



ENVIRONMENTAL
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State Wetland Protection

Status, Trends, & Model Approaches

*A 50-state study by the
Environmental Law Institute*

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Appendix: State Profiles

New York

I. Overview

The New York State Constitution specifically mandates the protection and conservation of wetlands, stating, “[t]he policy of the state shall be to conserve and protect its natural resources and scenic beauty . . . The legislature, in implementing this policy, shall include adequate provision for . . . the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.”¹

The state takes a habitat approach to wetlands protection, with a marginal focus on water quality. The primary regulatory agency with respect to wetlands is the New York State Department of Environmental Conservation (NYS DEC); however, the Adirondack Park Agency (APA) oversees wetland regulation within the boundaries of Adirondack Park.

II. Regulatory Programs

Wetland definitions and delineation

New York law defines “waters” to include:

lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York, and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private, which are wholly or partially within or bordering the state or within its jurisdiction.²

State law emphasizes vegetation in the definitions for freshwater and tidal wetlands, which are offered in separate statutes. Freshwater wetlands are defined as “lands and submerged lands commonly known as marshes, swamps, sloughs, bogs, and flats which support wetland vegetation,”³ with further provisions for what constitutes wetland vegetation. The law does also require the presence of “seasonal or permanent flooding or sufficiently water-logged soils” to determine whether facultative vegetation should be considered as wetland vegetation and describes instances where an area is considered a wetland, although wetland vegetation may be absent: (a) permanently wet conditions which contain dead upland vegetation; (b) areas substantially enclosed by wetlands; and (c) the waters which overlie any wetland area.⁴ Additional provisions are given to freshwater wetlands falling inside the Adirondack Park, a six million acre patchwork of public and private land protected under state law. Within the boundaries of the park, “wetlands” are defined as “any land which is annually subject to periodic or continual inundation by water and commonly referred to as a bog, swamp, or marsh...”⁵

“Tidal wetlands” are defined as “those areas which border on or lie beneath tidal waters, such as, but not limited to, banks, bogs, salt marsh, swamps, meadows, flats or other low lands subject to

¹ N.Y. CONST. Art. XIV, § 4.

² N.Y. ENVTL. CONSERV. LAW § 15-0107(4).

³ *Id.* § 24-0107(1).

⁴ *Id.*

⁵ N.Y. ENVTL. CONSERV. LAW § 24-0801; NY EXEC. § 801(68).

tidal action, including those areas now or formerly connected to tidal waters,” and “all banks, bogs, meadows, flats, and tidal marsh subject to such tides, and upon which grow or may grow some or any of the following: salt hay, black grass, saltworts, sea lavender, tall cordgrass, hightide bush, cattails, groundsel, marsh mallow, and the intertidal zone including low marsh cordgrass.”⁶

Delineation criteria differ from that of the §404 program (outlined in the U.S. Army Corps of Engineers’ 1987 *Wetlands Delineation Manual*),⁷ again emphasizing, but not limited to, vegetation. Although New York State wetland delineation criteria rely primarily on vegetation parameters, delineation techniques do parallel those offered in the Corps’ *Manual*, and soil and hydrological classifications can be used if needed.⁸ Generally, criteria are similarly stringent, but the amount of documentation required by New York State is less rigorous.⁹

Wetland-related statutes and regulations

The State of New York identifies and protects wetlands under the following state laws:

- Freshwater Wetlands outside of Adirondack Park (NY ECL Article 24, Title 7);
- Freshwater Wetlands within Adirondack Park (NY ECL Article 24, Title 8; NY ECL Article 27);
- Freshwater Wetlands subject to local control (NY ECL Article 24, Title 5);
- Tidal Wetlands (NY ECL Article 25); and
- Wetlands adjacent to any of the state’s navigable waters (NY ECL Article 15, Title 5).

Freshwater Wetlands Act. The Freshwater Wetlands Act (NYECL Article 24) was enacted in 1975 by the state legislature in response to rapidly increasing wetland losses throughout the state. Under the act, jurisdiction belongs to two state agencies. The NYS DEC manages and protects wetlands for the majority of the state. The APA oversees wetlands falling within boundaries of the Adirondack Park.¹⁰ Local municipalities may also assume control under the act, provided that local wetlands laws or ordinances are at least as protective as state law and do not affect activities exempted from permit requirements by the state.¹¹ Local assumption of wetlands regulation authority is uncommon; only three municipalities in New York have assumed the program to date.^{12,13} Aside from defining wetlands (see *Wetlands definitions and delineation* section above), the Freshwater Wetlands Act outlines size thresholds for protection, classifies

⁶ *Id.* § 25-0103.

⁷ U.S. ARMY CORPS OF ENGINEERS, WETLANDS RESEARCH PROGRAM TECHNICAL REPORT Y-87-1, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (1987), available at <http://el.erdc.usace.army.mil/elpubs/pdf/wlman87.pdf>.

⁸ NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, FRESHWATER WETLANDS DELINEATION MANUAL (1995), available at <http://www.dec.state.ny.us/website/dfwmr/habitat/wdelman.pdf>.

⁹ Personal communication with Patricia Riexinger, N.Y. Dep’t of Env’tl. Conservation (Nov. 12, 2003).

¹⁰ New York State Department of Environmental Conservation [hereinafter NYS DEC], *Programs to Conserve Wetlands*, at <http://www.dec.state.ny.us/website/dfwmr/habitat/fwwprog4.htm> (last visited Sept. 12, 2007).

¹¹ N.Y. ENVTL. CONSERV. LAW § 24-0501.

¹² As of June 2007, the Town of Union, the Town of Hempstead and the Village of South Hampton have assumed responsibility for carrying out the provisions of the Freshwater Wetlands Act.

¹³ Riexinger, *supra* note 9.

wetlands based on functions and benefits, and describes permitted activities in classified wetlands.¹⁴

With the exception of the Adirondack Park, NYS DEC regulates activities affecting wetlands that are greater than 12.4 acres in size and those less than 12.4 acres if they are deemed of “unusual local importance.”^{15,16} The regulated area includes the wetlands themselves as well as a protective buffer or “adjacent area” extending 100 feet landward of the wetland boundary. The adjacent area can also be extended “where necessary to protect and preserve the wetland.”¹⁷ Jurisdiction over wetlands that are less than 12.4 acres in size and not of “unusual local importance” is up to the discretion of local governments.¹⁸

Finally, wetlands under the state’s jurisdiction must be mapped according to the Freshwater Wetlands Act. This allows for landowners, regulators, and other interested parties to see and understand jurisdictional boundaries. The process of generating these maps involves public comment to ensure accuracy and, in recognition of wetlands as a dynamic resource, periodic amendments as necessary.¹⁹

Within the Adirondack Park boundaries, the APA regulates activities affecting wetlands greater than one acre in size or located adjacent to a body of water, including a permanent stream, with which there is free interchange of water at the surface, in which case there is no size limitation.²⁰ Mapping of wetlands under APA’s jurisdiction is ongoing.²¹

Regulated freshwater wetlands are classified according to Part 664 Title 6 of the New York State Codes, Rules, and Regulations (NYCRR) – Wetlands Mapping and Classification regulations. The rules guide the classification of wetlands during the mapping process described above. Classification categories range from Class I wetlands, which provide the most benefits, to Class IV wetlands, which provide the fewest.²² Obtaining a permit to alter a Class I wetland is more

¹⁴ NYS DEC, *supra* note 10.

¹⁵ N.Y. ENVTL. CONSERV. LAW § 24-0507.

¹⁶ Wetlands are of “unusual importance” if they “provide one or more of the benefits of wetlands described in [N.Y. ENVTL. CONSERV. LAW] subdivision 24-0105.7.” Benefits included in the statute are: “(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 species such as the bald eagle and osprey; (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.” N.Y. ENVTL. CONSERV. LAW § 24-0105.7.

¹⁷ *Id.* § 24-0701.

¹⁸ *Id.* § 24-0507.

¹⁹ See New York State Department of Environmental Conservation, *Freshwater Wetlands Act and What it Means to Wetlands Landowners*, at <http://www.dec.ny.gov/lands/5503.html> (last visited Sept. 13, 2007).

²⁰ N.Y. ENVTL. CONSERV. LAW § 24-0801; NY Exec. Law § 801(68).

²¹ Personal communication with Patricia Riexinger, N.Y. Dep’t of Env’tl. Conservation (Aug. 11, 2003).

²² N.Y. COMP. CODES R. & REGS. tit. 6, § 664.

difficult than a permit to alter a Class IV wetland. Thus, wetland classifications are important to the regulatory process and are subject to public comment during the mapping process.²³ Procedures, systems, and explanations for classification are described in the NYCRR.²⁴ Inside the Adirondack Park, wetlands are assigned value ratings according to their vegetation covertype and other wetland characteristics.²⁵ Value ratings within the park are considered in permitting in the same manner.²⁶

The Freshwater Wetlands Act regulates activities that can be performed in freshwater wetlands subject to jurisdiction. Actions requiring a permit include: the construction of buildings, roadways, septic systems, bulkheads, dikes or dams; placement of fill, excavation or grading; modification or restoration of existing structures; drainage (except for agriculture) or otherwise altering water levels; clear-cutting of trees; drilling wells; applying pesticides; and any other activity which substantially impairs freshwater wetland functions or the benefits they provide, whether or not they occur within wetland boundaries. Activities that are exempt from permit requirements include: normal agricultural activity (except filling), recreational activity, routine building maintenance, selective cutting of trees, and the continuation of an already lawful land use.²⁷

Tidal Wetlands Act. NYECL Article 25, the Tidal Wetlands Act, outlines measures specifically for tidal wetlands, which are regulated by the NYS DEC.²⁸ Unlike freshwater wetlands, the rules do not set size thresholds or classifications for regulated tidal wetlands. Tidal wetlands are required to be mapped according to similar procedures as those conducted under the Freshwater Wetlands Act, and nearly all activities that will alter wetlands or the adjacent areas require permits. The only exempt actions are those that continue lawfully existing uses, do not alter lands or wetlands, and do not change existing structures.²⁹

Water Resources Law. NYECL Article 15, Title 5, states that, without a permit, excavation or placement of fill is prohibited in “any of the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at a mean high water level or tide...”³⁰ The statute specifically exempts emergency procedures, general NYS DEC activities relating to flood control, general New York State Department of Transportation activities relating to canals, or other state agencies or organizations that have relevant memoranda of understanding with the NYS DEC.³¹ The corresponding state regulations, Title 6 of the NYCRR, Part 608, also exempt particular agricultural activities, including the crossing of protected streams by livestock or wheeled farming equipment and the withdrawal of irrigation water in a manner which does not

²³ NYS DEC, *supra* note 10.

²⁴ N.Y. COMP. CODES R. & REGS. tit. 6, § 664.

²⁵ *Id.* tit. 9, § 578.5.

²⁶ *Id.* § 578.10.

²⁷ N.Y. ENVTL. CONSERV. LAW § 24-0701; N.Y. COMP. CODES R. & REGS. tit. 6, § 663.4(d).

²⁸ New York Department of Environmental Conservation, *Tidal Wetlands Permit Program: Introduction*, at <http://www.dec.ny.gov/permits/6039.html> (last visited Sept. 12, 2007).

²⁹ N.Y. ENVTL. CONSERV. LAW § 25-0401(2); 6 NYCRR § 661.5.

³⁰ N.Y. ENVTL. CONSERV. LAW. § 15.

³¹ *Id.*

otherwise alter the stream.³² The permitting program is administered by the NYS DEC. Permit applications are submitted to regional administrators and, depending on the proposed project, must include various plans, reports, and maps, as well as §401 certification where applicable.³³ Applicable permits regulate two levels of protection for the state's streams. Stream protection permits apply to disturbances of streambeds and banks; about 2,000 of these permits are issued each year. Navigable water permits offer a higher level of protection; approximately 5,300 of these permits are issued annually. There is typically no mitigation associated with these permits since most impacts involve stream crossings or other activities that have a minimal effect on the land's function.³⁴

Organization of state agencies

The two agencies regulating wetlands activities at the state level, NYS DEC and APA, have similar roles in wetlands protection and management, albeit in different jurisdictions. The NYS DEC regulates all wetlands within the jurisdiction of the state's wetland-related laws, with the exception of those lying within the Adirondack Park. The APA regulates wetlands lying within the park boundaries.³⁵

Department of Environmental Conservation. Within the NYS DEC, the Division of Fish, Wildlife, and Marine Resources (DFWMR) has primary responsibility for wetlands. Thus, regulatory approaches are very habitat-focused, with less emphasis on water quality. Staff from the DFWMR's Bureau of Habitat and Wildlife conduct a variety of wetland-related activities, including permitting, enforcement, monitoring, outreach and technical support, restoration initiatives, management of state-owned wetlands, and mapping of jurisdictional wetlands. Nine regional offices and four sub-offices handle permit review and delineation tasks. Because freshwater wetlands, tidal wetlands, and streams are just three of many types of habitat being handled by DFWMR staff, there is no specific "wetlands program."³⁶ Wetland-related activities are spread among many areas of habitat protection and different divisions within the NYS DEC; therefore, it is difficult to calculate the amount of staff time or funding devoted specifically to wetlands management and protection within the agency. However, based on daily staff activity, an estimated 14.2 FTEs work on regulatory activities such as wetland delineation, permit review, compliance and enforcement, mapping, and program administration. This estimate does not include non-regulatory activities or broader conservation efforts.³⁷

Funding for the NYS DEC's wetlands-related activities comes from a diversity of sources. General state funds support a few employees. The state also has a Conservation Fund, which includes dedicated funding from the sale of sporting licenses and dedicated state appropriations to the DFWMR. The Conservation Fund supports both staff that conduct habitat protection work and management programs that benefit wetlands and wetland-related fish and wildlife. Federal grants are integral to many of the agency's initiatives. For example, funds from the Federal Aid in Wildlife Restoration Act and the Federal Aid in Sport Fish Recreation Act, commonly known

³² N.Y. COMP. CODES R. & REGS. tit. 6, § 608.

³³ *Id.*

³⁴ Personal communication with Patricia Riexinger, N.Y. Dep't of Env'tl. Conservation (June 17, 2004).

³⁵ Riexinger, *supra* note 9.

³⁶ *Id.*

³⁷ Personal communication with Patricia Riexinger, N.Y. Dep't of Env'tl. Conservation (Dec. 23, 2003).

as the Pittman-Robertson and the Dingell-Johnson Acts respectively, support employees working in stream protection, habitat protection, and other wetland-related activities.³⁸

Other NYS DEC divisions working on wetland-related activities include the Division of Environmental Permits (DEP), Division of Law Enforcement, and the Division of Legal Affairs. DEP is responsible for coordinating and processing wetlands permits, along with a suite of other agency permits administered under the Uniform Procedures Act.³⁹ DEP conducts screening for the presence of natural heritage, cultural, and historic resources; ensures compliance with the State Environmental Quality Review Act,⁴⁰ and screens for applicability of other regulatory programs. On certain minor projects negotiated regionally with DFWMR staff, DEP administers general permits for impacts to wetlands and protected streams. DEP provides the state with “one stop shopping” for permit applications and inquiries. The Division of Law Enforcement and the Division of Legal Affairs provide DFWMR with assistance on enforcement, compliance, and other legal issues.⁴¹

Adirondack Park Agency. The APA is primarily a land use regulatory agency.⁴² The agency administers two wetlands laws, the Freshwater Wetlands Act and the Adirondack Park Agency Act, and has lower jurisdictional thresholds for wetland regulation. Almost all wetland-related activities within the APA are conducted by the Resource Analysis and Scientific Services (RASS) Division. The RASS Division is responsible for wetland mapping, field delineations, resource analysis, support for enforcement staff, education and outreach, technical support, and review of projects on public and private lands in regards to potential impacts to the biologic or physical resources of the Park. The APA’s Planning Division does share some mapping work, but the RASS Division is the agency’s primary unit for wetlands management and protection.⁴³

The APA oversees approximately six million acres of land, nearly 20 percent of the state. However, development pressures in the Park are much less intense than in other parts of the state. Projects are reviewed case-by-case, and staff develop skills and training as needed. The agency is relatively small, with approximately 2-2.5 full-time equivalents (FTEs) working on wetland-related activities out of one central office.⁴⁴ Funding for the agency’s wetland-related programs and initiatives comes from general state appropriations supplemented by periodic federal grants. Since 1993, APA has received 13 U.S. Environmental Protection Agency (EPA) Wetland Protection Grants. These grants have ranged from \$36,000 for data collection and research to over \$500,000 for projects that span up to five years. The agency also relies upon volunteer help whenever possible.⁴⁵

³⁸ Riexinger, *supra* note 9.

³⁹ N.Y. COMP. CODES R. & REGS. tit. 6, § 621.

⁴⁰ The State Environmental Quality Review Act (SEQRA) requires all New York state and local government agencies to consider environmental impacts equally with social and economic factors during discretionary decision-making. N.Y. COMP. CODES R. & REGS. tit. 6, § 617.

⁴¹ Riexinger, *supra* note 21.

⁴² See generally New York State Adirondack Park Agency, <http://www.apa.state.ny.us> (last visited Sept. 12, 2007).

⁴³ Personal communication with Dan Spada, N.Y. Adirondack Park Agency (May 10, 2004).

⁴⁴ *Id.*

⁴⁵ Personal communication with Judith Smith, N.Y. Adirondack Park Agency (May 14, 2004).

Mitigation

Mitigation is addressed in the state's regulations (Title 6 of the NYCRR, Part 661 and 663). In order to receive a permit under the Freshwater or Tidal Wetlands Acts, an applicant must demonstrate that impacts to the wetland cannot be avoided, that the unavoidable impacts have been minimized to the fullest extent, and finally, that they will fully compensate for or replace "any remaining loss of wetland acreage and function unless it can be shown that the losses are inconsequential or that, on balance, economic or social need for the project outweighs the losses."⁴⁶ Compensatory mitigation for unavoidable impacts to a wetland must occur on or in the vicinity of the proposed project, must fall under the authority of the regulating agency after the mitigative measures have been completed, and must provide substantially equal or increased benefits to those of the lost wetland.⁴⁷

The NYS DEC has developed general mitigation guidelines for its regulating staff. The guidelines do not prescribe a "cookbook" approach for wetlands mitigation, but instead offer a framework for decision-making related to wetlands regulation and enforcement.⁴⁸ Guiding principles include the following:

- Priority requirements are to first avoid and then minimize project impacts;
- Compensatory mitigation should preferably be on-site and in-kind;
- The preferred order of mitigation approaches is wetland restoration, then creation, then enhancement;
- Mitigation proposals should be based on plans containing clear specific detail, short and long term goals, and measurable performance criteria;
- Replacement at a 1:1 ratio is desirable;
- Mitigation should be sustainable and must persist over time without intensive, long term maintenance;
- Projects should be monitored for an appropriate period of time, as determined on a case-by-case basis;
- Mitigation should be completed prior to or concurrent with the permitted project; and
- Joint mitigation projects and mitigation banking can be considered by permitting staff.⁴⁹

The NYS DEC has also addressed wetland mitigation banking. The agency issued a memorandum to its field staff advising them to consider banking as mitigation option equivalent to other off-site mitigation for freshwater wetlands.⁵⁰ NYS DEC does not support the use of banks for tidal wetlands. The state is also an active participant on the Mitigation Bank Review Team that covers activities in the New York and Buffalo Districts of the U.S. Army Corps of

⁴⁶ New York Department of Environmental Conservation, *Freshwater Wetlands Regulation - Guidelines on Compensatory Mitigation*, at http://www.dec.ny.gov/docs/wildlife_pdf/wetlmit.pdf (last visited Sept. 12, 2007).

⁴⁷ N.Y. COMP. CODES R. & REGS. tit. 6, § 663.

⁴⁸ NYS DEC, *supra* note 46.

⁴⁹ *Id.*

⁵⁰ Memorandum from Patricia Riexinger, N.Y. Dep't of Env'tl. Conservation, Div. of Fish, Wildlife and Marine Resources, Bureau of Habitat, to Natural Resource Supervisors, New York Department of Environmental Conservation (Dec. 24, 2002) (on file with author).

Engineers. Although the NYS DEC supports mitigation banking, the state feels that a formal, state-level banking program is not currently viable or necessary given the current demand for compensatory mitigation in the state.⁵¹

The APA generally reviews mitigation plans as part of the wetlands permitting process in cases where impacts to wetlands cannot be avoided, as well as mitigation resulting from enforcement activities. In 1995, the agency adopted general mitigation guidelines that, similar to the NYS DEC guidelines, recognize banking and in-lieu-fee as mitigation options, but do not prescribe specific methods for either.⁵²

Compliance and enforcement

Enforcement is decentralized in New York, with regional offices responsible for enforcement in their respective areas. DFWMR staff assist the NYS DEC's Division of Environmental Enforcement by providing technical guidance on wetlands impacts and remediation. DFWMR staff also often undertake informal action for minor infractions by working directly with landowners to fix problems, particularly with non-compliance with permit conditions. Wetlands enforcement cases in New York are pursued when violations are identified and the underlying facts warrant enforcement, which occurs infrequently.⁵³ Penalties and fines are directed into the state's general fund.⁵⁴

Sanctions under the Tidal and Freshwater Wetlands Acts are defined separately under NYECL Article 71 (Title 23 for freshwater wetlands and Title 25 for tidal wetlands) but are largely similar. Enforcement tools for both tidal and freshwater wetlands include summary abatement orders, consent orders, and administrative, civil and criminal penalties.⁵⁵

A summary abatement order is a strong tool that requires immediate cessation of the violating activity and that may also order restoration. Within 15 days, a hearing is held where challenges to the order can be made. The summary abatement order is typically used only if substantial environmental harm or imminent danger can be demonstrated. As a result, the summary abatement order is used rarely.⁵⁶

Civil sanctions may also be issued. For freshwater and tidal wetlands, a consent order may be issued with penalties, a requirement to cease and desist the violation activity, and restoration where appropriate. For freshwater wetlands, penalties of up to \$3,000 per violation may be imposed.⁵⁷ For tidal wetlands, monetary penalties can reach a maximum of \$10,000 per violation. Each day the violation continues is considered a new violation subject to penalty.⁵⁸ If the matter cannot be resolved with a consent order, a hearing may be held where these sanctions may also be imposed.⁵⁹

⁵¹ Riexinger, *supra* note 9; Patricia Riexinger, N.Y. Dep't of Env'tl. Conservation (Aug. 8, 2007).

⁵² Spada, *supra* note 43.

⁵³ Personal communication with Richard Sherman, N.Y. Dep't of Env'tl. Conservation (Jan. 15, 2004).

⁵⁴ Riexinger, *supra* note 9.

⁵⁵ Sherman, *supra* note 53.

⁵⁶ *Id.*

⁵⁷ N.Y. ENVTL. CONSERV. LAW § 71, Title 23.

⁵⁸ *Id.* § 71, Title 25.

⁵⁹ Sherman, *supra* note 53.

Certain tidal and freshwater wetland offenses may also be considered violations to NYECL Article 15, which applies to the excavation or placement of fill in navigable waters or their adjacent wetlands. Under NYECL Article 71, violations to NYECL Article 15 are considered a misdemeanor and are subject to a fine of up to \$10,000 and/or a civil penalty of up to \$5,000.⁶⁰

Criminal penalties can also be issued and take a tiered approach. A violation to freshwater wetlands can result in a fine of \$500 to \$1,000 and up to 15 days imprisonment for the first punishable offense. Second and subsequent offenses constitute misdemeanors, which are punishable by a fine of \$1,000 to \$2,000 and/or imprisonment of 15 days to 6 months. The statute specifically authorizes each day of a continuing offense to be treated as a separate and distinct offense. A court may, in lieu of criminal fines or conviction, order restoration of the wetland to its prior condition.⁶¹ For a violation to a tidal wetland, monetary penalties can include a criminal fine of \$500 to \$5,000 for a first offense. Subsequent offenses, which are considered misdemeanors, may be subject to a criminal fine of \$1,000 to \$10,000. Criminal sanctions may also include a prison term of 15 days to 6 months for multiple offenders. Violators may be ordered to cease and desist and to restore damaged wetlands.⁶²

While criminal enforcement mechanisms are available, they are rarely invoked.⁶³ Because most offenders perform violating activities inadvertently or unintentionally, a more typical resolution is for regional permitting staff to informally notify the offending individual and request that the unlawful activity cease. If the violator does not comply, a notice ticket is issued.⁶⁴ If noncompliance continues, greater levels of enforcement are sought. A consent order, which often includes a penalty and an order for restoration, gives people an opportunity to resolve the situation before moving to more serious criminal and civil sanctions. Because circumstances vary so widely from case to case, there is no typical sanction that is issued.⁶⁵

Nationwide permits

Ongoing review of the U.S. Army Corps of Engineers' nationwide permits (NWP) is an important task for NYS DEC staff. The lead liaison for coordinating comments on NWPs is in the DEP, though the DFWMR also participates. Multi-agency meetings are regularly held among NYS DEC, Corps, APA, EPA, U.S. Fish and Wildlife Service (FWS), and New York Department of State staff to discuss NWP re-authorizations.

A 2002 memorandum to Corps regulatory staff in the New York and Buffalo Districts outlines the state's decisions on §401 Certification for the 2002 NWPs.⁶⁶ Several NWPs do not require the state's §401 Certification because they are authorized only under §10 of the Rivers and

⁶⁰ N.Y. ENVTL. CONSERV. LAW § 71-1107.

⁶¹ *Id.* § 71-2303(2).

⁶² *Id.* §71-2503.

⁶³ Sherman, *supra* note 53.

⁶⁴ Riexinger, *supra* note 9.

⁶⁵ Sherman, *supra* note 53.

⁶⁶ Letter from William R. Adriance, Chief Permit Adm'r N. Y. Dep't of Env'tl. Conservation, to Richard Tomer, Chief, Regulatory Branch, U.S. Army Corps of Engineers N.Y. Dist. and Paul G. Leuchner, Chief, Regulatory Branch, U.S. Army Corps of Engineers Buffalo Dist. (March 15, 2002) (on file with author).

Harbors Act of 1899.⁶⁷ Several NWP's have been denied water quality certification altogether (NWP#15 - U.S. Coast Guard Approved Bridges; NWP#16 - Return Water from Upland Contained Disposal Areas; NWP#17 - Hydropower Projects; NWP#21 - Surface Coal Mining Activities; NWP#29 - Single-Family Housing; NWP#34 - Cranberry Production Activities; NWA#44 - Mining Activities). Of those remaining NWP's remaining, certification is provided but accompanied by a set of general conditions, including the following:

- A monitoring requirement;
- An exclusion for activities that may jeopardize endangered or threatened species or destroy or adversely modify critical habitat;
- An exclusion for activities occurring in sites identified as "Priority Natural Heritage Sites;"
- A state approval requirement for activities involving state-owned lands;
- An exclusion for any activities involving tidal wetlands, with the exception of NWP#4, 5, 6 and 20;
- An exclusion for any activities in "Wild, Scenic, and Recreational Rivers" listed under the National Rivers Inventory;
- An application of the most restrictive conditions when NWP's are used in combination; and
- An exclusion for activities involving utility lines and major electric generating facilities.

Several others also have additional special conditions that are specific to the activity authorized under the individual NWP.⁶⁸ New York's action on the 2007 NWP's could not be reviewed within the reporting period.

Tracking systems

The DEP provides a comprehensive one-stop shopping system for permits under the Uniform Procedures Act (UPA). UPA permits are issued for any activities that require a permit under the NYECL.⁶⁹ DEP's tracking system, Department Application Review Tracking (DART), manages the administrative aspects of permit processing, as well as monitoring permits for compliance with statutory frameworks. In 2003-2004, DEP issued more than 1,475 wetland permits, 2,260 excavation/fill permits in navigable waters, and 1,560 protection of stream permits.⁷⁰ There is currently no system in place to track either the impacts of individual wetland permits or the mitigation associated with permitted projects. Within the next five years the DEP hopes to facilitate the tracking of wetland-related compliance, delineations, mitigation, and the resource

⁶⁷ The following NWP's do not require §401 certification: NWP#1 - Aids to Navigation; NWP#2 - Structures in Artificial Canals; NWP#8 - Oil and Gas Structures; NWP#9 - Structures in Fleeting and Anchorage Areas; NWP#10 - Mooring Buoys; NWP#11 - Temporary Recreational Structures; NWP#24 - State Administered §404 Program; NWP#28 - Modification of Existing Marinas; NWP#35 - Maintenance Dredging of Existing Basins.

⁶⁸ Letter from William R. Adriance, Chief Permit Adm'r N. Y. Dep't of Envtl. Conservation, to Richard Tomer, Chief, Regulatory Branch, U.S. Army Corps of Engineers N.Y. Dist. and Paul G. Leuchner, Chief, Regulatory Branch, U.S. Army Corps of Engineers Buffalo Dist. (March 15, 2002) (*available at* <http://www.dec.state.ny.us/website/dcs/NationwideCert1.pdf>).

⁶⁹ New York State Department of Environmental Conservation, *Division of Environmental Permits*, at <http://www.dec.ny.gov/permits/6224.html> (last visited Sept. 12, 2007).

⁷⁰ Riexinger, *supra* note 21.

impacts of permits. Plans include connecting to the already-established DART system and building capacity for an electronic data collection system.⁷¹

The APA employs a comprehensive digital system to track wetlands activities. The Master Action Database (MAD) is an in-house network that can be accessed by all APA staff at their personal computers and is cross-referenced to a set of paper files available at the APA's central office. MAD tracks various elements of wetland projects being conducted within the Park.⁷²

Watershed programs

Although the DEC's Bureau of Habitat (in the DFWMR) and the Bureau of Water Assessment and Management (in the Division of Water) do not formally coordinate, funding appropriated to watershed restoration supports estuary restoration and other wetland-related projects.⁷³

Watershed planning is being conducted in different areas of the state, and wetlands staff do recognize the connection between wetlands and watershed initiatives, and various efforts⁷⁴ are underway. Due to statutory limitations, watershed considerations are slowly being integrated into wetland regulation. Although formal measures are not yet in place, NYS DEC staff envision planning that supports permitting, regulatory, and restoration/mitigation efforts in the future.⁷⁵

III. Water Quality Standards

New York has developed but not yet adopted water quality standards (WQS) specific to wetlands. However, state regulations do provide for the assignment of "discharge restriction categories" to certain surface waters or groundwaters, which may include "significant recreational or ecological waters." These are waters where quality is critical to maintaining the value for which the waters are distinguished, including groundwaters and surface waters that are both tributaries to and within Class I freshwater wetlands, intertidal marsh wetlands, and coastal fresh marsh tidal wetlands, as defined in the in Title 6 of the NYCRR.⁷⁶ Designated uses and anti-degradation standards specific to wetlands also have not been developed.⁷⁷

§401 certification

⁷¹ Riexinger, *supra* note 9; Personal communication with Patricia Riexinger, N.Y. Dep't of Env'tl. Conservation (May 31, 2007).

⁷² Spada, *supra* note 43.

⁷³ New York State Department of Environmental Conservation, *Bureau of Water Assessment and Management*, at <http://www.dec.state.ny.us/website/dow/bwam/index.html> (last visited April 12, 2007).

⁷⁴ Using State Wildlife Grant funds, DFWMR is launching, in coordination with a suite of partners, watershed-based natural resources conservation planning efforts in the Salmon River, Allegany, Nissiquogue, and East Fishkill watersheds. In addition, DFWMR acquired EPA funds to develop a conservation plan for the Great Swamp watershed. This is being completed through a contract with The Nature Conservancy. Wetlands protection and restoration are also a strong component of watershed protection for the New York City drinking water reservoir watersheds. Barrier removal and mitigation is being approached on a watershed basis. Wetlands are protected, mapped, restored, and managed under grants, studies, and projects implemented through the Hudson River Estuary Plan.

⁷⁵ Riexinger, *supra* note 9.

⁷⁶ N.Y. COMP. CODES R. & REGS. tit. 6, § 701.20.

⁷⁷ Riexinger, *supra* note 9.

Section 401 certification for federal §404 permits is not a primary means of wetlands regulation or protection. New York water quality standards focus on resources other than wetlands and are not habitat-oriented. In addition, the state's wetland regulatory programs are habitat-oriented and do not focus on water quality. Bureau of Habitat staff do recognize §401 certification as a wetlands regulatory tool, but the regulatory infrastructure is simply not in place to incorporate §401 certification into wetlands management. WQS specific to wetlands were developed at one time, but have never been adopted into the regulatory infrastructure.⁷⁸

IV. Monitoring and Assessment

Monitoring and assessment for wetlands

At present, New York State has not adopted an assessment methodology for wetlands. The agency began working with the University of Albany, using U.S. Environmental Protection Agency (EPA) grant funds, to develop wetland-monitoring capacity for purposes of 305(b) reporting.⁷⁹ However, a wetland monitoring strategy or program has not been implemented due to lack of funds.⁸⁰

NYS DEC conducted a study of the status and trends of wetlands in the state between the mid-1980s and the mid-1990s. The purpose of the study was to determine changes⁸¹ in the wetlands resource and to understand the factors causing those changes.⁸² DEC plans to update this study for the period of time between the mid-1990s to the mid-2000s and will be applying for grant funding in 2008.⁸³

The APA has also recently completed a study of the status and trends of the area's wetlands under an EPA grant. The agency also occasionally uses consultants for monitoring and assessment, mostly for regulation or enforcement purposes, and collects data for data layer buildup in a geographic information system. However, monitoring and assessment do not receive much focus overall.⁸⁴

Monitoring and assessment for streams

NYS DEC's Division of Water conducts multiple monitoring programs. The Statewide Waters Monitoring Program, which includes an ambient water quality monitoring program for rivers and streams in the state, conducts the Rotating Integrated Basin Studies (RIBS). The RIBS sampling program incorporates both numeric and narrative monitoring efforts using a rotating strategy in

⁷⁸ *Id.*

⁷⁹ Riexinger, *supra* note 21.

⁸⁰ Personal communication with Patricia Riexinger, N.Y. Dep't of Env'tl. Conservation (May 31, 2007).

⁸¹ New York State Department of Environmental Conservation, *Freshwater Wetlands Status and Trends*, at <http://www.dec.ny.gov/lands/31835.html> (last visited Sept. 13, 2007). The study indicated a net gain in freshwater wetlands in the Lake Plains region for the period, almost exclusively due to reverting agricultural lands. Outside the Lake Plains region, a "no net loss" of wetlands was determined for most other areas of the state, with the exception of Hudson valley, where a net loss of wetlands was determined.

⁸² *Id.*

⁸³ Riexinger, *supra* note 21; Personal communication with Patricia Riexinger, N.Y. Dep't of Env'tl. Conservation (May 31, 2007).

⁸⁴ Spada, *supra* note 43.

which all major drainage basins in the state are monitored once during a five-year period. The Division's Stream Biomonitoring Program and the Toxicity Testing Program also evaluate the viability of aquatic populations and overall ecosystem health. Biological monitoring includes an assessment of the community, composition of the resident invertebrates, and toxicity testing. Information produced during stream assessments feeds into listing for CWA §§303(d) and 305(b).

RIBS. In order to address the various monitoring objectives and the rotating cycle, component networks within the RIBS Program are designed around three separate yet interdependent monitoring strategies:

- The Screening Network provides a narrative assessment of water quality at a large number of sampling sites with minimal resources (biological sampling provides assessments of a large number of representative and varied sites within targeted basins);
- The Intensive Monitoring Network employs more frequent, comprehensive and integrated multi-media sampling (water chemistry, bottom sediment chemistry, toxicity testing, macroinvertebrates, fish, habitat assessments) to provide more detailed water quality data and information for a smaller number of waterbodies in a selected drainage basin;
- The Routine Trend Monitoring Network is designed to provide long-term trends, basic water quality characteristics, and establish baseline conditions by continuous sampling of water quality and conditions at fixed sites across the state.

The water quality data and information generated by the RIBS program are used to support many monitoring and assessment functions within the NYS DEC Division of Water. Specifically, RIBS information and data are used in the compilation of the Waterbody Inventory/Priority Waterbody List and the §305(b) Water Quality Report and §303(d) List of Impaired Waters of the State.⁸⁵

V. Restoration and Partnerships

Although there is no formal, state-level restoration program, there are many initiatives in which multiple agencies and organizations collaborate and contribute funding.⁸⁶ A primary example is the wetland restoration initiative underway in the Northern Montezuma Focus Area, where an array of funding sources and conservation programs are being used for the acquisition and restoration of thousands of acres of wetlands. NYS DEC's Bureau of Wildlife administers the initiative under the auspices of the North American Waterfowl Management Plan. Collaboration also includes numerous state, local, and federal government agencies, nongovernmental organizations, landowners, and other constituent groups. Another major effort is underway on the Niagara River. NYS DEC is collaborating with the New York Office of Parks, Recreation and Historic Preservation to restore hydrology on marshes adversely affected by power generation. Wetlands are also being restored in the Lake Champlain Basin, Long Island Sound,

⁸⁵ Personal communication with Margaret Novak, N.Y. Dep't of Env'tl. Conservation (Aug. 13, 2004).

⁸⁶ Riexinger, *supra* note 9.

Hudson River Estuary, Susquehanna Basin, and on a medley of state-owned lands throughout New York.⁸⁷ There are also restorations associated with remediation projects and superfund clean-ups. Success criteria and monitoring regimes are built into individual projects.⁸⁸

Outreach and technical assistance to landowners are usually deferred to local governments, soil and water conservation districts, nongovernmental organizations and federal agencies, but state agencies do participate in some multi-agency initiatives.⁸⁹ For example, New York has a very active and successful Wetlands Reserve Program (WRP) with the USDA Natural Resources Conservation Service (NRCS). One of the first nine states to implement the WRP, interest from landowners has been great. NRCS has entered into more than 590 contracts (easements and restoration options) on 26,800 acres of land in New York.⁹⁰ NRCS works with the NYS DEC, FWS, USDA Farm Service Agency, U.S. Army Corps of Engineers, The Nature Conservancy, EPA, Farm Bureau, New York State Department of Agriculture and Markets, Soil and Water Conservation Districts, and the Cornell Cooperative Extension Service on wetland restoration through the State Technical Committee. Other organizations are involved in implementing WRP projects, including the Great Swamp Conservancy, Mohawk and Oneida Indian Nations, Ducks Unlimited, local units of government, and colleges. These agencies and organizations work together on program development and implementation, planning, and wetland construction, as well as public relations and educational activities.⁹¹

A corporate wetland restoration program also exists in New York under the Coastal America Program,⁹² a partnership of federal agencies, state and local governments, and private organizations that seek to protect, preserve, and restore the nation's coasts, including estuarine wetlands.⁹³

VI. Education and Outreach

The NYS DEC currently does not have a strategic education and outreach program in place specifically for wetlands.⁹⁴ The state does conduct Project WET (Water Education for Teachers) and Project Wild, which do include materials on wetlands and streams. Additionally, wetlands are one of the many natural resources NYS DEC includes in its comprehensive and broad-scale education efforts, which include summer environmental education camps, publication of the award-winning magazine *The Conservationist*, and outreach at the State Fair and numerous outdoor expos, among other opportunities.⁹⁵

⁸⁷ Riexinger, *supra* note 21.

⁸⁸ Riexinger, *supra* note 9.

⁸⁹ *Id.*

⁹⁰ USDA Natural Resources Conservation Service, *New York Wetlands Reserve Program*, at <http://www.nrcs.usda.gov/programs/wrp/states/ny.html> (last visited Sept. 13, 2007).

⁹¹ *Id.*

⁹² Riexinger, *supra* note 9.

⁹³ See Coastal America, *What Is Coastal America?*, at <http://www.coastalamerica.gov/text/moreinfo.html> (last visited Sept. 13, 2007).

⁹⁴ Personal communication with Patricia Riexinger, N.Y. Dep't of Env'tl. Conservation (June 17, 2004).

⁹⁵ Riexinger, *supra* note 21.

The APA has multiple outreach efforts. Training programs focus on information transfer to local governments. For example, training is offered on various wetlands-related topics such as wetland recognition, project review, soils, wastewater treatment systems, and code development for municipalities. During these sessions, APA staff provide information about the importance of wetlands and wetlands protection both at the state and local level. The APA also provides training to some citizen monitoring groups. For example, the APA has recently provided the Boquet River Association and the Adirondack Park Invasive Plant Program with training on invasives identification and monitoring.⁹⁶

VII. Coordination with State and Federal Agencies

Besides the NYS DEC and APA, multiple state agencies conduct activities that are related to or affect wetlands. The New York Department of Transportation (NYDOT) has entered into a few Memoranda of Understanding/Memoranda of Agreement with other local and state agencies on wetland-related activities, including one with the New York City Department of Environmental Protection regarding New York City watershed activities,⁹⁷ two with the NYS DEC on wetland boundary determinations and wetland and stream permitting,⁹⁸ and one with the APA and NYS DEC on invasive plant issues in the Adirondack Park.⁹⁹ New York's Office of Parks, Recreation and Historic Preservation is steward of many wetlands on state parklands and helps to manage these resources. Finally, the New York Natural Heritage Program recently completed a biological assessment of all park lands, providing guidance on how best to protect natural communities, including wetlands, of statewide importance.¹⁰⁰

Interagency meetings are held at least three times a year to discuss various wetland- and stream-related issues, such as regulation, restoration, and outreach, in addition to the NWP re-authorization meetings held throughout the year (described above in *Nationwide Permits* section above). Participating agencies include: NYS DEC; APA; EPA; FWS; NRCS; National Marine Fisheries Service; Corps; NYDOT; Office of General Services; Canal Corporation; Department of Agriculture and Markets; Office of Parks, Recreation, and Historic Preservation; Department of States; and Soil and Water Committee. In addition, Native American tribes and local governments often participate.¹⁰¹ The Corps, APA, and NYS DEC often hold joint field trips as well.¹⁰²

⁹⁶ Spada, *supra* note 43.

⁹⁷ Memorandum of Understanding between the N.Y. Dep't of Transportation and the N.Y. City Dep't of Env'tl. Prot. available at <http://www.dot.state.ny.us/eab/epm/4bbattac.pdf>.

⁹⁸ Memorandum of Understanding Between the New York State Department of Transportation and the New York State Department of Environmental Conservation Regarding Wetland Boundary Delineations (Feb. 2001) (on file with author); and Memorandum from G.R. McVoy, New York Department of Transportation Environmental Analysis Bureau, to Regional Landscape Environmental Managers Regions 4, 5, 8, and 11, and Regional Environmental Contacts Regions 1, 2, 3, 6, 7, 9, 10 (Feb. 19, 1997) (on file with author).

⁹⁹ Spada, *supra* note 43.

¹⁰⁰ Riexinger, *supra* note 21.

¹⁰¹ Riexinger, *supra* note 9.

¹⁰² Spada, *supra* note 43.

State Wetlands Conservation Plan. In 1990, a State Wetlands Conservation Plan was developed under a Wetlands Program Development Grant from the Environmental Protection Agency. The plan was never adopted by the governor and has not been updated since 1990; however, the plan has served to establish guidance that still influences state activities and to foster relationships with local, state, and federal partners.¹⁰³

VIII. Acronyms and Abbreviations

APA – Adirondack Park Agency

CWA – Clean Water Act

DART – Department Application Review Tracking

DEC – New York State Department of Environmental Conservation

DEP – Division of Environmental Permits

DFWMR – Division of Fish, Wildlife, and Marine Resources

EPA – U.S. Environmental Protection Agency

FTE – Full-time Equivalent

FWS – U.S. Fish and Wildlife Service

MAD – Master Action Database

NRCS – USDA Natural Resources Conservation Service

NWPs – Nationwide Permits

NYCRR – New York State Codes, Rules, and Regulations

NYDOT – New York Department of Transportation

NYECL – New York Environmental Conservation Law

NYS DEC – New York State Department of Environmental Conservation

RASS – Resource Analysis and Scientific Services

RIBS – Rotating Integrated Basin Studies

SEQRA – State Environmental Quality Review Act

UPA – Uniform Procedures Act

USDA – United States Department of Agriculture

WI/PWL – Waterbody Inventory / Priority Waterbody List

WQS – Water Quality Standards

WRP – Wetlands Reserve Program

¹⁰³ Riexinger, *supra* note 9.