

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

CHAUTAUQUA LAKE PROPERTY OWNERS
ASSOCIATION, INC.; JIM WEHRFRITZ; TOWN OF
ELLERY; BUILDERS EXCHANGE OF THE
SOUTHERN TIER, INC.; and BEMUS POINT
BUSINESS ASSOCIATION,

Petitioners-Plaintiffs,

For a Judgment and Order Pursuant to Article 78
And/or Article 30 of the N.Y. *Civil Practice Law
and Rules* (“CPLR”),

-against-

THE STATE OF NEW YORK and the NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Respondents-Defendants.

**COMBINED
VERIFIED ARTICLE 78
PETITION
AND COMPLAINT FOR
DECLARATORY JUDGMENT**

Index No.

Assigned:

Petitioners-Plaintiffs CHAUTAUQUA LAKE PROPERTY OWNERS ASSOCIATION, INC. (“CLPOA”), a New York not-for-profit corporation, and JIM WEHRFRITZ, CLPOA’s president, together with the TOWN OF ELLERY, New York, BUILDERS EXCHANGE OF THE SOUTHERN TIER, INC., and BEMUS POINT BUSINESS ASSOCIATION, by and through their undersigned counsel, allege and state as follows as and for their combined petition brought pursuant to CPLR Article 78 and complaint for declaratory judgment pursuant to CPLR Article 30:

NATURE OF THE PROCEEDING

1. In a sweeping overhaul of the Freshwater Wetlands Act (Article 24 of the Environmental Conservation Law), the Legislature and the Department of Environmental Conservation (DEC) have imposed a dramatic new regulatory regime that extends across the entire

state—from the shores of Chautauqua Lake to the tip of Montauk. Through a series of statutory amendments and corresponding revisions to 6 N.Y.C.R.R. Part 664, the DEC has vastly expanded its authority over private property, overturning more than fifty years of established legal standards and settled expectations. By its own conservative estimate, the agency now claims jurisdiction over an additional 1.6 million acres—encompassing vast areas that bear little resemblance to any conventional definition of a wetland—subjecting countless landowners to onerous new permitting requirements and regulatory uncertainty.

2. Enacted in 1975, the Freshwater Wetlands Act established a carefully calibrated framework to protect the state’s wetlands while still allowing for reasonable economic development and land use. The Legislature sought to balance environmental preservation with private property rights, granting the DEC authority to identify and regulate true wetlands—defined as “lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic and semi-aquatic vegetation,” along with specific examples of characteristic flora. (ECL § 24-0107(1)(a)(1))

3. Crucially, the Act’s original scope excluded open water bodies such as lakes, large reservoirs, and man-made impoundments. These features were never within the definition of “wetlands” and were therefore never subject to DEC regulation under the Act’s original terms. Historically, lake managers, shorefront property owners, and other lake stakeholders could manage their weed removal and harvesting activities in the littoral zone, and their in-water invasive species management programs without triggering Article 24 or its onerous permitting regime.

4. The Legislature intentionally limited DEC’s jurisdiction to a clearly defined subset of the state’s wetlands. Only those areas that appeared on an official freshwater wetlands map—“promulgated by the [DEC] pursuant to [ECL § 24-0107(2)]”—qualified as regulated wetlands.

To be included, a wetland typically had to meet a minimum size threshold of 12.4 acres, unless it qualified as a smaller wetland of “Unusual Local Importance” under a narrow statutory exception, which both reserved jurisdiction over wetlands of “Unusual Local Importance” to the local government under its home rule authority and established a process of delegation, whereby DEC-approved local wetlands programs could operate in lieu or in parallel to DEC regulation. (ECL § 24-0107(1))

5. This deliberate limitation was rooted in the recognition that wetland designation carries serious regulatory consequences. Once a property is classified as a regulated wetland area or regulated adjacent area, virtually any land-disturbing activity is subject to state oversight. This includes basic residential uses—construction of sheds or driveways, repairing septic systems, maintaining docks or piers, applying pesticides or herbicides, or performing minor grading or drainage. No matter how routine the activity, landowners must submit to an elaborate regulatory process and obtain a permit, with no guaranteed outcome and no *de minimis* exception.

6. Because this designation so profoundly impacts property rights, the former Act embedded due process protections before DEC could map a wetland on private land. These included individualized notice to affected landowners, public hearings, a 60-day comment period, and a final written order based on a judicially reviewable administrative record—formally filed in the local land records. (ECL § 24-0301(5)) Until this process was complete, DEC had no authority to regulate the use of the land in question. As for smaller wetlands not meeting the statutory threshold, jurisdiction remained with local governments. (ECL § 24-0507)

7. These long-standing constitutional safeguards—respected for nearly half a century—have now been swept away by executive fiat. In their place, the law now establishes a sweeping *rebuttable presumption* that both mapped and unmapped lands falling within a

broadened definition of “boundary of a wetland” is presumptively regulated and subject to state permit requirements. (ECL § 24-0301(4)) (emphasis added). The burden is now on private citizens to disprove the State’s claim to regulatory authority—by proving, to the agency’s satisfaction, that their property does not meet this expanded definition.

8. The reliability and transparency of the official maps—once the cornerstone of landowner certainty—have been supplanted by administrative discretion and digital mapping software. Many of the 1.6 million newly regulated acres have already been put to beneficial use: family homes, small businesses, municipal services, and long-planned retirement dwellings. Chautauqua Lake (among others) has been the focus of extensive, publicly funded efforts to combat invasive species. Yet under the new rules, all of that is now in limbo—subject to some of the state’s most restrictive permitting regimes, which are expressly designed to discourage further development in and around wetlands, whether traditional or not.

9. In light of the sweeping scope of this regulatory expansion—and the statutory *presumption* that virtually every damp patch of land in the state is now a regulated wetland—the DEC offers landowners a hollow substitute for the due process protections long embedded in the prior mapping regime. This substitute, the so-called “jurisdictional determination,” bears little resemblance to the careful, site-specific assessments of the past. Rather than conducting on-the-ground evaluations, DEC staff now make initial, but fully binding determinations based solely on remote imagery viewed from a government office—often by individuals who have never set foot on the property in question. This bureaucratic shortcut not only removes the human element but strips the process of transparency, reliability, and fairness. Worse still, DEC’s new regulations tightly restrict a landowner’s ability to challenge such determinations, providing no meaningful procedural safeguards, no formal administrative record, and no guarantee of judicial review. This

is administrative overreach by design—insulating agency decisions from scrutiny while placing the burden of proof squarely on the property owner.

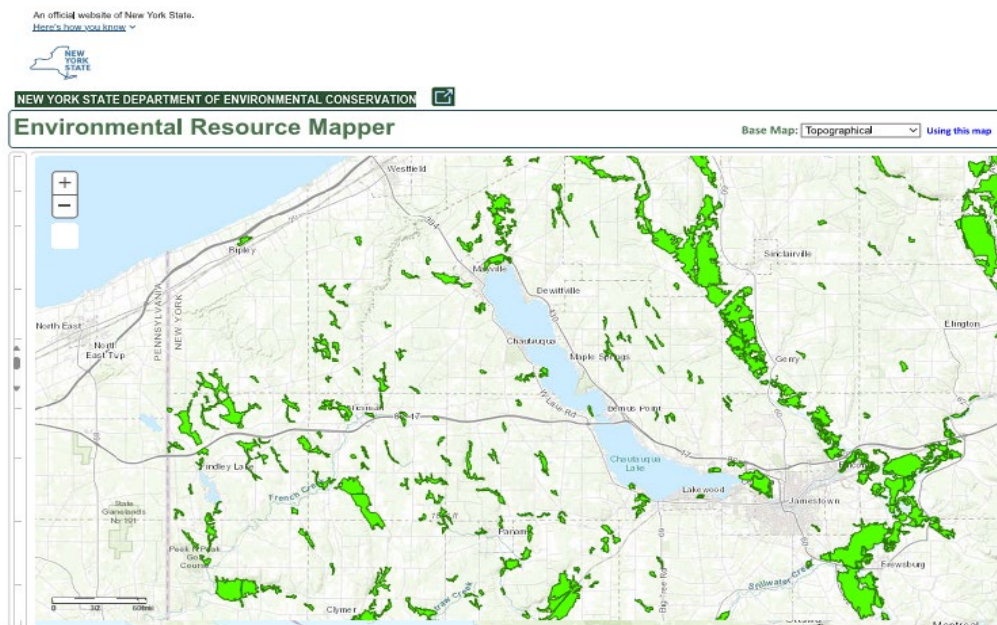
10. The real sleight of hand lies in the State’s quiet yet radical transformation of how wetlands are classified. Wetland ecosystems generally possess and were previously designated based on three essential characteristics: (1) hydrophytic vegetation, (2) hydric soils, and (3) wetland hydrology, the driving force creating all wetlands. Now, however, by dramatically expanding the definition of wetlands deemed to be of “Unusual Importance,” the DEC has effectively reclassified nearly every wetland in the state into its highest regulatory categories.

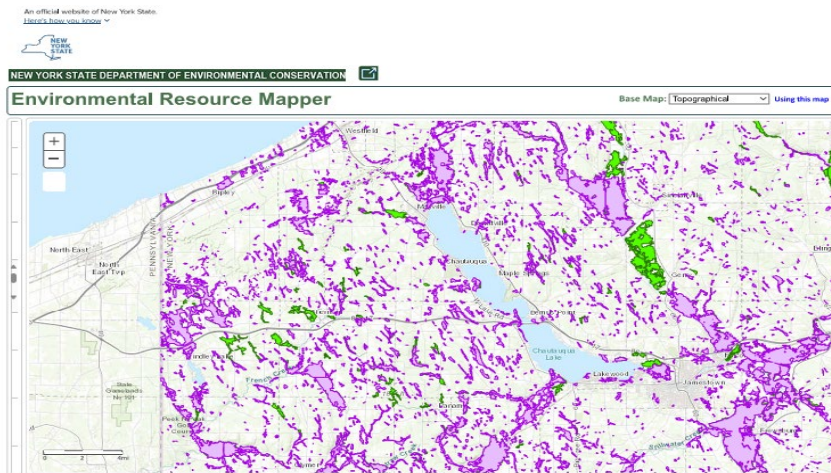
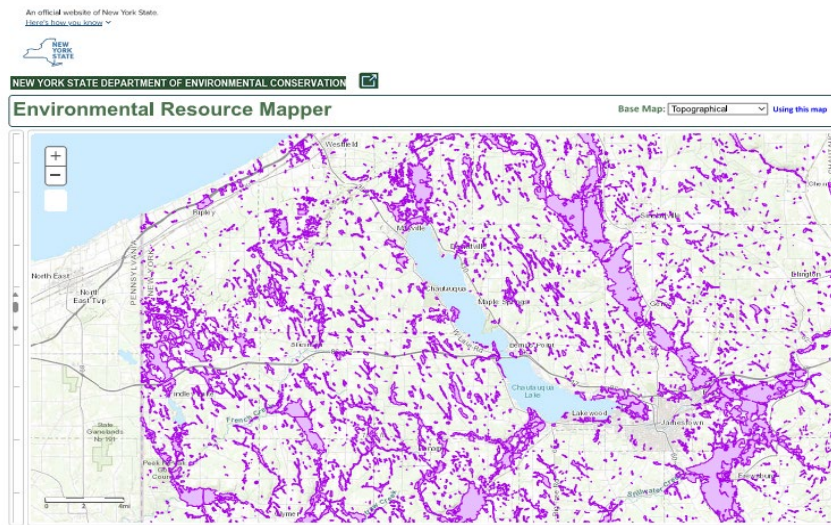
11. The agency has introduced eleven new, highly subjective criteria for this designation—so vague and malleable that virtually any wetland, no matter how marginal or previously unremarkable, now qualifies even without regard to the three essential wetland qualities. What was once a scientific determination based on observable wetland vegetation has been replaced by an amorphous checklist that allows the DEC (not, as before the local government) to label almost any area as “unusually important” and thereby subject it to the state’s most burdensome regulatory controls the same as a “Class I” or “Class II” wetland.

12. Once a parcel is caught in this expanded regulatory web, the restrictions are severe. Any activity that affects a wetland of Unusual Importance—or even touches its 100-foot adjacent area—is presumed impermissible. Whether the landowner seeks to install a septic system, perform grading, control drainage, or construct something as modest as a garden shed or storage outbuilding, the burden is theirs to prove that the work is not only necessary, but that no less intrusive alternative exists anywhere on the property. The regulation imposes a standard akin to constitutional strict scrutiny: the project must be the *only practicable alternative* and must offer a *compelling economic or social justification* that *substantially outweighs* any impact to the wetland.

(6 N.Y.C.R.R. 663.5(e)). In practice, this means routine land use decisions are subject to an impossible standard, enforced by an agency with virtually unchecked discretion.

13. The difference between the existing freshwater wetlands maps and the DEC's newly fashioned "Informational Maps" in the Chautauque Lake region is staggering, even before one accounts for the DEC's novel "in-lake" regulatory overreach (Green indicates wetlands protected under prior Article 24; Purple indicates DEC's view of the newly regulated wetland areas; the third diagram shows the combined wetlands under the prior and new Acts; Blue indicates open water areas that, although not mapped, are presumptively and in practice deemed wetlands subject to new Article 24):





14. This combined proceeding seeks declaratory and injunctive relief on multiple grounds: constitutional violations, procedural irregularities under Article 78 of the CPLR, and unlawful rulemaking under Section 202 of the State Administrative Procedure Act (SAPA). Petitioners respectfully request that this Court annul, vacate, and set aside the 2022 amendments to the New York Environmental Conservation Law (ECL) and the corresponding revisions to 6 N.Y.C.R.R. Part 664, including:

- ECL §§ 24-0107(2) (redefining “Freshwater wetlands map”),
- 24-0107(9) (expanding the definition of wetlands of “Unusual Importance”),
- 24-0301(1) and (2) (remapping and delineation procedures),
- 24-0301(4) (establishing a sweeping and constitutionally suspect *rebuttable presumption* that every mapped and unmapped area in the state may be regulated as a wetland unless the landowner can affirmatively prove otherwise),
- 24-0301(5) (delegating critical state regulatory powers to private entities and environmental advocacy organizations such as the Sierra Club and The Nature Conservancy),
- 24-0301(7), 24-0701(1), and 24-0703(5) (governing “jurisdictional determinations” made without physical site inspections and with no meaningful opportunity for review),
- 24-0705(1) (imposing a vague and expansive mandate that DEC consider “climate change, flood, hurricane and storm dangers” when evaluating permit applications, with no standards to guide such consideration), and
- All the corresponding amendments to 6 N.Y.C.R.R. Part 664.

15. These amendments unconstitutionally expand DEC’s regulatory reach while gutting the due process protections that have long governed landowner rights under the Freshwater Wetlands Act. The revised framework empowers unelected administrators and third-party advocacy groups to dictate land-use policy based on cursory, often remote assessments—with limited public transparency, no reliable administrative record, and no clear path to judicial review. It subjects citizens to a system of presumptive guilt, requiring them to disprove regulation rather than compelling the State to justify it.

16. Petitioners challenge this regime not only for its procedural and substantive defects, but because it enshrines unchecked administrative discretion, invites arbitrary enforcement, and violates fundamental principles of notice, fairness, and accountability in state rulemaking and property law.

PARTIES

17. The Chautauqua Lake Property Owners' Association is a registered 501(c)(3) and New York State not-for-profit corporation, with a principal place of business located at 4443 Lakeside Drive, Bemus Point, Town of Ellery, Chautauqua County. Formed in 2024, CLPOA is governed by a volunteer Board of Directors and consists of property owners, businesses, and lake users with property, scientific, or recreational interests in, adjacent to, regarding, or near Chautauqua Lake and/or its newly regulated freshwater wetland areas. CLPOA's mission is to research, analyze, and inform the public on fisheries and lake management issues related to Chautauqua Lake more generally, and now, specifically, related to the potentially devastating impact of CLPOA's supporters and/or the municipalities in which they reside being swept up in the above-described rulemaking.

18. CLPOA's team of engineers, scientists, lawyers, and others from Chautauqua Lake and the broader Jamestown area (and beyond), all volunteers, have devoted hundreds of hours of their own time poring over the hundreds of pages of regulatory documents which form the backdrop to DEC action, researching, asking questions, contacting DEC experts, attending webinars, and educating themselves as to regulations sure to impact all of their futures. This combination of scientific, engineering, project management, marine, and information technology, enhanced by other types of support by other volunteers allows the CLPOA to identify and communicate issues and opportunities which regulatory agencies and local governments may miss.

19. Under the new regulatory regime, the DEC will for the first time ever regulate through its freshwater wetlands permit program such things as weed harvesting, shoreline cleanup, and mechanized weed removal in and adjacent to Chautauqua Lake. CLPOA's lakefront property

owning supporters engage in these activities on a daily, monthly, and/or seasonal basis, as they attempt to maintain the value and aesthetics of their private lands.

20. CLPOA's supporters also participate and have an interest in long-standing efforts by other local non-profit groups to address aquatic invasive species in the Lake, such as Curly Pondweed and Eurasian watermilfoil, both of which are recognized as impediments to the Lake's health and full enjoyment by the public. Under the new regulations, even those remedial activities will be unnecessarily curtailed.

21. Jim Wehrfritz is the President of the Chautauqua Lake Property Owners Association (CLPOA) and resides on lakefront property located in Bemus Point, within the Town of Ellery, Chautauqua County, State of New York. Pursuant to the amended provisions of Article 24 of the Environmental Conservation Law and 6 N.Y.C.R.R. Part 664, his property is now presumptively classified as a regulated wetland. As a direct result of this classification, Mr. Wehrfritz is effectively prohibited from engaging in a wide range of ordinary and customary property maintenance activities — including, but not limited to, clearing driftwood, removing aquatic shoreline weeds, raking, regrading, performing minor landscaping, modifying his driveway, or constructing accessory structures — without first obtaining a Jurisdictional Determination from the Department of Environmental Conservation.

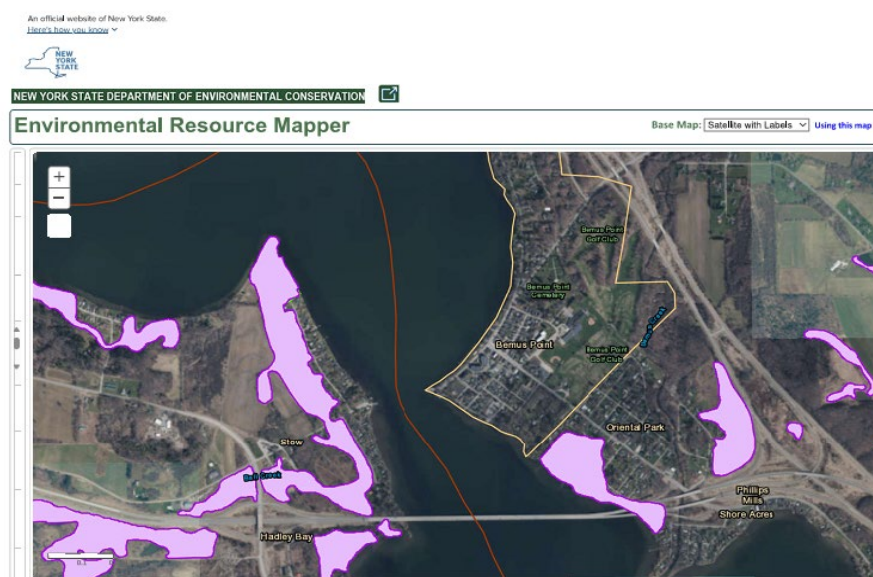
22. This process is burdensome, costly, and time-consuming, and, given the overly broad and vague criteria for wetland classification, is likely to culminate in the designation of his residential property as a fully regulated Class I wetland. Such a designation would subject Mr. Wehrfritz to extensive and unprecedented restrictions on the use and enjoyment of his property. Accordingly, Mr. Wehrfritz has a direct, personal, and legally cognizable interest in challenging the newly imposed wetlands regulations and thus possesses standing to maintain this proceeding.

Indeed, under DEC regulations, it is now an open question as to whether Mr. Wehrfritz (and other similarly situated CLPOA supporters) may store petroleum products or even use insect repellent sprays in their own backyards.

23. The Town of Ellery is a municipal corporation and political subdivision with a principal place of business located at 25 Sunnyside Drive, Bemus Point, Chautauqua County, New York, 14712. The Hon. Larry Anderson is the duly elected Supervisor of the Town of Ellery. The instant proceeding was authorized by vote duly taken by the supporters of the Town Board of the Town of Ellery in April 2025.

24. The Town of Ellery is uniquely situated on 20 of the 42 miles of Chautauqua Lake shoreline and on the peninsula, including Bemus Point that marks a chokepoint in Chautauqua Lake, functionally separating the Lake’s northerly and southerly reaches. Under the new regime, a large swath of the Town’s fully developed and occupied neighborhoods including Oriental Park will be a regulated wetland.





25. The Builders Exchange of the Southern Tier, Inc. (BEST) is a New York company with a principal place of business located at 15 Belden Street, Binghamton, Broome County, State of New York, which advocates for local builders and contractors, providing workplace safety training (OSHA), timely information on development trends, regular social events, and other pertinent programming to its more than 350 members and member groups (<https://bxstier.com/benefits-and-services/>). BEST was formed by a merger of two existing associations, the *Associated Building Contractors of the Triple Cities* which was established in 1942 and located in Binghamton, NY and the *Southern Tier Builders Association* founded in 1956 and located in Falconer, NY. BEST offers construction reporting and plan room services for New York and Pennsylvania. Its Build New York Online Plan Room offers General Contractors, Subcontractors, Suppliers and Manufacturers Representatives a forum to view construction plans & specifications, construction & contract documents, addenda, bid lists and much more for construction projects across New York and Pennsylvania.

26. The Bemus Point Business Association (BPBA) is a volunteer organization focused on developing Bemus Point as a premier destination (<https://www.visitbemuspoint.com>). The goal is to provide advocacy, collaboration, and promotion to all members equally. BPBA's dozens of members represent local tourism, recreation, and services industries in and around the Chautauqua Lake region, and its advocacy enhances quality of life and economic development. BPBA provides networking, cross-collaboration, and other business information and resources to local businesses affected by wetlands regulation.

27. The State of New York is the sovereign, governed by the elected governor Hon. Kathy Hochul, with a principal place of business located at The Capitol, Albany, County of Albany, State of New York.

28. The New York State Department of Environmental Conservation is an executive agency of the state of New York, led by Acting Commissioner Amanda Lefton. The DEC has its principal place of business at 625 Broadway, Albany, County of Albany, State of New York.

JURISDICTION AND VENUE

29. This Court has jurisdiction over the Petitioners' claims pursuant to Article 30 and Article 78 of the CPLR, and pursuant to Article I, § 6 of the New York State Constitution.

30. Venue in Albany County is appropriate pursuant to CPLR §§ 506(b) and 7804(b), as it is the place where the budget bill was adopted, and the new Part 664 regulations published.

STATEMENT OF FACTS

A. Chautauqua Lake -- the "Thumb of the Finger Lakes" -- and environs.

31. Chautauqua Lake, situated in the southeast corner of Chautauqua County, is the largest inland lake in western New York and one of the highest navigable bodies of water in North America, with an elevation of 1,308 feet. Spanning over 42 miles of shoreline and divided into

two basins by Bemus Point, the lake has been a hub of residential, commercial, and recreational development for more than 150 years. The surrounding region includes the Towns of Chautauqua, Ellery, North Harmony, Ellicott, and Busti, as well as the Villages of Mayville, Bemus Point, Celoron, and Lakewood. These areas have long depended on the lake as a central economic engine, generating substantial property and sales tax revenue and serving as a cornerstone of the region's tourism and hospitality industries.

32. The shoreline and adjacent upland areas are densely developed, comprising a diverse mix of private residences, seasonal camps, hotels, marinas, and other commercial enterprises. Although these lakefront properties occupy only approximately 1% of Chautauqua County's total land area, they account for more than 25% of the County's property tax base, underscoring the lake's outsized importance to the local economy.

33. Despite this high level of development, Chautauqua Lake remains ecologically productive and supports a robust and diverse sport fishery. It is well-known for recreational angling opportunities, including walleye, muskellunge, largemouth and smallmouth bass, and multiple panfish species—further contributing to its recreational, environmental, and economic value to the region. For generations, this balance of responsible development and ecological function has made Chautauqua Lake a model of sustained and beneficial land and water use.

34. Submerged aquatic vegetation, a/k/a macrophytes, has been a documented problem affecting Chautauqua Lake for more than 100 years. For as long as visitors have been drawn to the Lake for aesthetic, educational, and recreational purposes, residents, tourists, elected officials, and community organizations, such as CLPOA, working together with government agencies like the Town of Ellery and other bodies, have struggled to find an effective strategy for balancing the Lake's ecological needs with the demands of our fast-developing society. These efforts include

those necessary to develop an integrated management program for the management, and at times removal, of invasive aquatic species in the Lake such as Curly Leaf Pondweed and Eurasian Water Milfoil – a DEC identified invasive species that tend to overtake native species and cause nuisance conditions throughout the Lake.

35. In June 2017, for example, the DEC issued permits to the Town of Ellery and Village of Bemis Point to conduct a “Data Collection Project” (“Project”). The Project involved the application of registered aquatic pesticides Aquathol®K (active ingredient Dipotassium Salt of Endothal) and Navigate® (active ingredient Butoxyethyl Ester of 2,4-Dichlorophenoxyacetic Acid) to approximately thirty (30) acres of the Lake. This Project was successful and showed the potential for the use of these aquatic pesticides to control the spread of Curlyleaf Pondweed and Eurasian milfoil (and other invasive species) in the Lake. DEC approved the Project scope, supervised the onsite herbicide application, and confirmed the positive results.

36. Following the Project, SOLitude Lake Management (“SOLitude”), the licensed entity which applied the herbicides during the Project and conducted pre and post application aquatic vegetation surveys, assessed the results of the Project and concluded that the herbicides had been effective to control invasive aquatic weeds. SOLitude further concluded that the areas of the Lake in which a combination of Aquathol®K and Navigate® (2,4-D) were applied saw the greatest reduction in Eurasian Water Milfoil densities.

37. Given the positive findings of the Project, and after substantial public scoping, input and debate, Town of Ellery’s Town Board in April 2018 accepted a Final Supplemental Environmental Impact (“FSEIS”) as required by DEC and with its guidance for the purpose of examining the potential environmental impacts of using three (3) DEC-registered aquatic herbicides: Aquathol®K (active ingredient Dipotassium Salt of Endothal), Navigate® (active

ingredient Butoxyethyl Ester of 2,4-Dichlorophenoxyacetic Acid), and Renovate® (active ingredient Triclopyr).

38. The DEC, as the permitting agency, participated in the State Environmental Quality Review Act (“SEQRA”) process, including scoping and the preparation and review of the draft and final SEIS. In its Findings Statement following the FSEIS, the DEC stated “[T]he particular herbicides chosen for the treatment are not expected to have a significant adverse impact to native vegetation. These herbicides selectively target invasive species and are anticipated to greatly reduce the presence of curly leaf pondweed and Eurasian watermilfoil in treatment areas without harming native vegetation.”

39. Consequently, both the 2017 Project and 2018 FSEIS approved use of Aquathol®, Navigate®, and Renovate®. Based on the FSEIS, the DEC explicitly found: “Consistent with the social, economic and other considerations from among the reasonable alternatives thereto, the action approved is one which minimizes or avoids adverse environmental impacts to the maximum extent practicable; including the effects disclosed in the environmental impact statement” and “Consistent with the social, economic and other considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided by incorporating, as conditions to the decision, those mitigative measures which were identified as practicable.”

40. All this was accomplished outside the scope of ECL Article 24.

41. In a DEC Technical Memorandum issued thereafter, DEC stated “The 2018 Treatment Program was successful in eliminating invasive macrophyte populations, specifically Curly Leaf Pondweed and Eurasian Water Milfoil (EWM), *while having no reported direct or*

indirect adverse impacts on native plant species, invertebrates and vertebrate wildlife, or humans.” (Emphasis supplied)

42. Building off the FSEIS, and the successful 2018 FSEIS-approved treatment program, numerous stakeholders around the Lake entered into discussions intended to establish a Chautauqua Lake Weed Management Consensus Strategy. These discussions resulted in a Chautauqua Lake Weed Management Consensus Strategy Memorandum of Agreement dated May 1, 2019 (“MOA”), setting forth certain terms and understandings by and among those most affected by the Lake’s well-documented invasive macrophyte problem.

43. Among other things, the MOA states: “[W]eed management decisions will be based on science and will be carried out in a responsible manner in accordance with the Chautauqua Lake Macrophyte Management Strategy (MMS) as a guidance tool, which will be updated annually with oversight from the Alliance.”

44. By 2020, a new, more effective, and safer product for targeting invasive aquatic species had been registered by both the U.S. Environmental Protection Agency (2018) and DEC (2019) and was on the market: ProcellaCOR EC. According to DEC’s registration documentation issued in 2019, ProcellaCOR:

was granted reduced risk status from the U.S. Environmental Protection Agency as the overall profile for ProcellaCOR EC, when compared with the registered alternatives for weed control, is more favorable as it pertains to human health. In addition, ProcellaCOR demonstrates an alternate mode of action from any other aquatic herbicide which when used in integrated pest management (IPM) strategies will limit weed resistance. The application rate is orders of magnitude less than many other aquatic herbicides and the maximum application rate of 25 PDU per acre-foot is less than the New York State Drinking Water Standard for non-specific organic contaminants maximum allowed concentration of 50 ppb.

45. The designation by the U.S. Environmental Protection Agency of ProcellaCOR as a “Reduced Risk” pesticide means that the product is a viable alternative to older herbicide technologies and poses a significantly reduced risk to the environment and human health. Unlike the previously reviewed and approved products AquatholK® and Navigate®, ProcellaCOR has very minimal water use restrictions; it can be applied to potable water supplies with no restriction on the use of treated water for that purpose. It has no swimming or fishing restrictions. This new product was thus extremely well-suited to use in the Lake.

46. Since then, DEC has proven the effectiveness of ProcellaCOR in an expansive pilot program conducted on New York’s Lake George. But thereafter followed several years of DEC delays, limits on herbicide application areas, and other restrictions on the lake community’s invasive species management permits, the net effect of which was to increase the occurrences and/or density of the very invasive and other plant species that, under the “Unusual Importance” criteria, will now render wide swaths of the surface of Chautauqua Lake as within a freshwater wetland boundary and/or a regulated adjacent area (which may extend onto the nearby shoreline).

B. Wetlands Regulatory History in New York.

47. The "Freshwater Wetlands Act" (ECL Art. 24) was enacted in 1975 "to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands" (ECL 24-0103). To accomplish this goal, the Act assigned the Commissioner of DEC the task, "as soon as practicable," to study on a comprehensive, statewide basis using the best data available, and to map parcels found to contain wetlands throughout the State, provided they had an area of at least 12.4 acres or were areas measuring less than 12.4 acres but deemed of "unusual local importance" (ECL 24-0301 [1])

48. At that time, the phrase “Freshwater wetlands” was defined as “lands and waters of the state *as shown on the freshwater wetlands map* which contain any or all of the following.” (ECL 24-0107[1]) (emphasis supplied). Thereafter followed a clear definition of wetlands as “lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation” (*Id.*) The prior law then set forth eight (8) categories of characteristic wetland vegetation (ECL 24-0107[1][a][1]-[8]), to be used as the defining identifying feature as well as two other categories.

49. This legislatively required wetlands mapping proceeded in two stages: first, DEC developed a tentative map of wetlands of more than 12.4 acres. This tentative map was required to “set forth the boundaries of such wetlands as accurately as is practicable to inform the owners thereof, the public, and the department of the approximate location of the actual boundaries of the wetland.” (ECL 24-0301[3])

50. The tentative wetlands map was then subject to a public hearing “in that area in order to afford an opportunity for any person to propose additions or deletions from such map.” (ECL 24-0301[4]). Under former law, DEC was required to “give notice of such hearing to each owner of record as shown on the latest completed tax assessment roles, of lands designated as such wetlands as shown on said map and also to the chief administrative officer and clerk of each [impacted] local government...” (ECL 24-0301[4]) The DEC was also required to publish notice of any such hearing “at least once, not more than thirty days nor fewer than ten days before” it occurred, in two newspapers having general circulation.” (*Id.*)

51. Then, “after considering the testimony given at such hearing and any other facts which may be deemed pertinent, after considering the rights of affected property owners and the ecological balance in accordance with the policy and purposes of this article, the commissioner

shall promulgate by order the final freshwater wetlands map.” (ECL 24-0301(5) That DEC order, moreover, could not issue “less than sixty days from the date of the hearing.” (*Id.*)

52. And once it issued, the DEC was obligated to “give notice of such order to each owner of lands” so designated, by certified mail, and to publish notice of the designation order in two local newspapers of general circulation. It was also filed in the office of the local county clerk, indexed against local land records.

53. In summary, for the past half-century, DEC has mailed notices to all the potentially affected landowners who could be identified from the tax assessment roll, received public comment, and published notice of the tentative and final wetlands maps and orders in local papers in order to facilitate judicial review. In so doing, the requirements of due process and of ECL 24-0301 (4) and (5) were met.

C. Governor Hochul’s 2022 Overhaul of the Freshwater Wetlands Act.

54. In the state of New York, bills are generally only introduced by legislators or by standing committees of the Senate and Assembly. The only exception is the Executive Budget, which is submitted directly by the Governor.

55. This process is frequently criticized on the ground that the Executive Budget, adopted outside the typical legislative process, may be used strategically to get policy measures passed, since there is little the Legislature can do to amend the Governor’s full spending plan. What troubles critics is that, while there are more than two hundred seats in the state Legislature, these major budget decisions are largely left to three individuals: the Assembly speaker, the governor, and the state Senate majority leader.

56. Emblematic of the above, the 2022-23 Executive Budget passed by the New York State Legislature and signed into law by Governor Hochul on April 9, 2022, includes an historic

expansion in the regulation of New York’s freshwater wetland resources (S.8008C/A.9008). The budget bill’s amendments, Part QQ to the state Freshwater Wetlands Act, places strict limitations and permitting requirements on development in and around wetlands, ostensibly provide the DEC with new authority to regulate, conservatively, at least another one million acres of private and public land that will, given the overbreadth of the law the vagueness of the DEC’s stringent implementation regulations, largely be rendered undevelopable. A true and correct copy of the “Amendments to Article 24 Freshwater Wetlands, Title 23 of Article 71 of the Environmental Conservation Law,” highlighting the new amendments in **Blue** and **Green** is annexed hereto as **Exhibit 1**.

D. The DEC Adopts Implementing Regulations Effective January 1, 2025.

57. Ostensibly to implement the above gubernatorial mandate, Respondent DEC recently amended, indeed, completely overhauled, the existing freshwater wetland mapping and classification regulations set out at 6 N.Y.C.R.R. Part 664, which became effective through New York State on January 1, 2025. A true and correct copy of the DEC Part 664 regulations effective as of January 1, 2025, are annexed hereto as **Exhibit 2**.

58. Starting January 1, 2025, DEC’s freshwater wetlands regulatory authority will no longer be limited to the wetlands depicted on the official freshwater wetland inventory maps adopted and amended as SAPA rulemaking or those of any particular minimum size. First, the Legislature purports to have created a “rebuttable presumption” that mapped *and* unmapped areas of the state are subject to full DEC wetlands regulation if they meet the definition of a freshwater wetland. The former wetlands maps, created with ample due process protections, are not relegated to advisory status.

59. Second, Part 664 adopts the concept of a “Regulated Adjacent Area,” which extends full wetlands regulatory protection outside a freshwater wetland boundary and onto any lands (wet, dry, or otherwise) within at least one hundred feet (30.5 meters), measured horizontally, of the boundary of the wetland or beyond one hundred feet (30.5 meters) for “nutrient poor wetlands,” or “vernal pools,” where the Regulated Adjacent Area may be as much as 800’, but is effectively any distance DEC deems fit under the circumstances.

60. Third, the newly adopted law and regulations establish an extraordinarily expansive definition of wetlands deemed to be of “Unusual Importance,” built on eleven (11) sweeping and amorphous criteria that effectively subsume nearly all land in the state—developed or undeveloped. Under these standards, any parcel containing even a *single instance* of any listed characteristic is automatically subject to the most restrictive tier of state wetlands regulation. There is no threshold of significance, no requirement for cumulative impact, and no balancing of competing interests.

61. The presence of a single rare plant species, for example, is sufficient to trigger full regulatory control—regardless of the size of the wetland, its function, or the history of use on the property. The criteria are so broad and elastic that they now encompass: (i) any parcel within a watershed deemed to experience “significant” flooding; (ii) any land situated in or adjacent to an urban area, as determined by federal census definitions; (iii) any parcel containing *any* rare or endangered plant species; (iv) any habitat used for *any essential behavior* of species listed as endangered, threatened, of special concern, or merely of “greatest conservation need”; (v) any vernal pool that supports amphibian breeding activity; and (vi) any land that plays a “significant” role in protecting water quality—another term left to agency discretion.

62. In practice, this standard operates not as an exception, but as a catch-all. It transforms what were once narrowly drawn protections into an unbounded grant of regulatory authority, enabling the DEC to assert jurisdiction over virtually any damp patch of land in the state.

63. Property owners are left with the impossible burden of proving a negative disproving that their land might qualify under any of these opaque and technical criteria. Doing so requires familiarity with at least fifteen (15) distinct bodies of DEC practice, along with an array of implementing regulations and non-binding guidance documents that shift over time. The result is a regime so complex and discretionary that no landowner can confidently know whether or when they are subject to regulation—until the agency decides they are. This is not environmental regulation; it is administrative overreach cloaked in ecological language.

64. As a result of the newly adopted statutory and regulatory framework, landowners may no longer rely solely on the Freshwater Wetlands Maps that were previously promulgated by the Department of Environmental Conservation (“DEC”) through notice-and-comment procedures. Instead, where the presence of jurisdictional wetland characteristics is not self-evident, the regulations require landowners to obtain an individualized “Jurisdictional Determination,” a formal assessment conducted by the DEC to determine whether a specific parcel or project area meets the criteria for classification as a regulated freshwater wetland under the Freshwater Wetlands Act.

65. A Jurisdictional Determination may take one of two forms: (i) a “Parcel Jurisdictional Determination,” which identifies whether a parcel includes regulated freshwater wetlands or regulated adjacent areas; or (ii) a “Project Jurisdictional Determination,” which evaluates whether a specific proposed activity on a parcel containing regulated freshwater wetlands or adjacent areas requires a wetlands permit. The Parcel Jurisdictional Determination

provides only a binary determination of jurisdiction and does not delineate the boundaries or extent of wetlands present on the parcel.

66. Neither the amendments to Article 24 nor the Part 664 regulations identify a “Lake Jurisdictional Determination” or a “Surface Water Jurisdictional Determination,” which reflects the Legislative intent not to regulate those areas as wetlands.

67. The DEC is permitted up to ninety (90) days from the date of a request to issue a Jurisdictional Determination. These determinations are not binding on the land in perpetuity, nor do they run with the land; instead, they may be revisited and revised at the agency’s discretion after five (5) years from the date of issuance.

68. Upon receiving a positive Jurisdictional Determination, a landowner may initiate an appeal. However, prior to doing so, the landowner must participate in a mandatory consultation meeting with the regional DEC staff and must also submit a formal delineation of the wetlands identified. In the absence of such a delineation, the landowner may request the DEC to delineate the wetland boundaries prior to the consultation.

69. If, after consultation, the landowner chooses to proceed with an appeal, they must submit a complete Freshwater Wetlands Jurisdictional Determination Appeal application to the DEC within one hundred twenty (120) days of the consultation. The DEC must render a written decision within sixty (60) days of receiving a complete application, though that deadline may be extended by up to thirty (30) days if an additional site visit is necessary. The original jurisdictional determination remains in effect throughout the pendency of the appeal.

70. In adjudicating appeals, the DEC does not apply the familiar “substantial evidence” standard. Instead, the regulations impose a novel and narrower standard under which the appellant

must demonstrate that: (i) material facts were omitted; (ii) the rules and criteria governing wetland identification were misapplied; or (iii) applicable guidance documents were not correctly followed.

71. The new regulations also permit “any person” to request a Parcel Jurisdictional Determination, including but not limited to private individuals, project opponents, or advocacy organizations. This includes persons with no ownership interest in the property and no direct connection to the proposed use of the land. ECL § 24-0301(5) expressly authorizes the DEC to “accept information from . . . environmental organizations or other private agencies, regarding the location of freshwater wetlands.”

72. Based on this statutory authority, environmental organizations and other non-governmental entities may initiate jurisdictional determinations on any parcel in the state—including privately owned lands—without incurring any direct cost or procedural burden themselves. This mechanism permits third parties to engage the regulatory process in a manner that may result in significant delay or expense for the property owner or project sponsor, who must then navigate the full jurisdictional determination and appeal process under the constrained procedural framework described above.

73. After five (5) years, “any person,” including anyone opposed to a development or just having a personal grudge, may, and the landowners must, again request a Jurisdictional Determination before engaging in any of a boundless range of land development or maintenance activities.

74. For project sponsors with sufficient financial resources and technical capacity, the regulations provide an alternative pathway: the “Consultant Option Parcel Jurisdictional Determination.” This option requires the engagement of qualified environmental consultants to perform delineations and prepare supporting documentation before seeking DEC review. However,

this alternative requires substantial upfront investment and does not relieve the sponsor of the risk that the DEC will nevertheless determine the parcel to be jurisdictional under the expansive regulatory criteria.

75. Due to the inherent vagueness and ambiguity in the newly adopted regulatory definitions and criteria, the New York State Department of Environmental Conservation (“DEC”) has developed, but not formally adopted through any notice-and-comment rulemaking process, a forty (40) page document titled *First Standard Operating Procedures (SOP) for Remote Jurisdictional Determinations and Classification of Freshwater Wetlands Pursuant to 6 N.Y.C.R.R. Part 664, Freshwater Wetland Jurisdiction and Classification*. This SOP functions as de facto regulatory guidance, dictating how DEC Albany staff are to evaluate and classify wetlands, including through the use of satellite imagery, aerial photography, and other remotely sourced data, without requiring site-specific field verification in many cases.

76. DEC is also now struggling to publish certain so-called “General Permits,” not authorized by the Article 24 amendments, ostensibly to mitigate the harsh impact of the new regulatory regime.

77. Based on this new framework and without undergoing formal rulemaking, the DEC has publicly estimated that more than one million acres of previously unregulated freshwater wetlands and upland buffer areas may now fall within its regulatory jurisdiction. However, this estimate accounts only for newly included potential upland and wetland acreage. It does not include open water bodies such as lakes, large impoundments, and reservoirs, which were not historically considered part of regulated freshwater wetlands under the former statutory framework.

78. If such open water areas are included under the current interpretive regime—particularly given the vague and expansive criteria for wetland classification—the number of newly regulated acres could increase by an order of magnitude, placing substantial portions of the State’s developed and undeveloped land under regulatory control for the first time.

79. These critical determinations are now being made, in the first instance, not through site inspections or local review, but by remote desktop evaluations conducted by agency staff using geospatial technology and digital data overlays.

E. Wetlands Regulation Under Federal Law Goes in the Opposite Direction.

80. As the DEC dramatically expands its jurisdiction over wetlands—reaching far beyond prior boundaries and established expectations—the United States Supreme Court has moved in the opposite direction, acknowledging the burdens such regulation imposes on property owners. In *Sackett v. Environmental Protection Agency*, 598 U.S. 651 (2023), the Court unanimously rejected the federal government’s broad interpretation of “waters of the United States” under the Clean Water Act. The majority held that only wetlands with a *continuous surface connection* to a “relatively permanent body of water connected to traditional interstate navigable waters” fall within the scope of federal jurisdiction. The Court explicitly excluded from coverage wetlands that are merely “adjacent” or hydrologically connected by subsurface or seasonal means, reasoning that such an interpretation would give regulators unchecked authority and invite arbitrary enforcement.

81. The gubernatorial machinations leading to the rushed adoption of the budget bill and rushed adoption of Part 664 immediately followed the *Sackett* Court’s ruling.

82. There are no administrative remedies to exhaust; Petitioners-Plaintiffs have no adequate remedy at law; and Petitioners-Plaintiffs have not before requested the same or similar relief from any Court or other tribunal.

**AS AND FOR A FIRST CAUSE OF ACTION
(State Administrative Procedure Act Noncompliance)**

83. Petitioners-Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

84. Under SAPA § 202, any notice of proposed rulemaking must include a regulatory impact statement prepared pursuant to section two hundred two-a of SAPA, and must include a regulatory flexibility analysis and a rural area flexibility analysis prepared pursuant to sections two hundred two-b and two hundred two-bb of SAPA.

85. SAPA § 202-b, states:

In developing a rule, the agency shall consider utilizing approaches that will accomplish the objectives of applicable statutes while minimizing any adverse economic impact of the rule on small businesses and local governments. Consistent with the objectives of applicable statutes, the agency shall consider such approaches as: (a) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small businesses and local governments or the time needed by small businesses or local governments to come into compliance with the rule; (b) the use of performance rather than design standards; and (c) an exemption from coverage by the rule, or by any part thereof, for small businesses and local governments so long as the public health, safety or general welfare is not endangered.

86. SAPA further states,

In developing a rule for which a regulatory flexibility analysis is required and which involves the establishment or modification of a violation or of penalties associated with a violation, the agency shall: (a) include a cure period or other opportunity for ameliorative action, the successful completion of which will prevent the imposition of penalties on the party or parties subject to

enforcement; or (b) include in the regulatory flexibility analysis an explanation of why no such cure period was included in the rule.

87. With these requirements, the rulemaking agency must then “issue a regulatory flexibility analysis regarding the rule being proposed for adoption or the emergency rule being adopted.” Each regulatory flexibility analysis must contain: (a) a description of the types and an estimate of the number of small businesses and local governments to which the rule will apply; (b) a description of (i) the reporting, recordkeeping and other compliance requirements of the rule, and (ii) the kinds of professional services that a small business or local government is likely to need in order to comply with such requirements; (c) an estimate of the initial capital costs and an estimate of the annual cost of complying with the rule, with an indication of any likely variation in such costs for small businesses or local governments of different types and of differing sizes; (d) an assessment of the economic and technological feasibility of compliance with such rule by small businesses and local governments; (e) an indication of how the rule is designed to minimize any adverse economic impact of such rule on small businesses and local governments, including information regarding whether the approaches suggested in subdivision one of this section or other similar approaches were considered; and (f) a statement indicating how the agency complied with other parts of SAPA related to record-keeping.

88. When any rule is proposed for which a regulatory flexibility analysis is required, the agency must actively solicit the participation of small businesses and local governments in the rule making through activities in addition to publication in the state register and posting on the agency's website, such as, “the adoption or modification of agency procedural rules to reduce the cost or complexity of participation in the rule making by small businesses and local governments.”

89. By contrast here, the DEC enacted these “landmark amendments,” meant to fundamentally change wetlands law and regulation in the state, based on a 3.5 page, redundant and

wholly conclusory “Rural Area Flexibility Analysis” (a true and correct copy of which is annexed hereto as **Exhibit 3**); a similarly terse and unenlightening “Regulatory Flexibility Analysis for Small Businesses and Local Governments” (a true and correct copy of which is annexed hereto as **Exhibit 4**); and a 24-Page document titled “Revised Regulatory Impact Statement” filled with non sequiturs like “The proposed regulation does not directly result in additional costs to the regulated community or local governments,” when those entities now obviously need to hire or rely on professional consultants to help them wade through the morass of new regulations and contend with DEC’s newly-minted “presumption” that all land in the State is now potentially regulated wetlands. A true and correct copy of the Revised Regulatory Impact Statement is annexed hereto as **Exhibit 5**.

90. The so called “Impact Statement” does nothing but re-state the new rules over the course of the first eighteen (18) pages of the 24-page document, then sums up its no impact finding in the most conclusory and, at times, nonsensical ways possible, including by denying the obvious impact on citizens and local governments who now need to address potential impacts to what are now presumed to be Regulated Wetland Areas or Regulated Adjacent Areas.

91. On the other hand, DEC regulators have stated that municipal officials “have a moral responsibility to advise property owners, advise property owners” to request jurisdictional determinations. Whether moral or legal, the responsibility comes with costs to the subject municipality to develop written and other guidance documents, or even to amend local laws, to protect themselves against claims that they improperly granted land use approval for an activity that impacted a regulated wetland area or Regulated Adjacent Area.

92. More recently, a local Lake community considered adopting a “wetlands waiver and release” process whereby it requires landowners and project sponsors to waive and release any

claims it may have should the municipality approve a project that is later found to impact regulated wetlands.

93. The regulations offer no “cure period” and the regulatory flexibility analysis includes no explanation of why no such cure period was included in the rule.

94. Finally, the DEC devotes several pages of the rulemaking record to its so-called “Public Outreach” efforts, when those indiscriminate efforts consisted of agency officials unable to answer basic jurisdictional questions and describing to the public how they were “building the plane as they fly it,” and other such creative metaphors for their own uncertainty and confusion.

95. The above falls short of SAPA’s mandatory and unwaivable public notice, reporting, and impact assessment requirements, and should lead to the annulment of the Part 664 amendments in their totality.

**AS AND FOR A SECOND CAUSE OF ACTION
(Unconstitutional Deprivation of Due Process: Article I, Section 6 of the New York State Constitution and the Fifth and Fourteenth Amendments to the United States Constitution)**

96. Petitioners-Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

97. Every person in the state has an inviolable right to private property, subject only to reasonable government regulation in furtherance of a legitimate governmental interest. When government action affects private property, the New York State and U.S. Constitutions require effective notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Under the prior Act, the detailed notice, comment, hearing, record, and judicial review rights established under ECL § 24-0301(5) and (6) were designed to and did satisfy these minimum requirements of due process.

98. Under the prior Act, the property owner could make their own determination about the regulatory status of their parcel by consulting the published Freshwater Wetland Map and/or by reviewing standard land records kept by the county clerk. Now, there are no reliable maps and there will be no recorded notations in land records. Instead, “there is a rebuttable presumption that mapped and unmapped areas meeting the definition of a freshwater wetland in this article are regulated and subject to permit requirements.” (ECL 24-0301(4)) In other words, a property owner must proceed as if all wet areas (regardless of intermittence and regardless of size) are regulated freshwater wetlands.

99. For a property owner now to commence work on routine home improvement projects (e.g., regrading a driveway or backyard, installing a deck or accessory shed or structure, installing or relocating water, sewer, and other utility lines) it must rebut the “presumption” that the work will be in (or within 100 feet of) form of wet soils, or some possibility of endangered plant and/or animal species, or is occurring in a US Census designated Urban Area, or, even farther afield, whether the land is some required for flood control or water quality. All the citizens of the state must now know whether their land, or the land they wish to develop, is within eight hundred feet (or possibly more) of a vernal pool.

100. The only way to cure that uncertainty is through a costly, time-consuming, and cumbersome determination and appeal process, pursuant to impossibly narrow criteria for a successful appeal. In the meantime, the original jurisdictional determination would remain, and the property owner left with the Hobson’s Choice of risking it all and proceeding with the project during the appeal, or placing it on hold, possibly for a year or more, while its appeal is heard and decided.

101. In the meantime, this presumptive regulation of private property (without prior notice or opportunity to be heard at a meaningful time) will intimidate private development, reduce land values, and lead to the overall reductions in municipal property assessments, given that DEC is actively advising affected landowners to seek real property tax deductions from their local assessment official.

102. Even with these potential impacts on property rights, the DEC offers only a meager and ineffective path for review; one which virtually forecloses further judicial review due to the limited scope of appeal and nature of the inquiry – Courts will be asked to sit at computer screens and interpret digital maps, rather than hearing the live testimony of professional consultants who walked the land, sampled the flora and fauna, and made site specific delineations.

103. The above swapping out of certainty and recognized constitutional process for an opaque, diluted, and uncertain one expected to bring millions of acres of private land within DEC jurisdiction violates Petitioners' due process rights under the federal and state constitutions. It substitutes the constitutional due process previously provided by the prior mapping requirements and ability to seek prompt judicial redress for any deprivation, for the unguided discretion of low-level agency analysts largely working in a "black-box" at remote workstations (of unknown quality or vintage), and examining two-dimensional maps and diagrams from miles away, subject only to a costly and time-consuming administrative appeal process now made pursuant to an impossibly narrow standard of review.

**AS AND FOR A THIRD CAUSE OF ACTION
(Part 664 Amendments are Arbitrary and Capricious and Irrational)**

104. Petitioners-Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

105. The newly fashioned “Unusual importance” standards are so vague and overly broad that they are irrational and unenforceable. The DEC has gone from regulating wetlands based on characteristic plant and vegetation types, to layering over that special treatment for wetlands exhibiting other characteristics, *i.e.*, wetlands of “Unusual local importance” under ECL § 24-0107(9), in areas where there may or may not be legitimate wetlands. A finding that a wetland is of “Unusual importance” means it is subject to the most stringent regulatory requirements.

106. But no lay person or remote-working government agent could ever make that determination based on the vague definitions adopted in ECL § 24-0107(9).

- i. Subsection (a) brings within the scope of Article 24 any wet areas (of any size) “located in a watershed that has experienced *significant* flooding in the past or is expected to experience *significant* flooding in the future from severe storm events related to climate change.”
 1. To determine the potential for “significant flooding,” DEC seeks to use a 12-digit Hydrologic Unit Code (HUC) to identify wetlands meeting three criteria: (1) It has 2% or more impervious surface based on recent land cover data; (2) less than 5% of its surface area is comprised of floodwater storage zones in the form of lakes, ponds, reservoirs or wetlands, based on recent land cover data; and (3) it is located within 4 kilometers (2.48 miles) of an Urban Area, as defined and identified by the United States Census Bureau.
- ii. Subsection (b) brings within the scope of Article 24 any wet areas (of any size) “located within or adjacent to an urban area, as defined by the United State census bureau.”
 1. New York is home to a vast number of US Census-designated urban areas within nearly every region of the state, ranging from the entire Chautauqua Lake region to New York City, Buffalo, Syracuse, the Hudson Valley and even smaller urban centers like Cortland, Montauk, and Glens Falls. Property owners and project developers operating in, adjacent to, or near an urban area must now account for freshwater wetlands in their planning, as projects may be subject to additional permitting requirements and potential delays.
- iii. Subsection (c) brings within the scope of Article 24 any wet areas (of any size) if it “contains a plant species occurring in fewer than thirty-five sites statewide or having fewer than five thousand individuals statewide.”

1. There is no reasonable way of organizing development activities rationally around a requirement to identify such exceptionally rare plant species which may or not even rely on wetlands or their functions for their survival or propagation. Nor is there any way the DEC's "Informational Mapping" can reliably track, update, or identify such rare species with any degree of precision, which will lead to vast overregulation of private property.
- iv. Subsection (d) brings within the scope of Article 24 any wet areas (of any size) if it "contains habitat for an essential behavior of" any (even a single one), "endangered or threatened species or species of special concern," or "listed as a species of greatest conservation need in New York's wildlife action plan" (which is not the subject of notice and comment). Except to the extent those on the wildlife action plan overlap, the State's endangered and protected animal and wildlife species are all fully protected under Article 11 of the ECL.
- v. Subsection (j) brings within the scope of Article 24 any wet areas (of any size) if "it has wetland functions and values that are of local or regional significance."
 1. What these wetlands may ultimately be seem left to the unbridled discretion of the agency reviewer who happens to receive the request for jurisdictional determination, with mandatory input from an undefined universe of "environmental organizations and other private agencies."
- vi. Subsection (k) brings within the scope of Article 24 any wet areas (of any size) if "it is determined by the [DEC] to be of significant importance to the state's water quality."

107. Each state-regulated wetland will also continue to be classified by DEC according to its ability to perform wetland functions and provide wetland benefits. The highest rank (and most protected) is Class I, with ranks descending to Class II, III and IV. However, DEC is proposing new criteria to identify Class I Wetlands. If a wetland has any of the following characteristics, it would qualify as a Class I Wetland, subject to the highest form of protection under DEC's proposal: (1) the wetland area provides habitat for an essential behavior of an endangered or threatened animal species, or it contains an endangered or threatened plant species,

or it contains a wetland plant community identified as critically imperiled; (2) it falls within, or is contiguous to, a designated Significant Coastal Fish & Wildlife Habitat area; (3) it is a tidally influenced wetland not regulated by DEC; (4) it is contiguous to a tidally influenced wetland that is regulated by DEC; (5) it is nutrient poor; (6) it is located in an area designated as a floodway; and/or (7) is contiguous to fresh surface waters having classifications of A, AA, AA-S, A-S, or N.

108. The new criteria for Class II wetlands will expand the scope of wetland protection considerably, for example, by ensuring that all so-called urban wetlands receive protection, regardless of their past use or present state of fitness. On its face, these criteria bestow protection on even the tiniest and most marginal of urban (or urban adjacent) located wetlands. But many of the criteria are not as specific and thus the law as written leaves far too much uncertainty as to which wetlands are protected, and which are not.

109. These vague standards, coupled with the newly adopted “rebuttable presumption” of DEC regulatory jurisdiction over wet areas, have cast a regulatory pall over every home purchase, home improvement, every accessory outbuilding plan, every planned deck, porch, excavation, grading and arguably even mowing and brush-hogging in, on, or over private property. At a minimum, to avoid any ambiguity, the proposed regulations in 6 N.Y.C.R.R. 664.2(o) defining “freshwater wetlands” should be amended to include the following sentence: “Navigable waters in an inland lake shall not be considered wetlands.”

110. Such a change would also comport with S.9799, advanced in the Legislature by Senator George Borrello and Assemblyman Andrew Molitor, which would amend the ECL to exempt certain open-water areas from the new laws.

111. Because they are unduly vague, Part 664 regulations are also overbroad, in that they bring within the freshwater *wetlands* act, concerns regarding endangered plant and animal species that may have nothing to do with the preservation of *wetland* functions.

112. Chautauqua Lake is a *lake* – open water; it is not a wetland under the prior Act. In-Lake invasive species management activities have therefore never required a freshwater wetlands permit. Consequently, lakefront property owners, lake stewards and managers could conduct shoreline weed removal, and in water weed harvesting on their own, and obtain in-water herbicide treatment permits as needed from DEC pursuant to the DEC’s separate pesticide and herbicide regulatory regime.

113. Under the new “Unusual importance” criteria, the Lake, including its open water areas, is now also regulated as a wetland under Article 24. The diagrams below illustrate the difference. With the rare plants layer turned on, nearly all of Chautauqua Lake qualifies as a Class I wetland of unusual importance under the new regulations.

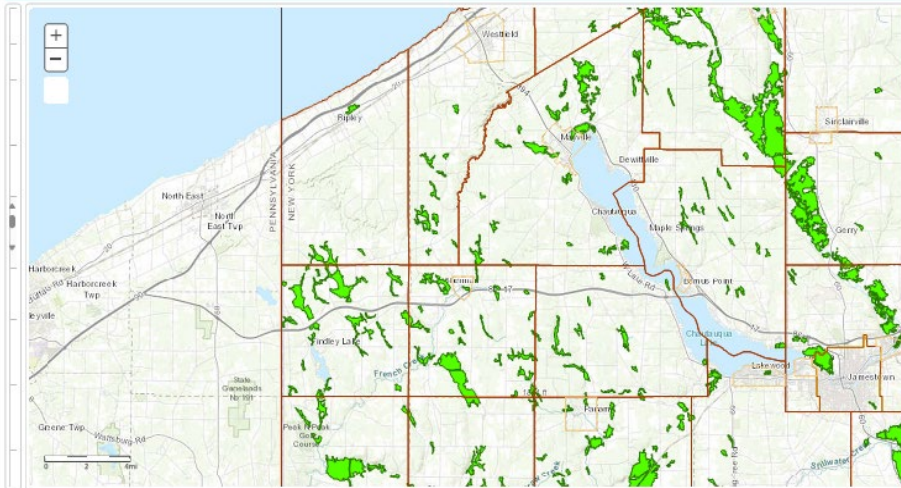
An official website of New York State
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NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Environmental Resource Mapper

Base Map: [Using this map](#)



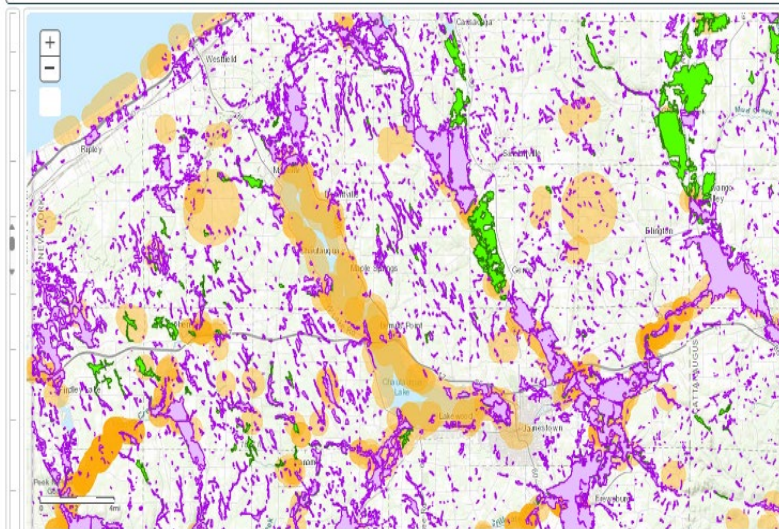
An official website of New York State
[Here's how you know](#)



NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Environmental Resource Mapper

Base Map: [Using this map](#)



114. On March 14, 2025, the DEC, without following the new regulatory process, issued a positive jurisdictional determination related to several proposed in-water herbicide treatment areas of approximately 450 acres of surface area in Chautauqua Lake. The Lake in this area, *i.e.*, the *open water itself*, identified by DEC as one inflicted with “large areas of [submerged aquatic vegetation]” would qualify as a Class I wetland, together with the one hundred foot “Regulated Adjacent Area,” which is presumably the entire water column, and/or onto the adjacent shorelines (thus restricting littoral owner’s property rights), though the regulations do not address that key concept. There is no accompanying delineation of which parts of the Lake are now so regulated, nor any guidance as to what is or is not permitted there. A true and correct copy of the March 14, 2025, Jurisdictional Determination to the Town of Ellery is annexed hereto as **Exhibit 6**.

115. The DEC did so in response to routine applications by the Town of Ellery for their annual permit to fight invasive plant species such as Curly Leaf Pondweed and Eurasian watermilfoil, which is absolutely necessary to keep the Lake clear for tourism and recreational activities, as well as for swimming, fishing, and aesthetic purposes. A true and correct copy of the February 7, 2025, “Letter of Notification” from said towns as to the herbicide treatment is annexed hereto as **Exhibit 7**.

116. The treatment window for applying the particular (and safe and well-tested) herbicides at issue in those areas is short: generally, two weeks in the early Spring, before SAV’s can reach seasonal prominence. Given the new rules, however, no such application may occur pending any request for review of the jurisdictional determination. It is not even clear that an in-water jurisdictional determination is appealable. In any event, by the time that appeal is decided, the treatment window will be closed, and the herbicide treatment will not advance in the current growing season.

117. The alternative is to accept the DEC's stringent limitations on the herbicide treatment – limitations so severe as to compromise the overall effectiveness of the treatment, likely rendering its pursuit ineffective and uneconomic.

118. If the in-Lake herbicide treatment does not occur this year, or occurs under significant DEC limitations, then the propagation of the above invasive species will continue unchecked, providing an even more compelling reason for the future regulation of the Lake as a Class I wetland.

119. The effects of this vagueness and uncertainty is already being felt in the greater Chautauqua Lake region: real estate sales have been deterred, property values have been rendered uncertain (including as to Mr. Wehrfritz's lands), thus complicating local real property taxation (for the Town of Ellery), private mortgages and loans, and other economic activity, as small business owners must now weigh the substantial added costs and time of being caught up in this new regulatory morass.

120. Indeed, DEC has gone so far as to encourage property owners to challenge their current real property assessments in order to gain a reduction in value for regulated wetland areas. This will have a direct impact on the Town of Ellery's fisc and ability to provide public services.

121. The entire process is irrational, uncertain, and unreasonably time consuming, leads to unreliable outcomes, and is otherwise arbitrary and irrational.

**AS AND FOR A FOURTH CAUSE OF ACTION
(The Jurisdictional Determination Process Constitutes Improper Delegation)**

122. Petitioners-Plaintiffs repeat and reallege each and every allegation above as if set forth in full herein.

123. The New York State Legislature has long failed to muster enough public support to support an environmental "citizen's suit" bill, *i.e.*, one authorizing private citizens, and, typically,

“environmental organizations and private agencies,” to bring a private cause of action against individuals and businesses for enforcement of state environmental laws.

124. In any such citizen’s suit legislation, the citizen-plaintiff must provide the target (and often the state or federal environmental regulatory agency) with prior notification of the putative lawsuit and the grounds upon which it will be based. If the allegedly wrongful conduct ceases during the mandatory notice period, and/or the allegedly requisite permits or approvals are sought, the citizen’s suit generally may not be sustained.

125. By contrast, these “environmental organizations and private agencies”; indeed, “Any person,” need not now provide any such notice to delay any form of private or public development they do not agree with: they may, without notice to the target or any opportunity to be heard, merely file with the DEC a request for a jurisdictional determination. The applicant may then, given the command that DEC “accept information” from those same groups, fill the record with any form of self-serving, unreliable, or other questionable “information,” never subjected to scrutiny or examination by the target of the request.

126. This entire regulatory process commenced and driven by third parties, including those with ulterior motives, which could lead to real restrictions on private property, can occur without any notice to or other input from the target/landowner or project developer.

127. By doing, DEC has improperly delegated its regulatory authority to private actors without so much as even restricting the kind or type of “information” they may submit and/or upon which DEC arguably must rely given the law’s vague “shall accept information” requirement.

AS AND FOR A FIFTH CAUSE OF ACTION
(Violation of Municipal Home Rule Law)

128. Petitioners-Plaintiffs repeat each and every allegation above as if set forth in full herein.

129. Under the New York State Constitution (Article IX) and the Municipal Home Rule Law (“MHRL”), local governments—especially towns, villages, and cities—have the authority to adopt local laws concerning their property, affairs, and government, and in relation to matters of local concern, provided they are not inconsistent with the Constitution or general laws enacted by the State Legislature.

130. The prior iteration of Article 24 and its implementing regulations acknowledged the importance of reserving Home Rule authority over wetlands of “Unusual Local Importance,” and provided a process whereby local governments could receive DEC approval and delegation of a comprehensive local wetlands regulatory program.

131. Amended Article 24 and Part 664 eliminate this long-standing power of local governments with no corresponding state need. The concept of “Local Importance,” once key to the local-state cooperative relationship, has been eliminated entirely, replaced with the vague, onerous, and pervasive regulatory scheme described, *supra*.

132. Worse, still, DEC appears to be encouraging municipal officials to be co-enforcers of the arbitrary new wetlands law, stating, on the one hand that local governments have no new burdens, but alleging on the other that municipal officials have a “moral obligation” to “warn” applicants for local land use permits of the new wetlands regime, while simultaneously advising littoral and other landowners to petition their now-defanged local governments for real property tax reductions.

133. Local governments like the Town of Ellery therefore stand to lose both regulatory control over small wetlands and real property tax revenue under an arbitrary and unneeded new regulatory regime.

134. Accordingly, the new wetlands regulatory regime targets purely local matters without municipal consent, intrudes on municipal control over its property, affairs and government without a valid countervailing state interest, and conflicts with an overrides local laws in an area where DEC does not occupy the field.

WHEREFORE, the Petitioners-Plaintiffs demand a Judgment and Order of this Court annulling, vacating, and setting aside the 2022 amendments to the Freshwater Wetlands Act (Part QQ) and the amendments to 6 N.Y.C.R.R. Part 664 and granting Petitioners such other and further relief which as to the Court seems just and proper, including an award of their reasonable attorney's fees and costs.

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YOUNG / SOMMER, LLC



William A. Hurst
Attorneys for Petitioners-Plaintiffs
500 Federal Street, 5th Floor,
Troy, New York 12180
Tel. : (518) 438-9907
Fax : (518) 438-9910
Email : whurst@youngsommer.com

