

New York State Department of Environmental Conservation Advanced)
Notice of Proposed Rule Making For Potential Revisions to Freshwater)
Wetlands Regulations 6 NYCRR Part 664)

Comments of the New York Solar Energy Industries Association

Introduction

On behalf of New York Solar Energy Industries Association (NYSEIA), we are pleased to provide the following comments for consideration by the New York State Department of Environmental Conservation (DEC) as the agency determined how to use the expanded jurisdiction the agency was granted in New York's 2022-2023 budget, which amended the Freshwater Wetlands Act, Article 24 of the Environmental Conservation Law (ECL). The ECL amendments expand the DEC's potential jurisdiction by: allowing the DEC to regulate unmapped wetlands starting on January 1, 2025; allowing the DEC to regulate smaller wetlands if they are of "unusual importance" starting on January 1, 2025; and reducing the size threshold for a regulated wetland from 12.4 acres today to 7.4 acres in 2028.

NYSEIA's 225 member companies develop distributed (rooftop and community) solar energy projects across New York State, supporting progress toward the critical climate goals enshrined in the Climate Leadership and Community Protection Act (CLCPA). NYSEIA appreciates and strongly supports the DEC's mission, which is to "conserve, improve and protect New York's natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being." NYSEIA's mission is to advocate for policies and programs that accelerate solar deployment in New York State, a mission that closely aligns with the DEC's.

NYSEIA is submitting comments in response to this ANPRM because the DEC's implementation of expanded freshwater wetlands protection in New York State could have significant impacts on New York's clean energy deployment and progress toward our CLCPA goals. Like most developments, solar projects must comply with the Freshwater Wetlands Act. NYSEIA's comments advocate for the DEC to develop rules and implement its expanded jurisdictional authority in a manner that is clear, predictable and that minimizes harm to solar deployment. An overly expansive implementation of the ECL amendments with regard to solar development could cause unintended environmental harm by preventing solar projects and forcing continued reliance on fossil fuels, which are known to cause significant air, land and water pollution. Therefore, NYSEIA respectfully provides the following feedback which encourages the DEC to use its rulemaking and administrative authority to ensure that the implementation of these modifications to Article 24 of the ECL be thoughtful and that the DEC seek to mitigate unintended negative impacts on New York's clean energy progress.

Regulation of Unmapped Wetlands

Transitioning from a system that relies upon DEC maps to a completely unmapped approach will create additional uncertainty/ambiguity and increase costs for solar development. Maintaining accurate maps

that serve as the basis for initial screening for wetlands and DEC jurisdiction will be valuable to both the DEC and solar developers. As additional small wetlands and wetlands of “unusual importance” fall under the DEC’s jurisdiction pursuant to the 2022-2023 budget amendments, these should all be added to the DEC’s maps. The alternative will be expensive and time-consuming for industry and for the DEC. NYSEIA recommends that the DEC endeavor to maintain accurate maps of its jurisdictional wetlands to provide ongoing certainty to New York’s solar industry and to support continued clean energy deployment.

As a practical matter, if every time a wetlands delineation is completed at a site that may meet one of the 11 sub categories and/or the size threshold, will the DEC have to visit the site to perform a wetland review/determination? How will the DEC handle this additional workload and site visits considering current staffing constraints at the DEC’s regional offices? How will a jurisdictional evaluation be completed when a wetland spans multiple parcels and a solar project is only proposed at one parcel and site access is not granted to adjacent lots? Will the creation of an unmapped process further delay jurisdictional inquiries, permitting and ultimately development/project (i.e. solar) schedules? If so, solar developers will likely need to increase budgets for consultation/site meetings and add a “buffer” to project schedules. These additional costs and delays will impede solar project development and drive up the cost for New York State Energy Research and Development Authority (NYSERDA) to achieve New York’s legislatively mandated clean energy goals. This negative outcome can be avoided through the maintenance of accurate and jurisdictional maps.

NYSEIA believes that an approach that relies on ad hoc site-specific jurisdictional determination is impractical, time-consuming and expensive for both the DEC and solar developers. NYSEIA encourages the DEC to enhance the NYS DEC Environmental Resource Mapper to efficiently review projects. For example, an enhanced map would include:

- A regularly updated layer of all current/former wetlands designated as of “unusual local importance”, “regional/local significance” and “vernal pools”;
- A layer that includes previously mapped Class I wetlands; and
- A layer with Hydrologic Unit Code (HUC) 12 watershed area to allow users to identify areas in watersheds with significant flooding.

The main point NYSEIA wishes to convey is that, without clear guidance, well-maintained tools, and thoughtful enforcement, expansion of DEC regulations to unmapped wetlands will be disruptive to New York’s clean energy development and impede progress toward one of New York’s central environmental goals.

Grandfathering of Prior Determinations is Critical

The DEC regularly makes jurisdictional determinations, which have important implications for the feasibility of solar projects under development. Solar developers and landowners are making significant financial commitments, such as signing lease agreements and paying for utility infrastructure upgrades, based in part on DEC determinations. It is critical that prior determinations be maintained to avoid negatively affecting solar projects in advanced stages of development. Retroactive imposition of new requirements could impose unreasonable financial hardship on solar development companies and landowners while jeopardizing progress toward achieving New York’s clean energy goals. NYSEIA

recommends that DEC jurisdictional determinations be grandfathered for a period of five years, irrespective of forthcoming changes that may expand the DEC's potential jurisdiction.

Solar is an Environmentally Beneficial Land Use that Should be Encouraged

Deploying solar energy systems in New York State is critical for New York to achieve its environmental goals, including carbon emissions reduction and mitigation of fossil fuel combustion, a practice known to generate significant air, land and water pollution. Additionally, when best-practices are followed, solar farms can actually reduce local water quality impacts compared to agricultural applications, potentially restoring watershed functions and improving impaired waters¹. As the DEC's jurisdiction is expanded in 2025 and again in 2028, it is critical for the DEC to consider the impacts of this expansion on solar deployment; without reasonable accommodations and the allowance of mitigation measures that enable solar deployment, expanded freshwater protections could inadvertently imperil New York's clean energy progress.

The New York Office of Renewable Energy Siting' (ORES) rules for large-scale renewable energy projects already include some allowable mitigation for projects that are adjacent to or overlap with certain regulated wetlands². However, these same mitigation options are not extended to smaller community-scale solar projects in a standard fashion. NYSEIA encourages the DEC to work closely with NYSERDA and other stakeholders to develop a freshwater protection plan that considers New York State's other environmental goals, and that creates reasonable compliance pathways for solar projects that are sited near protected wetlands, including unmapped wetlands and smaller wetlands that are not currently regulated by the DEC.

¹ Great Plains Institute. Solar and Water Quality: Best Practices from the Groundbreaking PV-SMaRT Project. <https://betterenergy.org/blog/solar-and-water-quality-best-practices-from-the-groundbreaking-pv-smart-project/>. Accessed February 16, 2024.

² New York Office of Renewable Energy Siting. Chapter XVIII, Title 19 of NYCRR Part 900 (Subparts 900-1 – 900-15). <https://ores.ny.gov/system/files/documents/2021/03/chapter-xviii-title-19-of-nycrr-part-900-subparts-900-1-through-900-15.pdf>. Accessed February 12, 2024.

REGULATIONS IMPLEMENTING SECTION 94-c OF THE EXECUTIVE LAW

Table 1: Wetland Mitigation Requirements

Feature/Activity	Class I ^a		Class II ^a		Class III & IV ^a Unmapped >12.4 acres	
	FWW	AA	FWW	AA	FWW	AA
Major Activities						
Wind Turbines	X	A(M3)**	X	A(E)*	A(M3)	A
Solar Panels	X	A(E)**	A(M2)	A(E)*	A(M3)	A
Energy Storage	X	A(M3)**	X	A(E)*	A(M3)	A
Access Roads	A(M1)	A(E)*	A(M2)	A(E)*	A(M3)	A
Power interconnections (including clearing for interconnections)	A(M1)	A(E)*	A(M2)	A(E)*	A(M3)	A
Clearing of forest	X	A(M3)**	A(M2)	A(E)*	A(M3)	A
Other activities and structures integral to the project involving placement of fill	X	A(M3)**	A(M2)	A(E)*	A(M3)	A
Intermediate Activities						
Security fence	X	A(E)*	A(M3)	A	A	A
Clearing and manipulation of undisturbed herbaceous vegetation	X	A(E)*	A(M3)	A	A(M3)	A
Other activities integral to the project involving grading	X	A(E)*	A(M3)	A	A(M3)	A
Minor Activities						
Grading and manipulation of disturbed areas (active hay/row crops, existing commercial/industrial development)	X	A(E)*	A(M3)	A	A(E)	A
Selective cutting of trees and shrubs	A	A	A	A	A	A
*No enhancements or mitigation required with 75 foot or more setback						
** 75-foot setback from wetland boundary required in undisturbed adjacent area						
^a ECL Article 24 classification as determined under 6 NYCRR Part 664.						

Agrivoltaics

Agricultural wetlands—both pastures and croplands—are important components of NY landscapes. Agricultural activity is generally exempt from wetlands permitting requirements, however there is no special consideration given to agrivoltaic projects, which maintain agricultural production under and around the solar array. This makes it extremely difficult to design agrivoltaic projects around existing farming practices, imposing changes in fencelines and cropping patterns that reduce agricultural efficiency without providing clear benefits to the already-impacted wetland. Setback requirements are particularly challenging, and can shift project layouts away from farmed wetland buffers and into wooded uplands, increasing habitat impacts from solar. NYSEIA recommends that the DEC establish guidelines to allow permitting of agrivoltaic projects in farmed wetland buffers and in minor wetlands such as sedge meadows, provided the agrivoltaic use will not cause additional impairment of wetland function.

Early Disclosure of Proposed 2025 Enforcement is Critical for a Smooth Transition

On January 1, 2025, the DEC will be able to regulate unmapped wetlands and small wetlands of unusual importance. The DEC has not yet issued any public plans for how this allowance of expanded jurisdiction will be implemented. NYSEIA respectfully requests that the DEC publish their proposed plans for stakeholder review and comment as soon as possible to allow for a smooth rollout and to mitigate unintended negative impacts on solar projects that are under development.

Specific Feedback on the ANPRM

NYSEIA respectfully submits the following feedback and questions for consideration in response to the specific questions included in the ANPRM.

2) Wetlands of Unusual Importance - Rare Animals (ECL § 24-0107)

Is suitable habitat alone sufficient for DEC to determine a wetland to meet these criteria, or is presence a determining factor? For instance, if habitat is present in a wetland at a location that is within the known range of a given species, will a wetland be deemed wetland of unusual importance without any further study? What if habitat is present, but rigorous presence/absence surveys are conducted and do not confirm that presence of species. Is that sufficient to prevent classification according to these criteria? Additional clarification is required to reasonably implement the DEC's expanded jurisdiction with regard to habitats. Northern Long-eared Bat habitat is widespread over forested areas/hibernaculum of the state. If mature trees with snags and crevasses are noted in a small swamp during a wetland delineation – what does that mean for jurisdiction? Who is making that call? Do solar project developers need to hire wetland delineators with rare species knowledge of the local area in order to perform wetlands delineation going forward? Do separate studies need to be performed in addition to following all local/state/regional/federal regulations for permit issuance and/or conformance to SEQR? These are a few of the questions that the solar industry has for the DEC regarding the implementation of the DEC's potential jurisdictional expansion.

3) Wetlands of Unusual Importance – Vernal Pools (ECL § 24-0107)

DEC should develop a clear definition of vernal pool that includes at minimum origin (natural vs man-made) of feature, hydroperiod, hydrology, presence of indicator species, non-compatible species (fish), etc. Other states, including Maine, have clear definitions of vernal pools and could be used as an example.

The egg mass threshold for the Great Lakes region is low. Pool breeding amphibians are known to place a few egg masses in features that are not actual vernal pools (e.g. tire ruts). As such, this number should be increased to avoid inadvertently classifying features that are not actual vernal pools.

There should be acknowledgement of non-sustaining features (i.e. vernal pool 'sinks') that do not hold water late enough in spring in a normal precipitation year, to support amphibian emergence. There are features that, in most years, contain enough egg masses to meet the threshold listed above, but that do not retain standing water in any year, long enough for larvae to transition to terrestrial form and disperse. These features are considered genetic 'sinks' and should not be protected for unusual importance.

DEC should develop survey guidance that includes a clear definition of vernal pools and a data form, for standardization of surveys and data collection.

4) Wetlands of Unusual Importance - Local or Regional Significant (ECL 24-0107)

Item 4.a.2 of the ANPRM states that wetlands partially located within the Adirondack Park, jurisdictional to the Adirondack Park Agency (APA), will be deemed DEC jurisdiction. Does this mean that wetlands within Adirondack Park fall solely under APA and US Army Corps of Engineers (USACE) jurisdiction

unless the wetland meets other DEC nutrient requirements? NYSEIA recommends that this section be clarified if the intent is for the DEC's jurisdictional expansion to cover only wetlands that are partially within/outside the park boundaries.

7) Jurisdictional Determination Procedure (ECL § 24-0703)

NYSEIA appreciates the DEC's proposal that "a negative jurisdictional determination shall be a complete defense to the enforcement for a period of five years from the date it is issued." Jurisdictional determinations have a significant impact on the feasibility of solar projects under development, and for the reasons outlined above, it is critical that DEC jurisdictional determinations made prior to the expansion of the DEC's jurisdiction in 2025 and 2028 also be maintained for five years.

Conclusion

NYSEIA appreciates the DEC's critical role in protecting New York's freshwater resources. The DEC also plays a pivotal role in implementing New York's Climate Leadership and Community Protection Act, which requires the rapid deployment of in-state clean energy resources to eliminate air, land and water pollution caused by fossil fuel combustion. NYSEIA encourages the DEC to consider the unusual importance of solar power as it develops rules and regulations to implement the expanded jurisdiction it was granted in the 2022 amendments to the Freshwater Wetlands Act, Article 24 of the Environmental Conservation Law (ECL). Thank you for the opportunity to provide input on these important matters.