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Environmental & Real Estate Alert

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## Court annuls New York's freshwater wetlands regulations

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A New York trial court annulled the New York State Department of Environmental Conservation's freshwater wetlands regulations, potentially impacting real estate development involving wetlands.



### What's the impact?

- New York's wetland regulations are now void, but the statutory framework remains intact: The 2022 wetland statutory amendments—including expanded jurisdiction over wetlands—continue to govern. The State retains authority over wetlands, encompassed by the 2022 statutory amendments; only the procedural regulations implementing that authority have been invalidated.
- The court's ruling means that the New York State Department of Environmental Conservation (DEC) must determine how to administer the statute without the annulled procedural framework:
- Projects in the pipeline may face delays as DEC recalibrates. Applicants should expect a transition period as the agency clarifies its approach. However, existing permits remain valid, and the underlying wetland protections continue.

On April 8, 2026, the New York Supreme Court, Albany County, annulled the regulations promulgated under 6 NYCRR Part 664—the rules governing the classification and jurisdictional determination of freshwater wetlands (Freshwater Wetland Regulations) under the 2022

amendments to the NY Freshwater Wetlands Act, New York Environmental Conservation Law Article 24, which took effect on January 1, 2025. The court found that DEC failed to comply with the [State Environmental Quality Review Act](#) (SEQRA) when it adopted Part 664, rendering the regulations null and void in their entirety.

## Background

The Freshwater Wetlands Act, enacted in 1975, originally required DEC to map wetlands of at least 12.4 acres for state regulation. In 2022, the Legislature replaced mapping with a definition-based system, under which any area meeting the statutory definition is presumptively regulated. DEC's revised Freshwater Wetland Regulations, effective January 1, 2025, implemented the 2022 statutory amendments by establishing jurisdictional determination procedures (including a presumption rebuttal process); classification criteria for newly regulated wetlands (including those between 7.4 and 12.4 acres, wetlands in urbanized areas, productive vernal pools, and nutrient-poor wetlands); standards for identifying wetlands of "unusual importance;" and provisions extending the longstanding 100-foot adjacent-area requirement for wetlands newly brought under state jurisdiction.

A broad coalition of petitioners challenged both the 2022 statutory amendments to ECL Article 24 and DEC's implementing Part 664 regulations on constitutional and procedural grounds. Four groups of petitioners filed consolidated challenges on constitutional and procedural grounds.

The court upheld the 2022 statutory amendments in their entirety, rejecting arguments that the definition-based approach to jurisdiction violates due process. Petitioners contended that regulating wetlands based on whether they meet the statutory definition—rather than solely on whether they appear on DEC's official maps—fails to provide fair notice. The court disagreed, analogizing New York's framework to the federal Clean Water Act, under which the Army Corps of Engineers asserts jurisdiction based on whether a waterbody meets the statutory definition of "waters of the United States," not merely on mapping. The court emphasized that the rebuttable presumption is constitutionally valid because landowners have "a fair opportunity to challenge the presumption through the jurisdictional determination process, a no-cost review that DEC must complete within ninety (90) days." This holding carries significant implications: DEC's expanded statutory authority over wetlands between 7.4 and 12.4 acres, wetlands of unusual local importance, and adjacent areas remains fully intact and enforceable, even as the implementing regulations have been struck down.

The court also rejected a void-for-vagueness argument by petitioners, noting that the core statutory definition of "freshwater wetlands" has remained substantively unchanged since 1975, without any successful vagueness challenge, and that the analogous federal Clean Water Act has "consistently survived vagueness challenges." Additionally, the petitioner's improper delegation claim failed because "only DEC is authorized to render jurisdictional determinations"—private parties may initiate the process but cannot exercise regulatory authority. Lastly, the home rule

challenge was rejected because the 2022 Amendments “constitute general laws to protect the environment, a matter of substantial state concern.”

## **The decisive SEQRA ruling**

However, the court annulled Part 664 in its entirety for non-compliance with SEQRA. First, the court noted that in completing the Short Environmental Assessment Form, DEC checked boxes indicating “no impact” or only “small impact” across all categories, offering only a conclusory explanation that expanded wetland protection would reduce adverse impacts through the existing permitting process. Yet the administrative record showed that DEC received over 4,900 public comments raising specific concerns—including urban sprawl, growth-inducing effects, and impacts to aquatic ecosystems—none of which the agency identified as warranting a “hard look” under SEQRA. With over one million additional acres at stake, “the treatment of buffer zones is a highly consequential regulatory judgment,” and DEC “erred in simply assuming” that Part 664 would have no adverse environmental impacts.

Beyond the failure to take a hard look, the court faulted DEC for not providing the “reasoned elaboration” that SEQRA requires. The agency’s contemporaneous explanation amounted to just a few sentences and “does not address any potential adverse impacts, reference any supporting documents, acknowledge the concerns raised in public comments, or analyze the concerns that were identified.” When DEC attempted to fill this gap through a litigation affidavit submitted in opposition to the petitions, the court rejected it outright, holding that SEQRA requires a clear explanation of the agency’s reasoning “at the time the negative declaration is made,” and allowing post hoc rationalizations “is inconsistent with the longstanding rule that ‘a lead agency must strictly comply with SEQRA’s procedural mandates, and failure to do so will result in annulment.’”

## **Implications**

The annulment creates a significant regulatory gap: Part 664 is null and void, but Part 663, which sets forth Freshwater Wetlands permit requirements, and the 2022 statutory amendments remain in effect. DEC retains its expanded statutory jurisdiction over wetlands between 7.4 and 12.4 acres, wetlands of unusual local importance, and adjacent areas, as well as its rebuttable presumption framework—but the procedural structure for classifications, jurisdictional determinations, and buffer zone applications has been invalidated. It is also not yet clear whether the DEC will appeal the decision or whether any appeal would stay the trial court’s annulment of Part 664. Property owners and developers with pending jurisdictional determinations or permit applications should consult with counsel to assess the impact on their projects.

Nixon Peabody's [environmental](#) and [land use](#) attorneys are closely monitoring DEC's response and any appellate developments. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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