

DRAFT SUMMARY OF DRAFT REVISIONS TO STATE FRESHWATER WETLAND REGULATIONS

November 2020

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 projects and activities proposed near wetlands. Implementation of the law required both the RI Department of Environmental Management (DEM) and the RI Coastal Resources Management Council (CRMC) to undertake rulemaking within their respective programs. 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 data and recommending changes in state law or regulations that could foster a business climate to grow the economy while ensuring better protection of our natural resources.

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 areas 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 new law include:

- Strengthens wetland 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 freshwater wetland buffers and setbacks. The legislation recognizes the important values of buffers in the protection of the wetland resources.
- 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. Preliminary draft rules were the subject of a public workshop in September 2019. The September 2020 draft rules

reflect revisions by the Agencies in response to public feedback. The statutory changes in definitions affect the wording in all sections of the rules and result in a new framework for the regulatory process. Hence, the rulemaking involves repealing and replacing the rules currently in place. The major new changes involve the designation of “jurisdictional area” and specifying requirements for freshwater wetland buffers and setbacks within the jurisdictional area. To support regulatory process improvements, the draft rules also introduce a general permit process, propose new exempt activities, expand or clarify certain other exemptions and simplify the application fee schedule. The rules have been further restructured to have the performance standards and the review criteria listed in a single section 2.7. 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 2.13 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.

Section 2.4 Definitions:

The draft rules include new or revised definitions required by state law and intended to provide greater consistency among DEM and CRMC programs as well as clarity for applicants and the public.

Freshwater wetlands: 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” are no longer defined as wetlands and used in the rules. [§ 2.4(A)(32)]

Jurisdictional Area: This new term defines the land 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 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. [§ 2.4(A)(39)]

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 jurisdictional area. Land within the buffer zones includes a range of land uses as well as areas qualifying as “buffer” (see below). [§ 2.4(A)(11)]

Buffer: This new term refers to an area of undeveloped vegetated land that is to be retained in its natural undisturbed condition. (Buffers can be created.) [§ 2.4(A)(10)]

Section 2.5 Applicability and Regulated Activities:

The amended law expanded the jurisdictional authority of the Agencies. (See definition of Jurisdictional Area above).

Section 2.6 Exempt Activities:

Within the Jurisdictional Area, the draft rules include the following new exemptions and expansion or clarification of approximately 16 other existing exemptions. All exemptions are subject to certain conditions and limitations specified in the rules.

- Cutting or maintenance of vegetation within lawns or landscaped areas consistent with other approvals;
- Forest management practices in response to an event-specific emergency in consultation with the Division of Forest Environment;
- Cutting within a floodplain that is located outside of all freshwater wetlands and their 100/200-foot jurisdictional areas;
- Cutting of vegetation for routine maintenance of approved landfill or remediation caps;
- Maintenance or repaving of existing parking lots with size limits;
- Addition of gates or barriers at existing or approved driveways or access roads;
- The installation of small signs associated with conservation activities;
- Crossing of or relocating an area subject to storm flowage;
- Restoration of wetlands resulting from unauthorized alterations associated with an enforcement action; and
- Establishment of a new pedestrian trail outside of wetlands and buffer zones.

Section 2.7 Protection Standards and Variance Procedures:

A new section of rules consolidated the wetland protection standards and review criteria. This section also specifies buffer protection standards.

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 freshwater wetlands (including lakes and ponds) which are distributed throughout the state. Consistent with state law and the LTF Final Report (2014), in developing the requirements, including the buffer zone widths, 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 the buffer standards. All wetlands will now be designated a buffer zone which addresses a gap in protection noted by the LTF. About 19% of vegetated wetland resources were prioritized for the greatest protection (100-foot buffer zones). This approach provides desired predictability while still allowing the buffer standards to generally account for the ecological variability associated with different wetlands. 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 provide the benefit of reduced regulatory burdens on previously developed properties.

Regional Framework for Tiered Protection: Under the tiered approach, the state was divided into regions to facilitate the application of a range of buffer standards that reflect a gradient of watershed conditions. The regions consist of urban areas and non-urban areas – the latter of which is further divided into two regions to distinguish certain river buffer zones. In addition, requirements in drinking water supply watersheds were incorporated as an overlay in the non-urban regions. (See map) The tiered protective buffer zone distances were based on assessments of watershed resource protection needs, wetland resource characteristics and existing land use.

River Protection Region 1 - This Region includes watershed areas that are generally the highest priorities for conservation of fish and wildlife habitat. The region encompasses areas in the western and southeast portions of the state as well as Block Island. The watersheds exhibit low density of development, lower percentages of impervious cover and contain larger tracts of unfragmented habitat. Within this Region, in March 2019, a number of river segments in the Wood-Pawcatuck River watershed were federally designated as “wild and scenic.” River Protection Region 1 covers 52% of Rhode Island’s area (coastal waters excluded).

River Protection Region 2 - 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 including crossings of rivers. The region includes much of the suburban development that exists adjacent to the Urban Region areas. River Protection Region 2 covers 40 % of Rhode Island’s area (coastal waters excluded).

Urban Region – 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 highly developed or altered. This includes the Providence metropolitan area as well as portions of Woonsocket, Newport and West Warwick and Westerly. The Urban Region covers 8% of Rhode Island (excluding coastal waters)

Within the Regions, buffer zones were designated as follows and further described below:

- On a statewide basis, the most sensitive vegetated wetland types were identified and designated the highest level of protection (100 feet). These include unique and less common wetland types that are often sensitive to disturbance such as bogs, fens and marshes as well as evergreen swamps, swamps with Rhododendron understory and vernal pools.
- On a statewide basis, buffers zones were increased to strengthen protection in water supply reservoir watersheds.

- In River Protection Regions 1 and 2, protection was strengthened by (1) increasing the buffer zones 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 requirements were reduced in areas where existing land use have already resulted in the alteration or loss of vegetated buffer. This applies primarily in the Urban Region.

Section 2.23 Statewide Buffer Zone Designation

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 of rivers of any width. Within this area, buffer zones of varying widths have been designated in accordance with the following criteria.

River Protection Region 1 (Non-urban)	<ul style="list-style-type: none"> • Maintain 200 feet 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.
River Protection Region 2 (Non-urban)	<ul style="list-style-type: none"> • Maintain 200 feet 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 zone from 200 to 150 feet for other listed large rivers. • Maintain the 100-foot buffer zone on smaller rivers and streams.
Urban Region	<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 River. • 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 the Non-urban Region. (Not applicable outside watersheds of named reservoirs.)
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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 drinking water reservoirs.

River Protection Regions 1 and 2 (Non-urban)	<ul style="list-style-type: none"> • Increase buffer zone on lakes and ponds ≥10 acres from 50 to 100 feet (excluding listed lakes) • Maintain 50-foot buffer zone for lakes > ¼ acre and < 10 acres • Designate a 25-foot buffer zone on small ponds (< ¼ acre)
Urban Region	<ul style="list-style-type: none"> • Maintain the 50-foot buffer zone for listed lakes and ponds. • Designate 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 the Non-urban Region.

Other Wetlands:

Rhode Island freshwater wetlands have been mapped in the RI Geographic Information System for non-regulatory purposes using a standardized classification scheme. The most common wetland type in Rhode Island is deciduous swamp, which is located throughout the state. Other wetland types are much less common including bog and fens. Current regulations provide a 50-foot perimeter wetland around certain wetlands of certain sizes. Small wetlands are not provided buffer 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 table below applies statewide.

Bogs and fens 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 exceptions for <i>Phragmites</i> marshes and wet meadows
Vernal Pools	<ul style="list-style-type: none"> • Increase buffer zone from 0 to 100 feet where 50% or more of the land around the pool is undeveloped vegetated land. • Increase buffer zone from 0 to 50 feet where less than 50% of the land is undeveloped vegetated land.
Shrub Swamps	<ul style="list-style-type: none"> • Increase buffer zone to 75 feet for shrub swamps ≥1 acre

	<ul style="list-style-type: none"> • Designate a 25-foot buffer zone for shrub 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 the Non-urban Regions. • Maintain buffer zone of 50 feet for smaller swamps in the Non-urban Regions (1 to <10 acres). • Reduce the buffer zone from 50 to 25 feet around swamps in Urban Region. • Designate a 25- foot buffer zone for swamps < 1 acre.

Naturally vegetated, undeveloped areas within buffer zones will be expected to be maintained as buffer.

Application Types and 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 Wetland Permit” (§ 2.11).
- Applicants that meet all standards (§ 2.7.1), 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 the standard cannot be met. Variance requirements are outlined in § 2.7.3.
- The draft rules include an in-fill lot standard that acknowledges constraints on certain existing lots of record and allows processing of a permit without a variance (§ 2.7.1(B)(5)).
- 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 would 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 (§ 2.11).
- The draft rules provide new and clarify or expand certain exemptions for limited activities that do not present impacts to freshwater wetlands that merit review. See § 2.6.
- Simplified the application fee schedule. See § 2.8.9.

Municipal Coordination (§ 2.8.11): The draft rules have provisions to strengthen coordination with municipalities including the following:

- Notification of designated municipal officials of when permits are filed with state agencies;

- Require 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 wetland permit. Applicants are encouraged to obtain verified wetland edges as part of project planning.
- Opportunity to provide local input while maintaining timeliness within the state permitting programs;
- § 2.16 - Procedure for the municipality to petition the DEM or CRMC to increase the size of a buffer zone for a particular 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 2.13. 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.

Figure 1: Freshwater wetlands buffer regions map (2020)

