~his violation of~~] **violating** the act and to restore the affected freshwater wetland to its condition prior to the violation, insofar as that is possible within a reasonable time and under the supervision of the commissioner or local government. Any such order of the commissioner or local government shall be enforceable in an action brought by the attorney general at the request and in the name of the commissioner or local government in any court of competent jurisdiction. Any civil penalty or order issued by the commissioner or local government pursuant to this subdivision shall be reviewable in a proceeding pursuant to article seventy-eight of the civil practice law and rules.

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

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

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

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

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