January 25, 2022

Protect New York’s Wetlands

Title: in relation to freshwater wetlands; and to repeal certain provisions of such law

Justification: There is new and unprecedented development pressure on wetlands across New York State and the perpetual uncertainty of wetlands protection at the federal level has renewed the urgency for the Legislature and Governor to fix the State’s freshwater wetlands protection program this legislative session and preserve one of our most valuable and misunderstood resources. To address the issue, the SFY 2022-23 Executive Budget contains a proposal to change how wetlands in New York State are regulated and strengthen a failing Department of Environmental Conservation (DEC) program in the wake of regressive federal action.

The COVID-19 pandemic has put tremendous development pressure on land outside of New York State’s urban centers – as quarantine weary citizens contemplate relocation or second homes in less densely populated parts of the state. The desire to build more housing in the Hudson Valley[1], the Catskills[2], the Finger Lakes region,[3]and other increasingly popular rural areas will undoubtedly create more conflict with wetland habitats that in large part are not properly delineated on existing state jurisdictional maps. Giving DEC the tools to identify and protect wetlands as they become threatened is crucial.

The crisis for New York wetlands stems from decades of regressive court decisions, federal rollbacks, insufficient DEC permitting capacity, and political pressure to stifle an already broken wetlands mapping program. To the latter point, the Legislature can rectify how wetlands maps inhibit protection of wetlands they were created to serve. Currently, a wetland must be delineated on existing freshwater wetlands maps prepared by DEC after lengthy public comment in order to be subject to regulation under New York State law. But most of these maps have not been updated in over 20 years, making them woefully outdated, and the amendment process can be time-consuming and overly burdened with administrative costs. There are hundreds of thousands of acres of wetlands in high development areas of New York State that are not on official maps but desperately require protection.

included in the executive budget proposal, and in keeping with the Assembly’s perennial legislative efforts, was a provision to remove the jurisdictional barriers that these maps have created and allow DEC to immediately protect and regulate wetlands of all sizes if they meet the basic scientific definition of these critical habitat areas – featuring hydrophilic plants and hydric soils. DEC Commissioner Seggos has estimated that if this reform was enacted into law, it would be the equivalent of adding 1 million additional acres of wetlands under the State’s protection. That number represents wetlands that are 12.4 acres and larger that were never officially mapped by the State.
proposed reforms will also allow DEC to identify and protect smaller wetlands of unusual importance, which were once encumbered by the State’s regressive mapping protocol and never officially recognized.

This last provision is important as it represents the most significant difference between Part QQ and legislation the environmental community has supported in the past, which would have lowered the jurisdictional threshold from 12.4 acres to 1 acre. While giving the State permitting jurisdiction over all wetlands larger than 1 acre would provide more comprehensive coverage, it would also require dozens of new staff to process substantially more permits; a fiscal burden the State is not prepared to take on during an economic crisis.

Part QQ would grant the DEC the authority to regulate the majority of New York State’s wetlands, regardless of size, and give the DEC discretion to identify and protect our most important wetlands as they become threatened. This efficiency will allow the DEC to ‘triage’ development proposals without needing additional staff. Full permitting authority would remain for wetlands 12.4 acres and larger, mapped or unmapped, but state authority would also be extended to smaller wetlands of ‘unusual importance’ that are either Class I wetlands, or wetlands that possess valuable characteristics or provide ecosystem services, such as: effective for community flood water control, within an urban area, possessing rare plant or animal species, or important to maintaining clean drinking water. The proposal would require land developers to request a simple jurisdictional determination from the DEC, who would have 60 days to determine whether a full permit is required or whether a development activity can proceed with general guidance from the DEC or Army Corps of Engineers. This new authority would also allow the DEC to take enforcement action in the case of a wetland violation, where under the current law, an unmapped wetland is off-limits to scrutiny.

We are already seeing the principles of Part QQ being utilized by the DEC and the Office of Renewable Energy Siting (ORES) as they review renewable energy project sites that contain wetlands. The Article X process and ORES recognize and require permits for jurisdictional wetlands 12.4 acres and larger, regardless of whether they are on official maps. A review of the dozen or so large solar energy proposals currently in the permitting pipeline reveals that a significant portion of affected wetlands remain unmapped, which means that the DEC and ORES will continue to exercise this authority as more projects enter the queue. So far, giving the DEC discretion to identify and help mitigate adverse impacts to wetlands from the expansion of solar projects appears to be working as staff now have leverage to move development away from wet areas and mitigate where they cannot. It is not without irony that renewable energy installations receive disproportionate scrutiny when it comes to wetlands, when new housing developments, shopping malls, warehouses, and parking lots still get a pass if they intend to fill in an unmapped wetland. We have to rectify this inconsistency this year.

This proposal to repeal regressive burdens on wetlands regulation aligns with the goals of preserving 30% of New York State’s open space by 2030 and the $4 billion ‘Clean Water, Clean Air, Green Jobs, Environmental Bond Act’, which will be on the ballot in the fall of 2022. The aims of the Bond Act to restore habitat, protect drinking water and prevent catastrophic flooding, combine powerfully with a wetlands regulatory reform agenda. Spending billions on restoring degraded wetlands without doing all we can to prevent existing wetlands from becoming degraded would be a poor return on our investment. This vision of a climate-resilient and adaptive New York State is not possible without immediate wetlands reform. Sierra Club urges the legislature to support Part QQ (S.8008/A.9008) in their own budget resolutions and makes sure that a comprehensive wetlands package is included in the final budget agreement.