New York State Department of Environmental Conservation)
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 and Coalition for Community Solar Access

Introduction

On behalf of New York Solar Energy Industries Association (NYSEIA) and the Coalition for Community Solar Access (CCSA), we respectfully provide the following comments for consideration by the New York State Department of Environmental Conservation (DEC). New York's 2022-2023 budget amended the Freshwater Wetlands Act, Article 24 of the Environmental Conservation Law (ECL), expanding the agency's potential jurisdiction to protect freshwater wetlands. 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 235 member companies develop distributed (rooftop and community) solar energy projects across New York State, supporting progress toward the climate goals enshrined in the Climate Leadership and Community Protection Act (CLCPA). CCSA is a national organization of over 120 businesses and nonprofits working to empower every American energy consumer with the option to choose local, clean, and affordable community solar. Our members build community solar projects and advocate for policies to ensure the benefits of those projects flow to the customers. As of June 2024, the distributed solar industry has constructed 93% of New York's operational solar capacity, making it a central contributor to New York's clean energy transition. NYSEIA and CCSA appreciate 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 distributed solar deployment in New York State, a mission that closely aligns with that of the DEC.

NYSEIA and CCSA are submitting comments in response to this Notice of Proposed Rule Making due to the solar industry's deep concern that the DEC's proposed rules will imperil solar deployment in New York State, causing significant financial harm to rural landowners and solar developers, while undermining New York's climate change mitigation efforts. The DEC estimates

that expanding the agency's jurisdiction to unmapped wetlands on January 1, 2025 will nearly double the agency's jurisdiction, rendering more than one million additional acres of land off limits for solar development[1]. We know this will render thousands of proposed and potential community solar sites nonviable overnight; however, we don't know *which* solar projects will be impacted because the DEC's updated maps identifying small wetlands of unusual importance and other previously unmapped wetlands have not yet been published despite the looming January 1st deadline. The additional expansion of freshwater protections in 2028 will further constrain solar development just two years before the CLCPA mandate of 70% renewable electricity by 2030.

The DEC's proposed rules fail to consider and address New York's clean energy and climate commitments, resulting in a set of environmental regulations that could cause more environmental harm than good. Across the nation, solar projects are routinely located on or in close proximity to wetlands. When appropriate measures are deployed during design and construction, the integrity of the wetland and the ecosystem services it provides can be preserved and honored. These proposed rules fail to acknowledge this reality, and create a false dichotomy where New York must choose between two conflicting legislatively mandated environmental priorities; climate change mitigation and freshwater protection. New York can, and must, balance these two priorities. NYSEIA and CCSA urge the DEC to use its rulemaking and administrative authority to ensure that the implementation of these modifications to Article 24 of the ECL consider New York's climate commitments and mitigate unintended negative impacts on clean energy deployment.

The DEC's expanded jurisdiction will render thousands of potential solar sites nonviable

Community solar projects are environmental assets with a demonstrable ability to reduce harmful pollution from fossil fuel combustion. Despite New York's ambitious climate mandates and New York State Energy Research and Development Authority (NYSERDA) programs to support community solar deployment, it is increasingly challenging to deploy community solar projects in New York State due to dwindling cost-effective interconnection options and restrictive local laws and state regulations governing land use. To identify a suitable site for community solar in New York, a developer must consider: local electric infrastructure ("hosting capacity"); electric rates; local laws prohibiting solar as a land use ("restrictive local laws"); parcel size; and the presence of wetlands or other regulated environments. New York's viable community solar sites are an important, and increasingly scarce, environmental resource that should be protected.

[1] Sohr, Krista. New York State Department of Environmental Conservation. Freshwater Wetlands Proposed Regulation Changes: An Overview. August 1, 2024.

While electric infrastructure, parcel size and the presence of wetlands are innate site characteristics, restrictive local laws and regulations are human constructs designed to shape (or in certain cases prevent) development. New York's land use restrictions are more stringent than many other states, and present a significant barrier to solar deployment. NYSERDA acknowledges the significant impact of freshwater protection on solar deployment, noting that "wetlands are one of the most commonly encountered regulated environmental resources in New York State."[2] New York already has more stringent freshwater wetlands protections than other states, and the DEC has effectively prohibited solar in all classes of wetlands including a 100-foot buffer zone around the regulated wetland. The existing freshwater protections impacting New York's distributed solar industry are already above and beyond those of other states or the US Army Corps of Engineers (USACE), which allows solar posts on wetlands, does not require a 100-foot buffer, and provides allowances for minor (<1/10 acre) disturbance of freshwater wetlands (i.e., fill or dredging).

On January 1, 2025, the DEC's expanded jurisdiction will make it *even harder* to find suitable sites for community solar development. The DEC estimates that expanding the agency's jurisdiction to unmapped wetlands will increase regulated freshwater wetlands from 1.2 million acres to 2.2 million acres; nearly doubling the land on which distributed solar is de facto not permitted by the DEC. After the 2028 expansions are implemented, the impacts on solar development will be even more severe. While the DEC's expanded jurisdiction will render thousands of proposed and potential solar sites nonviable, it is currently impossible for solar developers and landowners to evaluate this risk; the DEC states that it has hired Cornell to create new, more accurate GIS maps of New York's wetlands, however, these maps are still under development and have not yet been shared with the public for inspection and analysis prior to the implementation date.

The DEC's proposed rules will have a substantial adverse impact on New York's solar workforce, and adopting these rules without a Job Impact Statement violates the New York State Administrative Procedures Act (SAPA)

New York's SAPA directs agencies developing rules to "strive to accomplish the objectives of applicable statutes in a manner which minimizes any unnecessary adverse impacts on existing jobs and promotes the development of new employment opportunities, including opportunities for self-employment, for the residents of the state."[3] Despite NYSEIA's prior comments in response to the Advanced Notice of Proposed Rule Making voicing concern that the DEC's proposed rules would harm the solar industry and cause job losses in the clean energy sector,

[2] New York State Energy Research and Development Authority. Solar Guidebook for Local Governments. May 2023.
[3] State Administrative Procedure Act (SAP) CHAPTER 82, ARTICLE 2 § 201-a. Job impact. https://www.nysenate.gov/legislation/laws/SAP/201-A. Accessed September 2024.

the DEC failed to incorporate any meaningful changes to mitigate harm or to minimize adverse impacts on existing jobs in New York's solar industry. Additionally, while the DEC has not yet provided any updated maps demarking the scope of their expanded jurisdiction, the scale of the expansion and the prohibition of distributed solar in or adjacent to DEC regulated wetlands makes it *nearly certain* that the proposed rule will have a "substantial adverse impact on jobs or employment opportunities" in the solar industry by rendering thousands of otherwise viable community solar projects nonviable due to the massive expansion of DEC jurisdiction and the significant regulatory uncertainty and added cost that accompanies this expansion without adequate mapping or impact mitigation effort. The DEC did not file the required Job Impact Statement, a clear violation of the State Administrative Procedures Act.

The DEC's Regulatory Impact Statement fails to acknowledge massive costs borne by landowners, the environment, and New York energy consumers

While the DEC's Regulatory Impact Statement (RIS) acknowledges that these proposed rules will create new permitting and consulting fees for landowners and New York's small businesses, it fails to address the most significant costs: the loss of property value associated with the restrictions which prevent landowners from using their land for solar projects; foregone tax revenue to local governments; and reduced clean energy generation. The loss in economic value for rural landowners and local governments is material and should be considered and addressed. Reducing clean energy generation by eliminating thousands of otherwise viable sites for solar development will drive up energy costs for New York electricity customers and cause significant environmental harm by extending New York's reliance on fossil fuel combustion for electricity generation; a practice known to cause air pollution, exacerbate climate change, and pollute the land and water during fuel extraction, transport and storage.

In July 2024, NYSERDA and the Department of Public Service filed a Clean Energy Standard Biennial Review disclosing that New York is no longer on track to achieve its CLCPA mandates. Distributed solar is the only clean energy sector that is on track to achieve its goals, and the proposed expansion of the DEC's jurisdiction without waivers or impact mitigation options for distributed solar could stop distributed solar deployment in its tracks. Such an outcome will drive up the overall cost of New York's clean energy transition while threatening the feasibility of achieving New York's CLCPA mandates. From the DEC's RIS, it's clear that the DEC failed to consult with key stakeholders during Phase I of its outreach, and neglected to consider and incorporate important feedback that it received in response to its ANPRM. NYSEIA and CCSA urge the DEC to confer with the NY-Sun team at NYSERDA to ensure that its proposed rules don't undermine the efforts of its sister agency that is also driving environmental progress in New York.

The DEC must take immediate action to ensure that freshwater protection doesn't undermine community solar deployment

Barring mitigation, the DEC's expanded jurisdiction of freshwater wetlands on January 1, 2025 will cause severe financial harm to rural landowners who are no longer able to monetize their land for low-impact projects and to solar developers who have invested millions of dollars into predevelopment and are no longer able to complete their proposed solar projects. It will harm New York's solar workforce, including thousands of solar development, project management, design and installation professionals who are earning family-sustaining wages constructing community solar projects across the state. In addition to the direct financial damages regulatory overreach will cause to the solar industry and property owners, the DEC's expanded regulations will inject risk and uncertainty into the community solar industry; New York's most successful clean energy sector. The regulatory uncertainty will impede developers' ability to raise capital for future solar projects in New York, causing them to withdraw from the market. This would undermine New York's clean energy transition, harming the economy, air quality, public health and the climate by preventing clean energy deployment and extending New York's reliance on polluting fossil fuel combustion to generate electricity. Causing these environmental harms is in direct opposition to the DEC's mission and the statutorily binding CLCPA mandates enacted by the legislature in 2019. These impacts can and should be mitigated. NYSEIA and CCSA respectfully offer the following recommendations for the DEC's consideration:

Recommendation 1: the DEC should delay implementation of its expanded jurisdiction by at least one year

Updated maps are not yet available, and the DEC did not file the required Job Impact Statement or file a comprehensive Regulatory Impact Statement. It would be irresponsible for New York to dramatically expand regulations that are expected to harm rural landowners, key industries, thousands of jobs, and undermine other legislatively mandated clean energy programs. The public, impacted agencies and industries deserve the opportunity to understand and evaluate these impacts and to provide informed comments. The DEC states that they aim to publish improved maps that more accurately depict the agency's expanded jurisdictional wetlands in the next few months. However, the DEC's right to regulate unmapped wetlands and wetlands of unusual importance is scheduled to commence on January 1, 2025. This timeline simply does not provide impacted parties sufficient notice. The solar industry, rural landowners and NYSERDA will all be significantly impacted by the DEC's expanded jurisdiction, and these stakeholders should be afforded the opportunity to review the updated maps, assess the impacts, provide comments, and then develop an adequate mitigation strategy to any new rules or expanded regulation.

A one year delay to the jurisdictional expansion, at least for solar projects which are also a land use of “unusual importance”, will also allow the DEC to meet with NYSERDA, the Office of Renewable Energy Siting (ORES) and other key stakeholders to develop appropriate rules to allow for solar deployment on or adjacent to certain classes of wetlands where ecological impacts are modest and environmental benefits are significant and/or provide time for the DEC to craft appropriate impact mitigation options.

Recommendation 2: the DEC should develop specific rules (and potentially a General Permit) for installing solar on certain classes of wetlands and buffer areas, and develop feasible mitigation options

As the DEC’s jurisdiction doubles in size, it will not be feasible to continue deploying community solar projects at-scale while completely avoiding freshwater wetlands and their buffers. New York clearly understands the need to create rules to permit solar on and adjacent to certain wetlands; in Article VIII, ORES outlines rules for utility-scale solar projects located on or adjacent to DEC regulated wetlands. These rules address how solar must be installed to limit adverse impacts to wetlands and also outline mitigation options. New York does not yet provide equal permitting support for community-scale projects, which have less of an impact on freshwater wetlands, and the DEC should afford similar or enhanced allowances/mitigation options to ensure equitable treatment of distributed solar projects. Distributed solar projects are smaller individually, but more consequential from a CLCPA and climate perspective; 93% of New York’s statewide solar capacity is distributed solar, and these resources must be prioritized.

New York’s successful track record deploying community solar may imply that siting is less of a concern, however, this is a misconception. Distributed solar projects are actually more limited in terms of siting options; utility-scale projects are large enough to finance long power lines to connect a solar farm to the transmission system, whereas distributed solar projects must be located adjacent to existing distribution infrastructure. This constraint means that it is harder for community solar projects to avoid wetlands while still connecting to the electricity grid. It’s also important to keep in mind that many local governments have banned solar as a land use on farmland, which further limits siting options for distributed solar projects; while ORES would likely waive such a law and grant a permit for a utility-scale project, distributed solar projects are not afforded the same state-level support. The combination of these constraints limit siting options and increase the need for carefully crafted waivers and mitigation options.

The federal government recognizes the environmental importance of renewable energy projects, and acknowledges that, when appropriate measures are deployed during design and construction, the integrity of wetlands and the ecosystem services they provide can be

preserved. USACE's Nationwide Permit 51[4] includes a set of rules for land-based renewable energy projects that we recommend as a starting point for the DEC to develop rules for installing solar on and adjacent to certain classes of wetlands. The USACE does not require a 100-foot buffer around all freshwater wetlands and allows minor wetlands disturbance where it is unavoidable.

The USACE requirements strike a fair balance between freshwater wetlands protection and clean energy deployment. NYSEIA recommends that the DEC adopt rules similar to those in the USACE Nationwide Permit 51, which allow solar racking to be installed in wetlands and allow minor disturbance (<1/10 acre) without mitigation. At minimum, the DEC should allow solar in Class III and IV wetlands without mitigation, and in the buffer of Class II wetlands without mitigation. ORES' regulations for utility-scale solar projects specifically allow solar to be installed in Classes III and IV wetlands without mitigation and within the buffer zone surrounding Class II wetlands without mitigation.[5] Many Class III and IV wetlands are actually low-lying farmland that is technically wet meadow. Deploying solar on these low-lying farmlands may actually *improve* wetlands function and ecosystem health; wetlands that were "drained for agriculture and are now being converted to solar may allow the area to recover previously lost wetland function, not least by reducing effects of pesticide/herbicide use."[6]

While NYSEIA and CCSA support the broad objective of avoiding impacts to freshwater wetlands, the DEC's jurisdictional expansion will make it increasingly difficult to deploy solar as the definition of a DEC regulated wetland continues to expand. Our main recommendation is the development of appropriate rules to allow solar on and adjacent to wetlands without requiring mitigation. However, compensatory mitigation could be a useful tool that will allow certain solar projects to proceed despite more significant disturbance to a DEC regulated wetland. The DEC's Freshwater Wetlands Regulations Guidelines on Compensatory Mitigation state that applicants must "fully compensate for (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 (emphasis added)***."[7] The economic and social benefits of solar deployment are meaningful; the solar industry employs 13,400 New Yorkers (as of 2022), contributes to the tax base, and provides a net environmental benefit by offsetting fossil fuel

[4] USACE. Nationwide Permit 51 - Land-Based Renewable Energy Generation Facilities. https://www.swt.usace.army.mil/Portals/41/docs/missions/regulatory/2021%20NWP/2021%20nwp-51.pdf?ver=ZRXrmlcrjxCHVsM5mZyh1w%3D%3D. Effective March 15, 2021-March 14, 2026.
[5] ORES. Regulations Implementing Article VIII of the Public Service Law. https://dps.ny.gov/system/files/documents/2024/08/chapter-xi-title-16-of-nycrr-part-1100-generation-siting-effective-2024-07-17.pdf. July 2024.
[6] Kahal, N. and Duke, D. The Impact of Solar Development on Wetlands: Literature Review and Jurisdictional Scan. Miistakis Institute. May 2023.
[7] DEC. Freshwater Wetlands Guidelines on Compensatory Mitigation. https://extapps.dec.ny.gov/docs/wildlife_pdf/wetlmit.pdf. Accessed September 2024.

combustion, which alleviates air, water and land pollution while improving public health. These benefits should be accounted for in any compensatory mitigation requirements for solar.

Additional Comments

Safe harbor ("grandfathering") rules must be modified to minimize harm to solar projects in development and for delays caused by utilities and authorities having jurisdiction (AHJ).

NYSEIA and CCSA appreciate the DEC's improvements to the proposed final rules regarding safe harbor of prior DEC jurisdictional determination. However, it is important to keep in mind that solar developers invest significant financial resources into developing a project and permitting long before they receive a final Environmental Impact Statement, negative declaration or site plan approval. If the DEC's rules go into effect as proposed, it will cause dozens of solar projects in the permitting phase to be delayed and/or canceled as the developer seeks a jurisdictional determination. NYSEIA and CCSA urge the DEC to update safe harbor rules to instead be based upon the date the application is submitted to the lead agency, which will eliminate this significant near-term cancellation risk to the pipeline of solar projects under development in New York. NYSEIA and CCSA also request that the DEC extend the duration of safe harbor in cases where an AHJ goes into moratorium or when a proposed solar project is waiting for the electric distribution utility to complete a multi-year distribution system upgrade. Solar project development is both capital and time intensive, and it is common for a solar developer to acquire land and pay for utility distribution system upgrades years before the utility is ready to interconnect the project. This proposal will ensure that solar developers and rural landowners are not penalized for delays caused by AHJs and utilities.

The 90-day response period for the DEC to determine jurisdictional status must be strengthened, and DEC staffing must be bolstered

The proposed 90-day response period for the DEC to determine jurisdictional status is an important improvement compared to the draft regulations. However, the combination of the site visit requirement and DEC staffing constraints could render this shot clock ineffective. Additionally, the solar industry is concerned that the shot clock could cause the DEC to frequently claim jurisdiction without adequate analysis as a precaution in the face of limited time and agency staffing; however, such rushed jurisdictional claims could unnecessarily kill solar projects that do not encroach on freshwater wetlands but do provide environmental and climate benefits. In short, we support the 90-day response period but urge additional action to ensure timely and accurate jurisdictional determination.

Further guidance is needed

The DEC's proposed rules leave many unanswered questions that should be addressed before rules go into effect. A few of the open items include:

- Further guidance on the jurisdictional determination process will be needed. For example, would verified delineation data only be necessary when permits are required? If there will be no impacts to delineated wetlands (or within 100-feet) would data still need to be verified to by the DEC? Response times for jurisdictional determinations are already protracted; how will the DEC handle the volume of requestions and has the DEC staffed to handle this volume without further delays?
- More clarity on specific implications of wetlands of unusual importance is needed. Will development projects still be allowed in these areas through Article 24 permits? Will there be increased mitigation requirements? Will the permit application process take longer? The regulatory changes appear to assert potential jurisdiction to wetlands (regardless of actual value or size) within specific locations (i.e., falling within locations subject to new unusual importance characterization, flood prone HUCs, urban areas, etc.). This provision will significantly increase the permitting burden for projects taking place in such locations. At a minimum, there should need to be some demonstration the wetland in question has certain function/value. For example, the rules suggest that an isolated, small depression with phragmites mono-culture that never receives floodwater may be considered of unusual importance simply because it occurs in such a geographic location.
- Irrespective of the proposed 90-day response window for jurisdictional determination, does the DEC expect permitting timelines to increase substantially based on increase in application volume caused by the jurisdictional expansion? Currently wetlands permitting can take up to 24 months, which is prohibitive for community solar projects.
- More clarity is needed regarding delineation and verification requirements for wetlands on properties outside of a project developer's control. Delineating full wetland limits may not be practicable based on a landowner or project developer's property parcel(s); for example, delineation beyond limits of land control or ownership.
- Although there are apparent grandfathering clauses for projects/wetlands that have achieved certain permitting milestones (negative declaration, final environmental impact statement or approved site plan), there do not appear to be allowances for those projects which may not have fully achieved those specific permit milestones but which have incurred significant time/effort/cost on designs/agreements/planning. Are project developers expected to start anew by requesting verification or assuming DEC jurisdiction where previously there would not have been jurisdiction for wetlands? If so, this has significant potential development timelines/cost impacts.

If the DEC is unable to harmonize freshwater protection and climate mitigation through rule making, urgent legislative or executive action will be needed

If the DEC is unwilling or unable to harmonize its freshwater protection and climate mitigation obligations as part of this rule making process, urgent legislative or executive action will be needed to mitigate harm to distributed solar deployment, to avoid "substantial adverse impact on jobs" in the solar industry, and to ensure that the DEC appropriately balances these competing priorities to achieve its overarching mission of environmental protection.

Conclusion

NYSEIA and CCSA appreciate the DEC's critical role in protecting New York's freshwater resources. The DEC also plays a pivotal role in implementing New York's CLCPA, a law that mandates the rapid deployment of in-state clean energy resources to eliminate air, land and water pollution caused by fossil fuel combustion. The DEC's proposed rules will cause have a substantial adverse impact on New York's solar workforce and undermine New York's ability to achieve its clean energy mandates. NYSEIA and CCSA encourage the DEC to consider the unusual importance of solar power as it develops rules and regulations to implement the expanded jurisdiction granted to the agency through amendments to the Freshwater Wetlands Act, Article 24 of the Environmental Conservation Law (ECL). Specifically, NYSEIA and CCSA urge the DEC to delay implementation of its jurisdictional expansion by one year and to develop appropriate waivers and mitigation options for solar in consultation with NYSERDA, ORES and industry stakeholders.

Thank you for the opportunity to provide input on these important matters.