SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CHAUTAUQUA

CHAUTAUQUA LAKE PARTNERSHIP, INC., MARY HUTCHINGS, MICHAEL LATONE, and JAMES CIRBUS,

Petitioners-Plaintiffs,

For a Judgment and Order Pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") and/or CPLR Article 30

- against -

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, SEAN MAHAR, in his capacity as INTERIM COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, AMANDA LEFTON, in her capacity as ACTING COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION.

Respondents-Defendants.

VERIFIED PETITION AND COMPLAINT

Index No.:

Petitioners-Plaintiffs CHAUTAUQUA LAKE PARTNERSHIP, INC. ("CLP"), MARY HUTCHINGS, MICHAEL LATONE, and JAMES CIRBUS (collectively, the "Petitioners") by and through their attorneys Couch White, LLP, as and for their Verified Petition and Complaint allege as follows:

1. Petitioners bring this hybrid Article 78 proceeding and complaint challenging the constitutionality and legality of a sweeping expansion of regulatory authority under the Article 24 of the Environmental Conservation Law ("ECL") (the "Freshwater Wetlands Act"), which was enacted through recent legislative amendments and corresponding revisions to 6 N.Y.C.R.R. Part 664 (the "Part 664 Amendments").

2. These changes, implemented by the New York State Department of Environmental Conservation ("DEC"), impose a drastically expanded permitting regime across New York State, purportedly extending regulatory jurisdiction over an additional 1.6 million acres of private and public lands.

3. The new framework subjects countless property owners, municipalities, and organizations like CLP, to burdensome permitting requirements, despite many of the affected areas bearing little resemblance to traditional wetlands and having fallen outside of the scope of DEC wetland regulation under prior interpretations of the Freshwater Wetlands Law since the law was passed in 1975. The new law and Part 664 Amendments will also substantially interfere with lawful recreational, environmental, and property management practices long governed by Article 15 and local oversight.

4. This designation is arbitrary and capricious, contrary to the statutory framework of the Freshwater Wetlands Act, and the very enactment of the Part 664 Amendments violated the State Administrative Procedure Act ("SAPA") and the State Environmental Quality Review Act ("SEQRA").

PARTIES

5. CLP is an all-volunteer, 501(c)(3) registered and domestic non-profit corporation with a mailing address of P.O. Box 337, Bemus Point, NY 14712. CLP, and its activities, are subject to the Part 664 Amendments.

6. CLP seeks to ensure that Chautauqua Lake is a healthy lake that can be enjoyed by all for fishing, swimming, and boating. To that end, it and its members oversee management of various components of certain activities that take place at Chautauqua Lake, including the

herbicide treatment program, which includes selection of herbicides and target areas, timing for treatment, and the yearly application process with DEC.

7. CLP also facilitates herbicide permits on behalf of participating townships and villages in full compliance with all DEC requirements. These efforts help create a swimmable, boatable, fishable lake that properly limits invasive species and other aquatic vegetation impeding on the lake's ecosystem.

8. This process was already time and cost intensive, involved many substantive requirements for the location, frequency, and type of herbicide treatment used, conditions and limitations to protect the lake and its ecology, as well as procedural requirements to notify neighboring property owners of treatments.

9. The CLP engages one of the leading aquatic plant management experts in the United States for independent aquatic surveys, design of experiments and management strategies based on the latest aquatic plant science. The surveys gather hydroacoustic and point intercept data each year at up to 1,000 sites throughout the lake, using standardized methodology, and document the presence and extent of aquatic plant species during Fall and Spring seasons. CLP also engages a certified professional lake manager to interpret this data, and to develop and execute annual plans for management.

10. The overall goal of CLP's work is to reduce the level of invasive and other nuisance species, including Eurasian Watermilfoil and Curly-Leaf Pondweed in the Chautauqua Lake system, which benefits the quality of the lake ecosystem itself, as well as allows for CLP and its members, as well as other lakefront property owners, recreational users, tourists and others to better enjoy Chautauqua Lake. This includes strategic planning of treatment areas based on

comprehensive aquatic plant surveys, current scientific knowledge and lake management best practices, which ensures optimum lake conditions.

11. The Part 664 Amendments will result in additional and substantial regulation of CLP's longstanding herbicide treatment applications, which already undergo significant DEC permitting and review each year.

12. CLP's Board of Directors and members include property owners on Chautauqua Lake. In addition to its members, CLP also represents the interests of participating municipalities and private entities such as homeowners' associations and businesses around the lake for herbicide permitting.

13. Mary Hutchings, Secretary and a member of the Board of Directors of CLP, owns a home on Chautauqua Lake located at 3483 Old Fluvanna Rd., Jamestown, Chautauqua County, New York, recreates on the lake, and actively works to carry out CLP's mission for lake management and the treatment of invasive and nuisance species. Ms. Hutchings will experience a loss of recreational use of Chautauqua Lake and expects, due to the confiscatory nature of the Part 664 Amendments, that her property value to decrease. She and her husband purchased their home to enjoy a lake, not a wetland. The Part 664 Amendments will also raise taxpayer costs to carry out new wetlands obligations, and create redundant and conflicting permitting requirements for CLP and other lake organizations, local governments and property owners. Critically, it will hinder lake maintenance, including maintaining healthy lake ecology, and ultimately harm local economies, including the one in which Ms. Hutchings lives. Ms. Hutchings has a direct, personal and legally cognizable interest in challenging the Part 664 Amendments.

14. Michael LaTone is the Treasurer and also a member of the Board of Directors of CLP, and owns a home on Chautauqua Lake located at 4427 Lakeside Drive, Bemus Point,

Chautauqua County, New York, recreates on the lake, and actively works to carry out CLP's mission for lake management and treatment of invasive and nuisance species. Mr. LaTone has a direct, personal and legally cognizable interest in challenging the Part 664 Amendments.

15. James Cirbus is the President and also a member of the Board of Directors of CLP, and owns a home on Chautauqua Lake located at 4429 Lakeside Drive, Bemus Point, Chautauqua County, New York, recreates on the lake, and actively works to carry out CLP's mission for lake management and treatment of invasive and nuisance species. He shares the concerns of CLP and its members, including the confiscatory nature of the Part 664 Amendments and its impacts to property value. Mr. Cirbus has a direct, personal and legally cognizable interest in challenging the Part 664 Amendments.

16. The Part 664 Amendments will also regulate CLP's Board of Directors and members, including Members Hutchings, LaTone and Cirbus, as any area within the lake designated as a wetland, or on its shores, will include a 100-foot buffer area that will sweep up and significantly decrease the amount of every day activities that CLP's members, including Members Hutchings, LaTone and Cirbus may pursue, such as clearing driftwood, removing aquatic shoreline weeks, raking, regarding, and performing minor landscaping.

17. Indeed, it is now questionable whether personal use of herbicides, petroleum products, or other everyday homeowner supplies would be permitted on lakefront properties on or within 100-feet of a newly jurisdictional DEC freshwater wetland. The Part 664 Amendments will strictly regulate if not outright prohibit the modification of driveways or parking areas, constructing or modifying homes or accessory structures, on every lakefront property on or within 100 feet of a newly-designated DEC freshwater wetland.

18. Any designation of Chautauqua Lake or its shorelines as a DEC freshwater wetland will subject CLP and its members to burdensome, costly and time-consuming delineation, jurisdictional determination, and permitting processes to carry out any of a host of activities they have previously carried out. Such a designation would subject CLP and its members, including Members Hutchings, LaTone and Cirbus to extensive and unprecedented restrictions on the use and enjoyment of Chautauqua Lake and each members' individual properties.

19. The New York State Department of Environmental Conservation is an executive agency of the State of New York, led by Acting Commissioner Amanda Lefton, a party herein. The DEC has its principal place of business located at 625 Broadway, Albany, New York.

20. Sean Mahar was the Interim Commissioner of the of the New York State Department of Environmental Conservation at the time that the Part 664 Amendments were proposed, promulgated and adopted, and when he was Commissioner, he had a principal place of business located at 625 Broadway, Albany, New York.

21. Amanda Lefton is the Acting Commission of the New York State Department of Environmental Conservation and has a principal place of business located at 625 Broadway, Albany, New York.

JURISDICTION AND VENUE

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

23. Venue is proper in Chautauqua County pursuant to CPLR 503, 506, 7804(b) because the property subject to regulation—Chautauqua Lake—is located in this County, Petitioners are based in Chautauqua County, and the burdens imposed by DEC's actions are directly and substantially experienced here. The challenged regulations directly impact

landowners, municipalities, and lake management organizations within this jurisdiction, giving rise to a substantial local interest in the legality of the agency's actions.

STATEMENT OF FACTS

24. Chautauqua Lake, located in southeastern Chautauqua County, is western New York's largest inland lake and one of North America's best-known navigable bodies of water.

25. Divided into two basins by Bemus Point, the lake spans over 42 miles of shoreline and has served as a center of economic, recreational, and environmental significance for over 150 years.

26. Lakefront and adjacent upland properties are extensively developed and support a robust tourism industry.

27. Its shoreline, though comprising less than 1% of Chautauqua County's land area, accounts for more than 25% of the County's property tax base.

28. At the same time, Chautauqua Lake remains ecologically rich, providing habitat for fish species including muskellunge, walleye, and bass.

29. This balance of development and ecological function has long made Chautauqua Lake a model of sustainable lakefront use.

30. For over a century, the lake has struggled with invasive aquatic vegetation such as Curly Leaf Pondweed and Eurasian Water Milfoil.

31. Community-led efforts—including those by CLP and others—have pursued integrated management strategies which allow the lake to retain these qualities. CLP's work has been completed under significant DEC permitting oversight, including Article 15 and herbicide permits yearly for each treatment, and all substantive and procedural requirements associated with carrying out these activities pursuant to the existing permits.

BACKGROUND OF PART 664 AND THE FRESHWATER WETLANDS ACT

32. Article 24 of the Environmental Conservation Law ("ECL"), commonly referred to as the New York Freshwater Wetlands Act (the "Freshwater Wetlands Act"), was enacted in 1975.

33. The Freshwater Wetlands Act was adopted in response to growing scientific recognition of the ecological importance of wetlands and increasing concern over development in these areas. At the time, it reflected a nationwide movement in the 1970s toward environmental protection following Federal enactments such as the Clean Water Act of 1972.

34. The primary purpose of the Freshwater Wetlands Act was to preserve, protect, and conserve freshwater wetlands and the benefits they provide. Specifically, the Legislature found that wetlands were essential to the health, safety, and welfare of New York residents and enacted the law to guard against their degradation or destruction through unregulated land use.

35. In this regard, the Freshwater Wetlands Act was designed to protect ecologically valuable wetlands defined by distinct vegetative, hydrological, and soil-based criteria.

36. Under the Freshwater Wetlands Act, DEC was granted regulatory authority over freshwater wetlands that met both size and mapping requirements.

37. Specifically, DEC was authorized to regulate wetlands of 12.4 acres or more, or smaller wetlands deemed of "unusual local importance," provided that the wetlands were shown on official Freshwater Wetlands Maps.

38. These maps became the cornerstone of jurisdictional determinations and were created through a formal mapping process.

39. Significantly, the mapping process included formal due process protections, including individualized notice to affected landowners, public hearings, and a final recorded designation.

40. The regulatory scope was largely limited to areas traditionally understood as "wetlands"—marshes, swamps, bogs, and flats supporting characteristic wetland vegetation.

41. Once a wetland was mapped and classified, the Freshwater Wetlands Act required permits for a variety of activities within the wetland and a 100-foot adjacent area, including construction, excavation, drainage, and vegetation removal.

42. In 2022, however, the Legislature expanded the Freshwater Wetlands Act significantly, by rendering the Freshwater Wetland Maps reference tools, authorizing DEC to make jurisdictional determinations for all lands where any number of wetland characteristics may be present (indeed, creating a rebuttable presumption that all such lands are wetlands), and creating a new category of wetland called "Wetlands of Unusual Importance" which is not restricted to the 12.4 acre size that a freshwater wetland traditionally had been.

43. The 2022 amendments went into effect on January 1, 2025.

THE PART 664 AMENDMENTS

44. The Part 664 Amendments were promulgated in an attempt to carry forward the 2022 Freshwater Wetlands Act amendments, and have significantly expanded the regulatory scope of DEC with respect to freshwater wetlands.

45. These amendments were purportedly enacted to strengthen environmental protections in response to increased development pressures, climate change, and degradation of critical wetland ecosystems.

46. In reality, the Part 664 Amendments have instituted a far-reaching regulatory framework that now spans the entire state, including Chautauqua Lake.

47. Specifically, the Part 664 Amendments significantly broaden DEC's regulatory reach over private land, and wreak havoc on more than five decades of settled legal precedent and property owner expectations.

48. By its own conservative estimate, DEC now asserts jurisdiction over an additional 1.6 million acres of land as freshwater wetlands—including vast tracts that scarcely resemble any traditional concept of a wetland—thereby imposing burdensome permitting obligations and creating widespread regulatory uncertainty for myriad landowners across New York State.

49. Moreover, the Part 664 Amendments fundamentally alter the scope and application of New York's wetlands law.

50. Notably, the Freshwater Wetland Act revisions and Part 664 Amendments presume that any land falling within the expansive and ill-defined criteria of a wetland is regulated, effectively shifting the burden of proof to the property owner.

51. The new framework of the Part 664 Amendments dramatically redefine regulatory wetlands and adjacent areas, expand DEC jurisdiction without traditional mapping (including field work), and introduce a broad category of wetlands deemed of "Unusual Importance" based on vague, non-scientific criteria. DEC's new "Jurisdictional Determination" process now governs whether property is regulated—but without field visits or reliable evidence to counter DEC's desktop review.

52. Instead, determinations rely on remote imagery and are subject to limited appeal rights.

53. Worse still, any person or organization may initiate a jurisdictional determination request, burdening landowners with compliance obligations irrespective of their own action. It creates uncertainty for all lakefront property owners, as they will not know if they will become

subject to regulation if other properties are delineated, or if a neighbor simply seeks a delineation against another neighbor. One of the Petitioners or other lakefront property owners could be repairing a foundation, gardening in their yard, or installing drainage, and be subject to enforcement.

54. Further, a determination in one area of a waterbody such as Chautauqua Lake can impact neighboring properties inadvertently.

55. Given that the jurisdictional determination process relies upon a given parcel and its ownership, it is, at a minimum, unclear how a lake, which does not have individual owners, could seek a jurisdictional determination. It also creates a potentially arbitrary impact to lakefront owners where lakes that are actively managed impact those properties, while lakes that escape DEC jurisdiction will not unwillingly ensnare lakefront property owners.

56. The principal changes introduced by the Part 664 Amendments are summarily detailed as follows:

a. **Elimination of Mapping as a Jurisdictional Prerequisite**: DEC's regulatory jurisdiction is no longer limited to wetlands shown on official Freshwater Wetlands Maps. Instead, any wetland that meets the statutory definition and regulatory criteria in the Part 664 Amendments is subject to DEC oversight, regardless of its depiction on maps. Moreover, mapping is now informational rather than determinative of jurisdiction;

b. **Inclusion of Smaller Wetlands of "Unusual Importance":** The Part 664 Amendments authorize DEC to regulate wetlands smaller than the standard size threshold (12.4 acres) if they satisfy any of eleven newly established criteria for "unusual importance." These criteria include whether it is in or near an urban

area, ecological significance, provision of drinking water, rare species habitat, whether it contains a vernal pool, was previously mapped or designated a local or state wetland, and flood mitigation capacity. It also includes a vague omnibus requirement that allows DEC to name virtually any wet area it sees a wetland for features that "ha[ve] significant importance to protecting the State's water quality based on substantial evidence";

c. **Formalization of Jurisdictional Determination Process:** The Part 664 Amendments clarify that any party can request a determination of whether jurisdictional wetlands are present on a given piece of land, and property owners may request a Jurisdictional Determination ("JD") from DEC to ascertain the limits of any regulated wetlands or adjacent areas. JDs are binding for a period of five years (after which time a new JD would be required); and

d. **Retention of the 100-Foot Adjacent Area Rule:** The amendments preserve DEC's authority to regulate activities not only within wetlands but also within 100 feet of a wetland boundary (and in some cases, a larger area).

57. As DEC is aware, CLP has engaged in significant outreach to DEC regarding the development of the Part 664 Amendments and their impact on Chautauqua Lake.

58. The group began interfacing with DEC on this matter in 2023 to better understand the potential impact to lakes. CLP has also attended DEC presentations and discussed the impacts to Chautauqua Lake.

59. CLP submitted 263 letters to DEC during the Advanced Notice of Proposed Rulemaking process earlier in 2024. CLP also submitted a detailed comment letter regarding the Part 664 Amendments.

60. In addition, CLP's membership has submitted more than 120 comments on the Part 664 Amendments. Additionally, as part of its ongoing lake management and herbicide permitting, CLP has at least two meetings a year with DEC.

IT IS ARBITRARY AND CAPRICIOUS TO DESIGNATE LAKES AS FRESHWATER WETLANDS

61. The Part 664 Amendments to the Freshwater Wetlands Act would arbitrarily and capriciously designate Chautaqua Lake as a wetland.

62. Such a designation imposes an unnecessary and duplicative regulatory burden on features already protected by existing statutory programs that safeguard water quality, regulate pesticide use, and control invasive species.

63. It is also arbitrary and capricious as none of the changes to the Freshwater Wetlands Law called for the regulation of lakes, particularly here where Chautauqua Lake could have been mapped under the original law at any time.

64. Requiring an additional freshwater wetlands permit for activities on lakes will significantly increase regulatory burdens on property owners and organizations, such as the CLP who invest substantial resources in maintaining the health and usability of Chautauqua Lake.

65. DEC could have instead chosen to amend any of its other regulatory programs that CLP currently must utilize to treat invasive species in the lake to address Chautauqua Lake (and other lakes). Instead, DEC, in an arbitrary and capricious manner, determined to subject Chautauqua Lake and other lakes to an entirely new regulatory program with confiscatory and complex implications for use of the lake and its shorelines.

66. For example, CLP's treatment addresses invasive species. Permitting is already required to satisfy DEC's Article 15 and invasive species programs. Should the Part 664 Amendments reduce the amount of treatment that can be conducted with respect to invasive

species, DEC's ECL Article 9 statutory requirements would be jeopardized. DEC regulation should not detract from invasive species protections required by law.

67. This added burden raises a substantial risk of regulatory takings.

68. The Part 664 Amendments themselves demonstrate that lakes are not appropriately classified as wetlands and numerous benefits attributed to wetlands in the regulations are incompatible with, or even contradictory to, the nature of a lake.

69. For example, 6 NYCRR 664.3(b)(4) states that wetlands cleanse water by absorbing silt and organic matter, thus protecting channels and harbors, a function not performed by a lake.

70. Similarly, 6 NYCRR 664.3(b)(5) notes that wetlands provide spawning and nursery grounds for fish, emphasizing that wetlands contiguous to lakes support the fish population, thereby recognizing lakes and wetlands as distinct features.

71. Additional references in 6 NYCRR 664.5 and 664.6 further confirm that wetlands are contemplated as separate features, providing hydrological, pollution control, and habitat benefits to surface waterbodies, rather than being the surface waterbodies themselves.

72. The enabling statute, Environmental Conservation Law § 24-0107, also supports this distinction.

73. It describes wetlands as lands dominated by aquatic or semi-aquatic vegetation, and includes "lands and waters substantially enclosed by such vegetation"—a condition not met by Chautauqua Lake, which is open water, not substantially enclosed.

74. Accordingly, regulating Chautauqua Lake as a wetland would be arbitrary and capricious, as lakes are not structured to provide many of the specific benefits wetlands are meant to offer.

75. Further, ECL § 24-0107(1)(c) conditions jurisdiction over semi-aquatic or aquatic vegetation on a necessity to protect and preserve it.

76. Chautauqua Lake's healthy aquatic environment does not meet this standard, nor would imposing freshwater wetlands permitting requirements advance that goal.

77. Indeed, regulating the lake as a wetland could undermine its ecology by impeding necessary management activities to control invasive species, as evidenced by 6 NYCRR 664.5(b)(12) and (c)(5), which recognize invasive species management as critical to wetland health.

78. Moreover, the Part 664 Amendments to the Freshwater Wetlands Act should expressly exclude lakes from the definition of regulated wetlands.

79. Such a distinction is not unusual or out of the ordinary.

80. For example, existing regulatory provisions exclude other surface water features regulated elsewhere, such as tidally influenced areas regulated by Article 25 (*see* 6 NYCRR 664.5(a)(4)) and Great Lakes Coastal Wetlands (*see* 664.5(b)(4)).

81. Accordingly, 6 NYCRR 664.2(o), defining "freshwater wetlands," should have been amended to add: "navigable waters in an inland lake shall not be considered wetlands."

82. Alternatively, the Part 664 Amendments should have included a permit by rule authorizing specified activities on waterbodies like Chautauqua Lake with clear parameters in the regulation. This would avoid the cost and uncertainty of permitting processes.

83. Without these types of exclusions, the Regulated Activity Chart at 6 NYCRR 663.4 will undoubtedly require costly DEC review for everyday activities by property owners, such as building homes, drilling wells, mowing lawns, maintaining lakefronts, or applying pesticides.

84. Surface water features, such as lakes, would also require freshwater wetlands permits for maintenance activities involving dams, drainage structures, or environmental protection measures.

85. Dredging activities necessary for the health of a navigable waterbody like Chautauqua Lake could also be impeded under this regime, adding further regulatory obstacles.

86. Seasonal management activities—such as weed treatment—that CLP undertakes would be disrupted, and without express exemptions for recurring seasonal work, property owners would be required to obtain additional permits annually beyond the permitting efforts CLP already undertakes.

87. These extensive restrictions would have severe adverse effects on the use and enjoyment of Chautauqua Lake, jeopardizing boating, fishing, tourism, and property values, as well as CLP's treatment activities.

PART 664 AMENDMENTS INCORPORATION OF "WETLANDS OF UNUSUAL IMPORTANCE" IS ARBITRARY AND CAPRICIOUS AND VOID FOR VAGUENESS

88. Further troubling is that the Part 664 Amendments' introduction of the concept of "Wetlands of Unusual Importance," which significantly expands DEC's authority to regulate even the smallest wetland areas.

89. The criteria for designation are vague and grant DEC virtually unbounded discretion to regulate property, including the ability to declare wetlands of any size jurisdictional, often based on subjective determinations.

90. Of the eleven (11) factors included in the Freshwater Act and the Part 664 Amendments, two are especially troubling. Specifically, DEC may designate wetlands based on whether they are deemed "of significant importance to protecting the state's water quality" or are classified as "Class I Wetlands" by the agency itself (see ECL § 24-0107(9)(k), (e)).

91. These provisions lack guideposts necessary for proper delegation of administrative authority, and provide rampant breeding ground for legislative policy making and arbitrary determinations by DEC.

92. With respect to wetlands "of significant importance to protecting the state's water quality," this usurpation of policy making and overbroad delegation is fully illustrated in 6 NYCRR 664.6(k) which requires that a demonstration be made to DEC's satisfaction that the wetland "has significant importance to protecting the State's water quality based on substantial evidence." *Id.*

93. Moreover, the Part 664 Amendments now permit a wetland to be regulated if, to DEC's satisfaction, substantial evidence shows it is important to water quality, without providing objective standards or clear guidance to property owners. DEC may, in its discretion, utilize any number of its arbitrary standards to determine whether the proposed "wetland is of significant importance in preventing exceedances of any water quality standards or guidance values derived pursuant to [6 NYCRR] Part 702." *Id.*

94. This provides no meaningful instruction to the agency or to the general public on what criteria could subject their property or project to freshwater wetland permitting requirements, other than to note that any wetland, of any size, for virtually any reason, could be determined to be jurisdictional.

95. As such, the regulated community cannot accurately predict if property will be ensnared in the Part 664 Amendments from this language, and DEC is given authority exceeding that which may be properly delegated.

96. Likewise, DEC's ability to define and apply new factors for Class I Wetlands that are 12.4 acres or wetlands of unusual importance for that reason—without statutory guardrails—

creates uncertainty and unpredictability for the regulated community, including CLP and its members.

97. Specifically, with respect to "Class I Wetlands," DEC is also authorized to determine the factors that would make a wetland a Class I Wetland, meaning that their own list of characteristics can be applied to features that are 12.4 acres or greater, or for wetlands of unusual importance that could be a small portion of a lakefront homeowners' yard.

98. This uncertainty for the regulated community will at a minimum create an unnecessarily large work burden on jurisdictional determinations, but will also impede up to the smallest residential activity absent review by and possible issuance of a permit by DEC. (The alternative, of course, being that such activities will be prohibited given the expanse of DEC's new jurisdiction.)

99. Worse yet, the Part 664 Amendments improperly allow "any party" to request jurisdictional determinations or delineations, creating opportunities for harassment, obstruction of development projects, and unwarranted intrusions on private property rights.

100. For example, this troubling provision could be used to derail projects or interfere with neighbors' property rights and use of their home.

101. The characteristics of private property should not be able to be evaluated by third parties without the landowner's consent, particularly where it could result in such a significant limitation on property rights.

102. The right to seek a jurisdictional determination should be limited to property owners (and potential purchasers, with the owner's consent), developers, and perhaps reviewing municipalities whose interests could be affected. Any parties beyond this list should be required to demonstrate good cause for the request for a jurisdictional determination.

THE FAILURE TO COMPLY WITH THE STATE ADMINISTRATIVE PROCEDURE ACT ("SAPA")

103. The Regulatory Impact Statement ("RIS") claims that there are no "direct" costs resulting from the Part 664 Amendments.

104. This position ignores the reality that this new regulatory regime will insert massive and broad-reaching new jurisdiction over activities that are lawfully occurring today without a freshwater wetland permit.

105. The RIS asserts that impact would only be created "if development occurs," which ignores the costs to every landowner today who may interact with a wetland on their property and would hesitate to continue those activities without a jurisdictional determination and potentially cumbersome permitting process. Indeed, it directly contradicts the statutory presumption that must be rebutted "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).

106. Every property owner, developer, and user of a resource that could remotely display one of innumerable characteristics that a New York freshwater wetland might have to undergo, at a minimum, the cost to seek a JD, let alone any permitting requirements, including hearing and/or litigation that may follow.

107. While it's noted that the Part 664 Amendments contemplate DEC offering delineations to minimize cost, the backlog would be expected to be unpredictable at best, and substantial, acting as a significant road block to any development, at worst.

108. In general, DEC's capacity to oversee, administer and enforce the Part 664 Amendments is doubtful, given existing workload and the freshwater wetland program's new, massive scope.

109. This will be to the detriment of every existing property owner who would now need to comply with the Part 664 Amendments and for future activities that trigger the Part 664 Amendments.

110. Given the potential enforcement consequences if the delineation is not done properly, and the specter of permitting costs, many will have no choice but to hire their own professional, which would impose a cost of several thousand dollars, at a minimum.

111. Further, a developer or user of the wetlands will need the certainty for the permitting processes they already underwent prior to the Part 664 Amendments via their own delineation.

112. If jurisdiction were found, those individuals then have to expend funds for an appeal and/or for a permit.

113. The costs for permitting alone, including an application, various studies, mitigation plans and other documents would be significant, if not exorbitant, and should have been evaluated in the RIS.

114. Additionally, costs for mitigation are substantial, and would be encountered for likely every application, whether it is in the form of construction additional wetlands or making donations (where available) to wetland conservancy groups. These costs should have been studied as well.

115. Further, the benefits of wetlands needed to be more carefully described, as even the most beneficial qualities of wetlands have their limits.

116. A wetland, for example, can lose vegetation or be lost if too many toxins are introduced to it.

117. More significantly, the costs and any purported benefits resulting from turning a lake into a regulated wetland should have been described in the RIS. There is no discussion of those costs and benefits in the RIS.

118. Many of the benefits provided by wetland protection would not be realized by designating a lake a wetland in that a lake has so many significant differences from a wetland that trying to regulate a lake as a wetland would be like trying to fit a square peg into a round hole.

119. One of the other key components of SAPA is ensuring meaningful opportunity for the public to comment on proposed regulatory enactments, as well as for the public to have the opportunity for additional public comments if substantive changes are made to the proposed regulations that warrant additional review. CLP, its members, and other members of the public are also entitled to final regulations, a final Regulatory Impact Statement and other documents that reflect meaningful review of the over 4,500 separate comments received on the Part 664 Amendments.

120. Upon information and belief, DEC did not complete a sufficient review of comments, did not incorporate those comments into text changes and a final Regulatory Impact Statement and other documents, and deprived the public of sufficient time to review the Part 664 Amendments by publishing them on December 31, 2024, hours before they went into effect, massively changing the landscape of freshwater wetland regulation in New York.

121. Upon information and belief, this last minute rush not only has wreaked havoc on all development in New York State, including CLP's, since the promulgation of the Part 664 Amendments, but also has created substantial confusion and delay within DEC, which exacerbates the extreme difficulties experienced by the regulated community in coming into conformance with this expansive and confiscatory new regulatory scheme.

THE FAILURE TO COMPLY WITH SEQRA

122. Under SEQRA, the lead agency must identify relevant areas of concern, take a hard look, and provide a reasoned elaboration of its determination of significance, and, where an Environmental Impact Statement is warranted, it must complete such process and issue a Findings Statement.

123. During the promulgation of the Part 664 Amendments, DEC hardly gave SEQRA a look, let alone did it meet its legal requirement to take a "hard look." Its SEQRA analysis failed to provide any meaningful review of the regulations' potential adverse impacts on invasive species, nuisance species overgrowth, preservation of recreational space, let alone issues impacting other types of development such as the density of land use, sprawl, and the inclusion of urban areas within the definition of areas of unusual importance, impact of agricultural land resources, community character, and the future population growth that will inevitably result from the prohibition of many activities proximate to wetlands and the attendant pressures and impacts resulting from the shift of development to other areas in and outside of urban areas.

124. Moreover, the Part 664 Amendments and the related documentation, including its SEQRA documents do not even attempt to estimate the waterbodies and lands that will be impacted by the new unmapped regulated areas beyond a conclusory recognition that DEC's jurisdiction will increase by at least 1.6 million acres. No meaningful review could have occurred, given that the totally of DEC's SEQRA review is as follows:

> "DEC has determined that the revisions to 6 NYCRR Part 664 will not have any significant adverse impacts on the environment. The purpose of this rule making is to implement amendments to the Freshwater Wetlands Act (ECL Article 24) adopted on April 9, 2022, that, among other changes, expanded protections to previously unprotected wetlands throughout the state. These changes fundamentally altered the statutory framework of ECL Article 24, and this action is necessary to clarify statutory provisions and guide DEC's implementation of the changes to the Freshwater Wetlands Act that take effect January 1, 2025. The

> purpose of the Freshwater Wetlands Act is to preserve, protect, and conserve freshwater wetlands and this action will substantially increase the amount of wetlands across the state regulated under the Freshwater Wetlands Act. The expanded scope of regulatory jurisdiction will lead to a reduction in adverse impacts on these wetlands as more projects will be required to avoid, minimize, or mitigate impacts through the long established permitting process."

125. This snippet of language, which merely assumes without any analysis whatsoever that the new Wetlands Regulations will be beneficial, fundamentally failed DEC's SEQRA obligations.

126. Indeed, DEC merely checked the "No Impact" box for each and every category of environmental assessment, and called that good enough. This is patently insufficient for a SEQRA review, and DEC's SEQRA review, and the corresponding Part 664 Amendments, should be annulled accordingly.

FIRST CAUSE OF ACTION
ARBITRARY AND CAPRICIOUS

127. Petitioners repeat and re-allege each and every allegation contained in Paragraphs "1" through "126" as if fully set forth herein.

128. CPLR §7803(3) authorizes the Court to annul an administrative agency's determination when the "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . ."

129. The DEC's promulgation of the amendments to 6 NYCRR Part 664, described herein as the Part 664 Amendments, including the potential designation of portions or all of Chautauqua Lake and its shorelines as a regulated freshwater wetland, constitutes action that is arbitrary and capricious, an abuse of discretion, and affected by error of law.

130. The Part 664 Amendments' designation of a lake as a freshwater wetland contradicts both the express language and intent of the Freshwater Wetlands Act, which defines wetlands as vegetative systems distinct from open water bodies like lakes.

131. No changes were made to the Freshwater Wetlands Act that triggered the need to regulate lakes, including Chautauqua Lake which could have been mapped under the original Freshwater Wetlands Act, but was not.

132. Further, DEC could have simply added further protections to the existing regulatory programs lakes like Chautauqua Lake are already subject to rather than adding an entirely new regulatory scheme that is ill-fitting at best.

133. Subjecting lakes to the Part 664 Amendments is also arbitrary and capricious in that it could limit invasive species management, which contradicts DEC's invasive management requirements pursuant to ECL Article 9.

134. Various provisions of the Part 664 Amendments themselves—such as 6 NYCRR 664.3(b)(4)-(5), 664.5, and 664.6—also demonstrate that wetlands are envisioned as providing sedimentation, filtration, and habitat benefits distinct from the functions of navigable lakes.

135. DEC's utter failure to recognize the fundamental distinction between wetlands and lakes will undoubtedly result in an irrational and unsupported exercise of regulatory authority, improperly subjecting existing property owners, municipalities, and nonprofit lake management organizations such as CLP to duplicative, onerous, and unjustified permitting burdens.

136. Furthermore, DEC's discretionary authority to designate any feature as a "Wetland of Unusual Importance" under proposed 6 NYCRR 664.6 lacks objective standards or scientific guideposts, empowering arbitrary determinations that lack a rational basis in fact or law.

137. The Part 664 Amendments are arbitrary and capricious for additional reasons pleaded throughout this Verified Petition and Complaint.

138. Accordingly, the adoption and enforcement of the Part 664 Amendments, as applied to Chautauqua Lake, must be annulled and set aside as arbitrary and capricious under CPLR § 7803(3).

SECOND CAUSE OF ACTION
FAILURE TO COMPLY WITH THE STATE ADMINISTRATIVE PROCEDURES ACT

139. Petitioners repeat and re-allege each and every allegation contained in Paragraphs "1" through "138" as if fully set forth herein.

140. The DEC's adoption of the amendments to 6 NYCRR Part 664, described herein as the Part 664 Amendments, violates multiple provisions of SAPA including but not limited to SAPA §§ 202 and 207.

141. SAPA requires that an agency's RIS provide a thorough analysis of the costs, benefits, and alternatives to a proposed rule, and consider the burdens placed on regulated parties.

142. The RIS accompanying the Part 664 Amendments is deficient in that it failed to account for the substantial direct and indirect costs that property owners, municipalities, and nonprofit organizations would incur due to the expanded permitting obligations and regulatory uncertainty.

143. The RIS incredibly and erroneously states that there would be no direct costs from the regulations, ignoring the extensive compliance burdens that would fall on CLP in its pesticide treatments, as well as its members' rights property owners engaging in ordinary maintenance activities near the lake and on other organizations conducting seasonal lake management activities. It is noted that any permit applicant will undergo significant direct costs.

144. This includes, but is not limited to, significant cost for studies, engineers, attorneys and other professionals to assist with the permitting process, costs for mitigation, and, should a JD require appeal, or permit hearings and litigation be necessary, costs will become exorbitant if not outright prohibitive.

145. DEC, critically, also failed to adequately consider less burdensome alternatives to designating lakes as wetlands or explain why duplicative permitting requirements under Articles 15 and 24 are necessary or appropriate.

146. In addition, meaningful opportunity for public comment was constrained by the rushed timing of the proposed rulemaking relative to statutory deadlines, in contravention of SAPA's purpose of ensuring informed and transparent agency rulemaking. Further, the final Regulatory Impact Statement lacks necessary updates and, upon information and belief, amendments to the Part 664 Amendments may have been necessary given the volume of comments and the types of changes made to the Part 664 Amendments after the comment period.

147. As a result, the Part 664 Amendments must be invalidated for failure to comply with SAPA's procedural and substantive requirements.

THIRD CAUSE OF ACTION
VOID FOR VAGUENESS

148. Petitioners repeat and re-allege each and every allegation contained in Paragraphs "1" through "147" as if fully set forth herein.

149. Under the Due Process Clauses of the New York State Constitution (Article I, § 6) and the United States Constitution (Fourteenth Amendment), laws and regulations must provide regulated parties with fair notice of what conduct is required or prohibited and must establish clear standards to prevent arbitrary enforcement.

150. The Part 664 Amendments are unconstitutionally vague because they fail to provide clear, objective criteria for key regulatory determinations, including;

a. The designation of "Wetlands of Unusual Importance" under proposed 6 NYCRR 664.6, which relies on undefined or subjective standards such as wetlands "of significant importance to protecting the state's water quality";

b. The definition and scope of terms such as "pollution," "Potential Environmental Justice Area," and "wetland plant community," which are undefined or inadequately defined in the regulations; and

c. The open-ended ability of "any party" to request jurisdictional determinations, which threatens to interfere with property rights without appropriate procedural protections

151. The lack of clear regulatory guideposts exposes property owners and lake management entities to unpredictable enforcement risks, discourages lawful activities, and enables arbitrary decision-making by DEC staff.

152. This regulatory uncertainty deprives Petitioners and similarly situated parties of the fundamental due process rights guaranteed by law.

153. Accordingly, the Part 664 Amendments must be declared void for vagueness and unenforceable.

FOURTH CAUSE OF ACTION
IMPROPER DELEGATION/*ULTRA VIRES*

154. Petitioners repeat and re-allege each and every allegation contained in Paragraphs "1" through "153" as if fully set forth herein.

155. Two of the eleven (11) factors included in the Freshwater Act and the Part 664 Amendments grant too much authority to DEC without sufficient guardrails. Specifically, DEC

may designate wetlands based on whether they are deemed "of significant importance to protecting the state's water quality" or are classified as "Class I Wetlands" by the agency itself (see ECL § 24-0107(9)(k), (e)).

156. These provisions lack guideposts necessary for proper delegation of administrative authority, and provide rampant breeding ground for legislative policy making and arbitrary determinations by DEC.

157. To the extent that DEC has granted itself greater authority than the Freshwater Wetlands Act contemplates with these provisions, such provisions are *ultra vires*.

158. With respect to wetlands "of significant importance to protecting the state's water quality," this usurpation of policy making and overbroad delegation is fully illustrated in 6 NYCRR 664.6(k) which requires that a demonstration be made to DEC's satisfaction that the wetland "has significant importance to protecting the State's water quality based on substantial evidence." *Id*.

159. Moreover, the Part 664 Amendments now permit a wetland to be regulated if, to DEC's satisfaction, substantial evidence shows it is important to water quality, without providing objective standards or clear guidance to property owners. DEC may, in its discretion, utilize any number of its arbitrary standards to determine whether the proposed "wetland is of significant importance in preventing exceedances of any water quality standards or guidance values derived pursuant to [6 NYCRR] Part 702." *Id*.

160. This provides no meaningful instruction to the agency or to the general public on what criteria could subject their property or project to freshwater wetland permitting requirements, other than to note that any wetland, of any size, for virtually any reason, could be determined to be jurisdictional.

161. As such, the regulated community cannot accurately predict if property will be ensnared in the Part 664 Amendments from this language, and DEC is given authority exceeding that which may be properly delegated.

162. Likewise, DEC's ability to define and apply new factors for Class I Wetlands that are 12.4 acres or wetlands of unusual importance for that reason—without statutory guardrails—creates uncertainty and unpredictability for the regulated community, including CLP and its members.

163. Specifically, with respect to "Class I Wetlands," DEC is also authorized to determine the factors that would make a wetland a Class I Wetland, meaning that their own list of characteristics can be applied to features that are 12.4 acres or greater, or for wetlands of unusual importance that could be a small portion of a lakefront homeowners' yard.

164. As, at a minimum, these parameters either unlawfully delegate policymaking authority to DEC, and/or are *ultra vires* in excess of the authority contemplated in the Freshwater Wetlands Act, and the Part 664 Amendments should be declared void and annulled accordingly.

FIFTH CAUSE OF ACTION
VIOLATION OF SEQRA

165. Petitioners repeat and re-allege each and every allegation contained in Paragraphs "1" through "164" as if fully set forth herein.

166. The Part 664 Amendments are an "action" subject to SEQRA, as it is "agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions" and "adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment" (*see* 6 NYCRR § 617.2[b][2] and [3]).

167. DEC's SEQRA regulations expressly provide that "the adoption by any agency of a comprehensive resource management plan" is a Type I action (*see* 6 NYCRR § 617.4[b][1]).

168. The adoption of the Part 664 Amendments qualifies as a comprehensive resource management plan for the management of wetlands throughout New York, and thus was a Type I action under SEQRA.

169. For Type I actions, a presumption of environmental significance attaches that the action will result in a significant environmental impact and an Environmental Impact Statement must be prepared by the lead agency.

170. Upon information and belief, DEC failed to classify the action as a Type I action, and thus attempted to avoid the presumption that its action would result in a significant adverse environmental impact.

171. Instead, DEC's SEQRA analysis summarily rejects that there are any adverse environmental impacts and concludes that the Part 664 Amendments would be wholly beneficial.

172. For Type I actions, a Full EAF must be prepared, which DEC failed to do for the Part 664 Amendments.

173. Once DEC was ready to determine whether a negative or positive determination of significance is appropriate, the lead agency must: "(1) consider the action as defined in sections 617.2(b) and 617.3(g) of this Part; (2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern; (3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (*see* 6 NYCRR 617.7[b]).

174. For Type I actions, such as the Part 664 Amendments, the threshold for a positive declaration and a subsequent EIS is relatively low. However, a negative declaration would have to demonstrate that there will be no significant adverse environmental impacts. DEC failed under any of these rubrics.

175. While DEC did complete a (Short) EAF to evaluate whether the Part 664 Amendments have potentially significant adverse impacts, DEC's SEQRA review failed to provide any meaningful analysis of the regulations' potential adverse impacts on invasive species, ecology, open space and recreational opportunities, or any other impact related to wetland development in general, such as the density of land use, sprawl, inclusion of urban areas within the definition of wetlands of unusual importance, impact of agricultural land resources, community character, and the future population growth that will inevitably result from the prohibition of many activities proximate to wetlands and the attendant pressures and impacts resulting from the shift of development to other areas predominantly outside of urban areas.

176. The SEQRA review completed for the Part 664 Amendments does not even mention these significant impacts, much less take a hard look at them.

177. Instead, indeed, as Part 2 of the EAF shows, DEC simply checked off boxes to indicate that "[n]o, or small impact may occur" for all environmental assessment categories listed on the form, without any explanation or elaboration.

178. The SEQRA review for the Part 664 Amendments must be annulled. Put simply, DEC expects to regulate an additional 1.6 million acres of land, with drastic impact to CLP's treatment and CLP's landowners' activities, to say nothing of development across New York State, and yet asserts that no, or a small, environmental impact could result from regulating and limiting

activities across Chautauqua Lake and other waterbodies, as well as halting development across the State.

179. DEC failed to complete any review of the environmental impact of adding millions of newly regulated acres to DEC's jurisdiction.

180. The Part 664 Amendments will undoubtedly have a moderate to large impact on all categories listed in the EAF. Thus, the Wetlands Regulations should have been deemed to have a significant impact on the environment, necessitating the completion of an EIS.

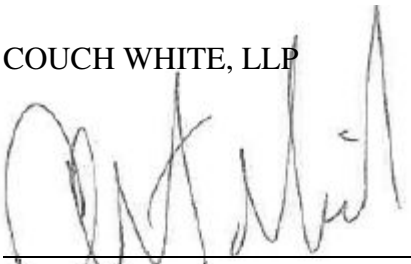
181. In addition, the two-sentence Negative Declaration issued for the Part 664 Amendments does not contain any reasoned elaboration for its determination. Nor does it provide reference to any supporting documentation.

182. As such, even though the Part 664 Amendments, a SEQRA Type I Action, required compliance with SEQRA's substantive and procedural mandates, the Negative Declaration issued falls well short of even a generous interpretation of SEQRA's requirements. The Negative Declaration, and thereby the Part 664 amendments, should be annulled accordingly.

WHEREFORE, Petitioners-Plaintiffs respectfully request that this Court enter judgment as follows: (1) declaring and directing that the Part 664 Amendments, which was made effective on December 31, 2024, was made in violation of lawful procedures, was arbitrary, capricious, *ultra vires* and/or improper delegation of legislative authority, and an abuse of discretion and therefore should be annulled; (2) awarding Petitioners-Plaintiffs the costs, disbursements, and attorneys' fees incurred in connection with this proceeding; and (3) awarding Petitioners-Plaintiffs such other relief as this Court deems just, proper, or equitable.

Dated: April 30, 2025
Albany, New York

COUCH WHITE, LLP



Alita J. Giuda, Esq.
Charlie G. Carluccio, Esq.
Attorneys for Petitioners-Plaintiffs
540 Broadway, P.O. Box 22222
Albany, New York 12201-2222
Telephone: (518) 426-4600

VERIFICATION

STATE OF NEW YORK)
)
COUNTY OF ALBANY)

ALITA J. GIUDA, an attorney duly admitted to practice law in the State of New York, under penalties of perjury, affirms the following: That deponent is a Partner with the law firm Couch White, LLP, attorneys for the Petitioners-Plaintiffs in the above action; that deponent has read the foregoing Verified Petition and Complaint and knows the contents thereof; that the same is true to the deponent's own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters believes it to be true. The reason this Verification is not made by the Petitioners-Plaintiffs and is made by deponent is that the Petitioners-Plaintiffs' principal place of business is not located in the county where the deponent-attorney maintains an office. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: review of documents, records, rules, and other written materials, representation of the Petitioners-Plaintiffs with respect to the regulatory enactment challenged in the above-referenced hybrid Proceeding and Complaint, and meetings and conversations with representatives of Petitioners-Plaintiffs.

ALITA J. GIUDA, ESQ.

Sworn to before me this
30th day of April, 2025

Notary Public

KYLE E. MCMAHON
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01MC6402021
Qualified In Rensselaer County
Commission Expires December 23, 2027