

SUMMARY OF DRAFT REVISIONS TO STATE FRESHWATER WETLAND REGULATIONS

August 2019

Background:

State law pertaining to freshwater wetlands (R.I. Gen. Laws §2-1-18 through 2-1-28) was amended to strengthen the protection of freshwater wetland resources while streamlining the regulatory framework applicable to proposed projects and activities taking place near wetlands. Implementation of the law requires both the RI Department of Environmental Management (DEM) and the RI Coastal Resources Management Council (CRMC) to undertake rule-making for their respective regulations. The amended state law was based on the findings and recommendations of a Legislative Task Force (LTF) previously established by the Regulatory Reform Act (R.I. Gen. Laws § 42-64.13-10). The LTF was composed of a variety of stakeholders and charged with evaluating the adequacy of protection of Rhode Island freshwater wetlands considering both the state and municipal level, evaluating if gaps in that protection existed based on current scientific knowledge and recommending changes in state law or regulations that could improve protection of our natural resources and foster a business climate to grow the economy.

The amended state law acknowledged the important functions and values of freshwater wetlands and their buffers, the need to strengthen wetland protection and the need to protect and regulate the area adjacent to wetlands. The law also recognized the benefits of having a single set of wetland protection standards administered only at the state level. Key provisions of the law include:

- Strengthens wetlands protection administered at the state level while eliminating the duplication of effort at the municipal level.
- Expands the jurisdiction of state agencies and requires the promulgation by rule of standards for wetland buffers and setbacks. The legislation recognizes the important values of buffers in the protection of the wetland resources and the benefits they provide.
- In establishing buffer standards, the regulations provide flexibility to assign variable levels of protection by considering existing land use and resource characteristics.
- Re-defines and clarifies terminology and promotes common terminology among DEM and CRMC programs.
- Maintains the existing definition of “Farmer” and applicable regulatory procedures, as codified in state law, and associated permitting exemptions.
- Establishes new requirements for state agencies to share information with municipalities.

Draft Revised Freshwater Wetland Regulations:

Overview: DEM and CRMC have drafted amendments to their respective existing freshwater wetland rules to fulfill the statutory mandates. The statutory changes in definitions affect the wording in all sections of the rules and result in a new framework for the regulatory process. The major new changes involve the designation of jurisdictional area and specifying requirements for wetland buffers and setbacks within the jurisdictional area. To support regulatory process improvements, the draft rules also introduce a general permit process, expand or clarify certain exemptions and simplify the fee schedule. The rules have been further restructured to have the performance standards and review criteria listed in a single section. Portions of the rules have been restructured to improve organization for the reader but have not been substantively modified; e.g., review criteria and significant alteration procedure. Rules related to agricultural activities have been grouped into its own section, and rules related to coordination with municipalities have been specified and the existing provisions related to the municipal veto have been eliminated to be consistent with the amended state law.

Change in Definitions: The draft rules reflect changes in definitions required by the state law and are intended to provide greater consistency among DEM and CRMC as well as clarity for applicants and the public.

Freshwater wetland: The definition of freshwater wetlands has been changed and now refers to the resources to be protected which includes vegetated wetlands and surface waters. The new definition is broadly applicable with a limited exception for certain farming activities. The terms “perimeter wetland” and “riverbank wetland” will no longer be defined as wetlands and used in the rules.

Jurisdictional Area: This new term defines the lands and waters that are subject to regulation and includes freshwater wetlands, buffers, floodplains, areas subject to storm flowage, areas subject to flooding and contiguous areas extending 200 feet outward from the edge of a river, stream or drinking water supply reservoir and 100 feet outward from all other wetlands. Persons planning new projects or regulated activities within the Jurisdictional Area will need to obtain a permit unless otherwise exempt.

Buffer Zone: This new term is used to refer to the land that is contiguous to a freshwater wetland and within which vegetated buffer should be maintained or in some situations created. Buffer zones are designated within or up to the limit of the applicable jurisdictional area. Land within the buffer zones may include a range of land uses as well as areas qualifying as “buffer” (see below).

Buffer: This new term refers to the area of undeveloped vegetated land that is to be retained in its natural undisturbed condition. (Buffers can be created.)

Overall Approach to Buffer Standards: Rhode Island’s freshwater wetlands resources include its rivers, streams, lakes and ponds as well as swamps, marshes, bogs, and vernal pools. About

sixteen percent (16%) of Rhode Island's land area consists of these freshwater wetlands (including lakes and ponds) which are distributed throughout the state. Consistent with state law and the LTF Report, in developing the requirements, including the buffer zone width, the agencies considered the resource characteristics, watershed protection needs and existing land uses. A framework of tiered protection was identified as the preferred approach to establishing buffer standards. All wetlands will now be designated with a buffer zone which addresses a gap in protection noted by the LTF. This approach provides desired predictability while still allowing the buffer standards to generally account for the ecological variability associated with different wetland types. The approach allows DEM and CRMC to direct their limited resources to areas where oversight is appropriate and most needed. It further provides the means to reduce regulatory burdens on previously developed properties.

Regional Framework for Tiered Protection: Under the tiered approach, the state was divided into three regions (A, B, C) to facilitate the application of a range of buffer standards that reflect a gradient of watershed conditions. (See Map.)

- **Region A** - This region includes watershed areas that are generally high priorities for conservation of fish and wildlife habitat. The watersheds exhibit generally low density of development, lower percentages of impervious cover and contain larger tracts of unfragmented habitat.
- **Region B** - This region includes areas of the state that exhibit a mix of land uses and watershed characteristics including urban, suburban and rural settings. Existing land use patterns have resulted in greater fragmentation of buffers within the jurisdictional areas in this region.
- **Region C** - This region includes densely developed, urbanized areas of the state including portions of watersheds that contain high percentages of impervious cover and areas that are already developed or altered.

Within Regions A, B and C, buffer zones were designated as follows:

- On a statewide basis, the most sensitive freshwater wetland types were identified and assigned the highest level of protection (100 feet). These include unique and less common wetland types that are often sensitive to disturbance such as bogs and marshes as well as evergreen swamps, swamps with Rhododendron understory and vernal pools.
- On a statewide basis, buffer zones were increased to strengthen protection in water supply reservoir watersheds.
- In Regions A and B, buffer zone protection was strengthened by (1) increasing it for headwater rivers including cold water rivers as recognized as a need in the LTF Report; (2) increasing the buffer zone on larger lakes and ponds that provide high recreational and habitat value and that currently have large amounts of intact shoreline buffer; and

(3) increasing the buffer zone around larger swamps some of which are also part of valuable wetland complexes providing multiple habitats.

- As practicable, buffer zone requirements were reduced in areas where existing land use has already resulted in the alteration or loss of vegetated buffer. This applies primarily in Region C.

Buffer Zones for Rivers and Streams

Current regulations designate 200 feet around rivers 10 feet or greater in width (referred to as large rivers) and 100 feet around narrower rivers and streams. The new jurisdictional area authorizes the agencies to regulate the area within 200 feet of rivers of any width.

Region A	<ul style="list-style-type: none"> • Maintain 200 foot buffer zone on large rivers (with exceptions for a limited number of developed areas). • Increase the buffer zone from 100 to 200 feet for named rivers of high wildlife habitat value to provide stronger protection of habitat, water quality and other functions. • Increase the buffer zone to 150 feet for all other rivers. • Maintain the buffer zone of 100 feet for streams.
Region B	<ul style="list-style-type: none"> • Maintain 200 foot buffer zone on listed large rivers with intact existing buffer. • Increase the buffer zone from 100 to 150 feet for designated cold-water rivers and other listed rivers of high wildlife habitat value. • Reduce the buffer from 200 to 150 feet for other listed large rivers. • Maintain the 100 foot buffer zone on smaller rivers and streams.
Region C	<ul style="list-style-type: none"> • Reduce the buffer zone from 200 to 150 feet along the Blackstone River and portions of the South Branch of the Pawtuxet. • Reduce the buffer zone from 200 to 100 feet for listed large rivers. • Reduce the buffer zone from 100 to 50 feet for other rivers and streams in urbanized settings.
Drinking Water Supply Reservoirs	<ul style="list-style-type: none"> • Increase the buffer zone to 200 feet on rivers which are tributary to named public drinking water supply reservoirs in Region A and B.

Buffer Zones for Lakes and Ponds

Current regulations designate 50 feet around lakes and ponds greater than ¼ acre for protection. The new Jurisdictional Area authorizes the agencies to regulate the area within 100 feet of lakes and pond and within 200 feet of a drinking water reservoir.

Region A	<ul style="list-style-type: none"> • Increase buffer zone on lakes ≥ 10 acres from 50 to 100 feet (excluding listed ones) • Maintain 50-foot buffer zone for lakes and ponds $> \frac{1}{4}$ acre and < 10 acres • Add a 25-foot buffer zone to small ponds ($< \frac{1}{4}$ acre)
Region B	<ul style="list-style-type: none"> • Increase buffer zone on lakes ≥ 10 acres from 50 to 100 feet (excluding listed ones) • Maintain 50-foot buffer zone for lakes and ponds $> \frac{1}{4}$ acre and < 10 acres • Add a 25-foot buffer to small ponds ($< \frac{1}{4}$ acre)
Region C	<ul style="list-style-type: none"> • Maintain the 50-foot buffer zone for listed lakes and ponds. • Require a 25-foot buffer zone for all other ponds.
Drinking Water Supply Reservoirs	<ul style="list-style-type: none"> • Increase the buffer zone to 200 feet around named public drinking water supply reservoirs in Region A and B.

Buffer Zones for Other Wetlands: Rhode Island freshwater wetlands have been mapped in the RI Geographic Information System using a standardized classification scheme. The most common wetland type is deciduous swamps, which are located throughout Rhode Island. Other wetland types are much less common including bog and marshes. Current regulations provide a 50-foot perimeter wetland around certain wetlands of certain sizes. Small wetlands are not provided such protection in the current regulations. Under the draft rules all wetlands are designated with a buffer zone ranging from 25 -100 feet. Unless otherwise noted, the buffer table below applies statewide.

Bogs, Marshes, Evergreen forested swamps ≥ 1 acre, Swamps with Rhododendron ≥ 1 acre	<ul style="list-style-type: none"> • Increase buffer zone to 100 feet with some reduced buffers for <i>Phragmites</i> marshes and wet meadows
Vernal Pools	<ul style="list-style-type: none"> • Increase from 0 to 100 feet where 50% or more of the land around the pool is undeveloped vegetated land. • Increase from 0 to 50 feet where 50% or more of the land is developed.
Shrub Swamps	<ul style="list-style-type: none"> • Provide 75 feet for swamps ≥ 1 acre • Add a 25-foot buffer zone for swamps < 1 acre
Deciduous Swamps	<ul style="list-style-type: none"> • Increase buffer zone from 50 feet to 75 feet for swamps of 10 acres or more in Regions A and B. • Maintain 50 feet for smaller swamps in Region A and B (1 to <10 acres). • Reduce the buffer zone from 50 to 25 feet around swamps in Region C. • Add a 25- foot buffer to swamps < 1 acre.

Undeveloped vegetated areas within buffer zones will be expected to be maintained as protective buffer.

Permitting Process: The draft rules make changes to the existing permitting processes to improve clarity and predictability and reduce regulatory burdens.

- The DEM Preliminary Determination permit outlined in the current rules will be replaced with a “Freshwater Wetlands Permit”. Applicants that meet all defined standards, including the buffer standard, will have reduced submittal requirements from the current Preliminary Determination Application. The draft rules include a new variance procedure for those situations in which a standard cannot be met.
- The draft rules include an in-fill lot standard that acknowledges constraints on certain existing lots of record and allows processing of an application without a variance.
- The draft rules also establish a process for DEM to issue a “General Permit” for certain categories of projects with predictable and limited impacts. The issuance of general permits will occur at a future date and involve specifying the requirements and conditions under which such a permit would apply. This is intended to have reduced submittal requirements and review times in comparison to an Application for a Freshwater Wetlands Permit.
- The draft rules clarify and expand certain exemptions for limited projects and activities that do not present impacts to freshwater wetlands that merit review.
- Simplified the fee schedule.

Municipal Coordination: The draft rules have provisions to strengthen coordination with municipalities, including the following:

- Notification of designated municipal officials when applications for certain permits are filed with state agencies.
- Requires applicants for major land development projects to obtain master plan approval, pursuant to R.I. Gen. Laws § 45-23-40, prior to filing for a state freshwater wetlands permit. Applicants are encouraged to obtain verified wetland edges from the state during project planning.
- Opportunity to provide local input while maintaining timeliness within the state permitting program.
- Procedure for the municipality to petition the DEM or CRMC to increase the size of a buffer zone for a particular type of wetland resource (the requested buffer zone cannot exceed the jurisdictional area).

Agricultural Activities: For clarity the rules pertaining to agricultural activities have been grouped into its own section. Note that per state law, the regulatory oversight of normal farming and certain related activities for farmers as qualified under the law has not changed; e.g. the expanded jurisdictional area does not apply.

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1.21 Appendix 4. Freshwater Wetlands Buffer Regions Map

