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September 18, 2024

Roy Jacobson, Jr.
Head, Habitat Protection Section
Division of Fish and Wildlife
New York State Department of Environmental Conservation
625 Broadway, 5th Floor
Albany, NY. 12233-4756

**RE: PROTECT Comments on Proposed Freshwater Wetlands
Regulations, 6 NYCRR Part 664**

Dear Mr. Jacobson:

Protect the Adirondacks (“PROTECT”) is pleased to submit these comments on the regulations proposed by the Department of Environmental Conservation (“DEC” or “Department”) for implementing the amendments to the Freshwater Wetlands Act (“FWA”), Environmental Conservation Law (“ECL”) Article 24. The proposed regulations will repeal and replace the current FWA regulations codified at 6 NYCRR Part 664.

Protect the Adirondacks

PROTECT is a not-for-profit organization dedicated to the preservation and stewardship of the 6-million-acre Adirondack Park. Our mission is to protect the Adirondack Park’s wild character for current and future generations. PROTECT pursues this mission through a combination of advocacy, grassroots organizing, independent public oversight, research, water quality monitoring, education, and legal action. PROTECT has over 2,000 members and supporters who share a common desire to protect the environmental health and legacy of the Adirondack Park. Many of PROTECT’s members reside or own property within the Park. More information regarding PROTECT may be found on our website at www.protectadks.org.

General Comments

PROTECT strongly supported the amendments to the FWA, which provide much-needed additional protections to wetlands in New York State. When the

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FWA was originally passed in 1975, wetlands were already recognized as having critically important ecological functions and values, including habitat for fish and wildlife, protection of surface and groundwater resources, and erosion and flood control. Today, more severe flooding events resulting from climate change, new threats to groundwater resources posed by “forever chemicals” and other pollutants, and the continuing loss of biodiversity render the functions and values provided by wetlands even more critical. The amendments to the FWA recognized this fundamental ecological fact and provided additional protections by lowering the jurisdictional threshold for DEC permitting and providing for smaller wetlands of unusual importance to be protected through regulation including, for the first time, vernal pools determined to be productive breeding habitat for amphibians. The amendments also improved and streamlined the DEC wetland regulatory process by eliminating the requirement that wetlands be mapped prior to DEC exercising its regulatory authority.

PROTECT strongly supports the proposed regulations and applauds the Department for the carefully crafted and well-balanced regulatory provisions as well as for the open and public process utilized to develop them. With a few exceptions, discussed below, we believe the Department’s proposed regulations implement the statutory changes in a reasonable and science-based manner. PROTECT urges DEC to expeditiously promulgate the final regulations in their current form, with the few changes suggested below.

Specific Comments

Applicability, Part 664.1: The FWA amendments include the following provision:

There is a rebuttable presumption that mapped and unmapped areas meeting the definition of a freshwater wetland in this article are regulated and subject to permit requirements. This presumption may be rebutted by presenting information to the department that the area does not meet the definition contained in this article. A wetland delineation by the department, or a verification by the department of a wetland delineation by another party, is required to identify the regulated freshwater wetland boundary in a particular location.

S.8008C, A. 9008C, TEDE QQ, § 1, 2021-2022 Sess. (N.Y. 2022). The applicability section of the implementing regulations should include this important statutory provision and state that there is a rebuttable presumption that mapped and unmapped areas meeting the definition of a freshwater wetland are protected and subject to DEC regulatory requirements.

Grandfathering provisions, Part 664.1(c) and (d). The proposed regulations provide that if a property owner or applicant receives a freshwater wetland permit or a notice of complete application prior to January 1, 2025, the project “may proceed under the freshwater wetlands jurisdictional determination issued by the department prior to January 1, 2025, until expiration of the issued permit.” Part 664.1(c). The proposed regulations further provide for delayed applicability of the new statutory provisions in cases where a final environmental impact statement prepared pursuant to the State Environmental Quality Review Act (“SEQRA”) has been accepted by a lead agency, a SEQRA negative declaration has been issued for a Type I action, or the

applicant has received written site plan approval from a local government. Under those circumstances, the proposed regulations delay applicability to July 1, 2028 for projects defined as “major” by DEC’s regulations implementing the Uniform Procedures Act (“UPA”), ECL Article 70, or until January 1, 2027 for projects defined as “minor” under the UPA regulations. Part 664.1(d).

PROTECT agrees that the possession of an FWA permit prior to January 1, 2025 should exempt a landowner or applicant from the new statutory and regulatory provisions for the term of the permit. However, there is no basis in the statutory amendments for granting an exemption to an applicant who has received a notice of complete application but has not yet been issued a permit. Nor is there a basis in the FWA amendments for delaying the applicability of the new statutory provisions for projects that are at various stages of the SEQRA process or site plan approval but have not yet received a final approval. Indeed, by establishing phased implementation of the new statutory provisions, the Legislature provided landowners and applicants with ample time to anticipate and adjust to the new requirements, and thus there is no need or basis for DEC to further delay implementation of those requirements. Had the Legislature intended to provide additional exemptions or to further delay applicability beyond the phased implementation, it would have included such grandfathering provisions in the amendments.

Landowners and applicants have been on notice since April 9, 2022 of the amendments to the FWA. It is neither unfair nor onerous to require applicants who will have had nearly three years’ notice of the new provisions to become bound by them when they come into effect, regardless of where they are in the application process. Accordingly, we urge the Department to withdraw the grandfathering provisions in Parts 664.1(c) and (d), with the exception of the provision applying to landowners or applicants who possess a FWA permit prior to January 1, 2025.

Vernal Pools, Part 664.6(g): The proposed regulations set forth criteria for determining whether a vernal pool or vernal pool complex is of “unusual importance” and thus subject to regulation under the FWA. The criteria are based on the number of egg masses of specified amphibian species, with different species selected for each region of the State. PROTECT believes that the criteria are unduly restrictive and may result in productive vernal pools failing to be protected. Specifically, the criteria are unduly restrictive in two respects:

- First, confining the egg mass analysis to only two or three species in each region of the State potentially eliminates vernal pools or complexes that may be critical breeding habitat for other amphibian species. Although the Department apparently chose the species used in the regulations based on concern for their long-term viability, omitting other species may result in loss of their breeding habitat, thereby placing those species at risk. The criteria should be expanded to include egg masses from other amphibian species for each region.
- Second, using a hard numerical egg mass standard eliminates the flexibility needed to account for uncertainties in field observations and the potential for additional egg masses to be present after the date of field observation. PROTECT therefore proposes that DEC use a range of egg mass numbers, such as 6-12, instead of a hard number such as 10.

In addition, the proposed regulation provides that “A landowner may report information to the department that a vernal pool or vernal pool complex occurs on their property that meets one or more of the criteria” Part 664.6(g). Excluding anyone other than a current landowner from submitting vernal pool information to DEC is far too restrictive. There is no rational reason for the Department to exclude other persons or entities who may have pertinent information, such as former landowners, local regulatory bodies, researchers and others, from providing it to DEC. As DEC has acknowledged, the majority of vernal pools currently known to meet the unusual importance criteria are located on State lands because the Department lacks adequate information about vernal pools on privately owned lands. One would hope that under these circumstances, the Department would welcome *from any source* pertinent, verifiable information of the existence of vernal pools on private lands that are productive for amphibian breeding. Restricting the receipt of that information by requiring that it come from the landowner is, in our view, contrary to the legislative intent to afford the greatest possible protection to productive vernal pools. Moreover, allowing any person to submit the information would be consistent with the regulations’ provision that allows *any person* to submit a request for a jurisdictional determination, not just the current landowner. Part 664.8(a).

Local or regional significance, Part 664.6(j): PROTECT supports inclusion of wetlands partially located within the Adirondack Park as being of local or regional significance. Part 664.6(j)(2). However, PROTECT does not support the provision specifying that wetlands in a designated critical environmental area (“CEA”) will be classified as being of unusual importance only if there is a specific reference to wetland protection in the written justification for the CEA designation. Part 664.6(j)(1). This unnecessarily restrictive requirement strikes at the heart of the protections afforded CEAs. The regulatory provision should be changed to include all CEA wetlands as being of unusual importance.

Miscellaneous provisions, Part 664.7: The proposed regulations establish a regulated adjacent area of 800 feet for vernal pools determined to be productive for amphibian breeding. Part 664.7(a). However, studies have shown that a radius of undisturbed habitat beyond DEC’s proposed 800-foot buffer is necessary for some amphibian species. For example, a radio transmitter study of tiger salamanders found that individuals ranged as far as 925 feet from vernal breeding pools.¹ The final environmental impact statement for a proposed wind energy project affecting amphibian breeding habitat stated that the mean distance Jefferson salamanders migrate from breeding pools is approximately 826 feet.² In another study, wood frog juveniles were found to migrate, on average, 1550 feet from breeding pools.³ The same study found that that even a relatively small degree of development—covering approximately 25% of the surrounding critical terrestrial habitat—can negatively impact vernal pool wildlife even where there was a forested buffer.

¹ Titus, V., D. Madison and T. Green, 2014. The importance of maintaining upland forest habitat surrounding salamander breeding ponds: case study of the Eastern tiger salamander in New York, USA, *Forests* 2014 5(12) 3070-3086.

² Town Bd. of the Town of Orangeville, New York (2011), Final Environmental Impact Statement for the Stony Creek Wind Farm (July 6, 2011).

³ Calhoun, A.J.K. and M. W. Klemens, 2002. Best development practices: conserving pool-breeding amphibians in residential and commercial developments in the northeastern United States, MCA Technical Paper No. 5, Metropolitan Conservation Alliance, Wildlife Conservation Society, Bronx, New York.

Based on these studies, PROTECT urges the Department to amend the proposed regulatory provision to add a requirement that 75% of the upland habitat around a vernal pool to a distance of 1,250 feet must be protected, with an emphasis on the highest quality habitat likely to sustain and support vernal pool-dependent amphibian populations. The regulation should also make clear that DEC may require implementation of certain design standards for protection of amphibians, including wildlife-friendly roadside curbing and wildlife tunnels to avoid or limit mortality of migrating amphibians.

Jurisdictional determinations, Part 664.8: The proposed regulations provide:

The department shall provide a definite answer in writing within 90 days of the receipt of such request as to the jurisdictional status of a parcel, and if requested, whether a permit is required for proposed activities. Provided however, that if weather or ground conditions prevent the department from making a jurisdictional determination within 90 days, it may extend such period until a determination can be made.

Part 664.8(e). This provision should be clarified for vernal pool jurisdictional determinations by stating that when on-the-ground conditions are not conducive to breeding (*e.g.*, too cold, too dry, or outside of the breeding season) such that a vernal pool cannot be verified as productive for breeding, the time to make a jurisdictional determination shall be extended until the productivity of the vernal pool can be determined.

Housing and Wetlands

At the public hearings, some developers claimed that the new wetland regulations will impede the development of housing, including affordable housing. PROTECT recognizes the critical need for development of workforce and affordable housing and takes issue with the claim that reasonable regulatory protections for wetlands are incompatible with that objective. As recognized by New York Engineers, “the soft soils in swamps and wetlands make it nearly impossible for heavy equipment to move.”⁴ Homes sited too close to wetlands experience shifting slabs, flooding, damp basements, mold, clogged storm drains and erosion. *See* National Wildlife Federation, *Why You Never Want to Buy a Home Built Over Wetlands* (2019).⁵ One study examining homes built in wetlands to address a housing shortage found that inhabitants of homes constructed in and near wetlands experienced structural failure of their housing units and other infrastructure.⁶ Thus, ensuring that new housing is sited in an environmentally responsible manner will protect the personal safety and property of new homeowners and lessors as well as the long-term viability and success of new housing developments.

⁴ New York Engineers, Construction tips for wetland areas, available at <https://www.ny-engineers.com/blog/construction-tips-for-wetland-areas>.

⁵ Available at <https://reduceflooding.com/2019/12/15/why-you-never-want-to-buy-a-home-built-over-wetlands>.

⁶ Sithole, A. and B. Goradema, 2013. Building in wetlands to meet the housing demand and urban growth in Harare, *International J. of Humanities and Social Science* 3(8) (2013).

Conclusion

On behalf of the Board of Directors of Protect the Adirondacks, please let me express our gratitude for the opportunity to submit these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Amato". The signature is fluid and cursive, with a long horizontal stroke at the end.

Christopher Amato
Conservation Director and Counsel