

**Andrew Molitor**  
**10 East Campbell Street**  
**Westfield, New York 14787**

August 26, 2024

Roy Jacobson, Jr.  
New York Department of Environmental Conservation  
625 Broadway, 5<sup>th</sup> Floor  
Albany, New York 12233-4756

Re: Wetland Part 664 Comments

Dear Mr. Jacobson:

It is extremely important that the proposed wetland regulations reflect an appropriate balance between the environment and the economy; both are important.

As noted in ECL 24-0105, “freshwater wetlands are invaluable resources for flood protection, wildlife habitat, open space, and climate change mitigation...” At the same time, however, landowners have legitimate concerns that overregulation can damage property values, impede their ability to use their property in a reasonable manner, and/or adversely impact the use and enjoyment of other natural resources, such as Chautauqua Lake and many other lakes in our State.

It appears that the proposed wetland regulations in some areas exceed the legislative intent of the ECL and extend governmental regulation beyond the scope reasonably necessary to protect our environment. Accordingly, please consider the following changes to the proposed regulations:

1. ***Wetlands of Unusual Importance*** (ECL 24-0107(1) and (9); proposed 6 NYCRR 664.5 and 664.6)

The 2022 statutory changes expanded DEC authority to include wetlands of “unusual importance,” ***regardless of size***. These wetlands are defined by statute to include those that are classified by the DEC as “class 1 wetlands.” See, ECL 24-0107(9).

The current DEC regulations define class 1 wetlands to include wetlands “adjacent or contiguous to a reservoir or other body of water that is used ***primarily for public water supply*** or is ***hydraulically connected*** to an aquifer which is used for public water supply. 9 NYCRR

664.5(a) (emphasis added). This definition was in effect when the State Legislature approved the statutory changes.

The proposed regulations dramatically expand the DEC authority over small wetlands by changing the definition of class 1 wetlands to include any wetland that is “contiguous to fresh surface waters having classifications of A, AA, AA-S, A-S or A-N.” (Proposed §664.5(a)(9)). Class A waters are defined as waters where the highest usage might be as “a source of water supply for drinking, culinary or food processing purposes; primary and secondary contact recreation; and fishing....” 6 NYCRR 701.6.

The effect of the proposed regulations is to eliminate the existing requirement that a class 1 wetland “used *primarily for public water* supply or [be] *hydraulically connected to an aquifer* which is used for public water supply.” Thus, for example, the proposed regulations make all wetlands contiguous to a fresh water lake that *could* be used as a source of drinking water as “wetlands of unusual importance” even if the lake is not *actually* used as a source of drinking water, or the drinking water is taken from the lake miles away from the wetland, or the wetland has no actual hydraulic or any other connection to the use of the lake as a source of drinking water.

In Chautauqua County, Chautauqua Lake, Cassadaga Lake, Findley Lake, Bear Lake, Lake Erie, portions of French Creek, Gage Creek, Chautauqua Creek, Slippery Rock Creek, Canadaway Creek, and Walnut Creek are all classified as class A or class AA waters. Under the proposed regulations, any wetland regardless of its size would become a regulated “wetland of unusual importance” merely by being contiguous to any of these lakes or streams.

The impact of an expanded definition for a class 1 wetland cannot be overstated, especially when considering the impact of the proposed automatic 100 foot buffer area around a regulated wetland. For example, a 100 foot buffer around a small 1 acre wetland would result in a regulated area of over 3.4 acres, or more than triple the size of the wetland.

RECOMMENDATION: The DEC should not change the definition of a class 1 wetland to grant itself a dramatic increase in regulatory authority far beyond that envisioned in the original legislation. *See, Relentless v. Dept. of Commerce.*

## 2. **Wetland Buffer Area** (ECL 24-0701(2), proposed 6 NYCRR 664.2(ac)).

The 2022 statutory changes did not affect the statutory provisions that authorize the DEC to regulate certain activities “if they *impinge upon or otherwise substantially affect* the wetlands and are located *not more than one hundred feet* from the boundary of the wetlands....” Thus, the statute imposes two concurrent requirements: (a) the activity must impinge upon or substantially affect the wetland, and (b) the activity must be located not more than 100 feet from the wetland.

The proposed regulations, however, impose regulatory permit requirements on all activities within 100 feet of the wetland, without requiring an initial determination that such activities impinge or otherwise substantially affect the wetland. See, 6 NYCRR 621 and 6 NYCRR 664.2(x) (“permit” needed in a “regulated adjacent area”) and 6 NYCRR 664.2(ac) (“regulated adjacent area” includes all land or water within 100 feet” of the wetland boundary). This would result in permit requirements even if the proposed activities are hydraulically separate from wetlands, such as intervening drainage or topographical features.

RECOMMENDATION: The proposed definition of “regulated adjacent area” should be amended to include the phrase “to the extent that activities specified in section 24-0701 of the Act impinge upon or otherwise substantially affect the wetland.”

3. **Extended Buffer Area** (ECL 24-0107(9), proposed 6 NYCRR 664.6(g) and 6 NYCRR 664.7(a)).

Current law gives the DEC the authority to regulate a buffer area larger than 100 feet from the boundary of a wetland “*where necessary to protect and preserve the wetland.*” ECL 24-0701. This is not a carte blanche statutory authorization for the DEC to impose arbitrarily larger buffer areas; any larger buffer areas must be justified as being necessary to protect and preserve the wetlands.

The proposed regulations, however, appear to impose a 300 foot buffer around any wetland designated as being “nutrient poor” and an 800 foot buffer for wetlands that are “vernal pools ... productive for amphibian breeding.” 6 NYCRR 664.7 (a), 664.6(g). Vernal pools are typically seasonal depressional wetlands that are covered by shallow water for variable periods from winter to spring but may be completely dry for most of the summer and fall. The existence of various salamanders would trigger the automatic 800 foot buffer. 6 NYCRR 664.5(g).

The automatic applicability of an 800 foot buffer would convert a very small seasonal pool into a very substantial regulated area; a ¼ acre season pool, for example, would result in a regulated area of over 53 acres of land. The practical and financial impact on the landowner could be substantial.

RECOMMENDATION: The proposed regulations related to “extended adjacent areas” (6 NYCRR 664.7(a)) should be amended to include the phrase “to the extent necessary to protect and preserve such wetland,” thus ensuring consistency with the statutory language.

4. **Regulating Navigable Waters.** (ECL 24-0107(a) and (c); proposed 6 NYCRR 664.2(o)).

ECL 24-0107(a) defines “freshwater wetlands” as “lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats” supporting designated plant species. Pursuant to ECL 24-0107(c), lands and “*waters substantially enclosed*” by designated plant species are

also considered as wetlands. Navigable lakes, however, would never be commonly called “marshes, swamps, sloughs, bogs, and flats,” and waters substantially enclosed by aquatic plants would not be navigable.

The proposed regulatory change in the definition of a Class 1 wetland to include any wetland, regardless of size, that is contiguous to any class A or AA river or lake (6 NYCRR 664.5(a)), and the corresponding 100 foot buffer area (6 NYCRR 664.2(ac)), would result in navigable portions of lakes and rivers being classified as wetlands. Such a result is inconsistent with the statutory language and intent of the ECL.

**RECOMMENDATION:** To avoid any ambiguity, the proposed regulations in 6 NYCRR 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.”

**5. Jurisdictional Determinations.** (ECL 24-0703; proposed 6 NYCRR 664.8)

Under the prior law, regulated wetlands were shown on wetland maps that were publicly available. ECL 24-0107(1). By referencing these maps, a landowner could verify whether any portion of their land might be considered a wetland. The 2022 statutory amendments eliminated this mapping requirement, thus creating potential uncertainty and ambiguity over the location, nature, and extent of a potential wetland.

The 2022 statutory language (ECL 24-0703(5)) and proposed regulations (6 NYCRR 664.8) attempt to address this uncertainty by providing a process for landowners to obtain a determination from the DEC whether any given parcel includes a regulated wetland.

The statute states that the DEC “shall give a definitive answer in writing within 90 days of such request as to the status of such parcel and whether a permit is required for the proposed activity, provided that the person has a delineation verified by the [DEC] and site-specific plans.” ECL 24-0703(5).

The proposed regulations, however, add an additional requirement beyond those specified by statute. The proposed regulations require the landowner to send a notice by certified mail with a copy of all the application materials to the DEC, and provide the DEC with an additional 10 days to respond. 6 NYCRR 664.8(f). It is inappropriate for the DEC to add another regulatory hoop by requiring a landowner to notify the DEC of its failure to respond in a timely manner, and then grant the DEC an additional 10 days before the statutory deadline to respond.

**RECOMMENDATION:** The proposed regulations requiring an additional notification by the landowner as set forth in 6 NYCRR 664.8(f) should be eliminated, and the proposed regulations in 6 NYCRR 644.8 (g) should be amended consistent with the statutory language to read:

If the department fails to provide a definitive answer in writing within 90 day, or notification of an extension based on weather or ground conditions pursuant to 24-0703(5) of the Act, freshwater wetland jurisdiction shall be deemed waived. Such waiver shall serve as a complete defense to the enforcement of the Act for a period of five years from the date of the waiver.

**Conclusion.** It is sometimes difficult to balance environmental concerns with the legitimate interests of landowners in the reasonable use of their property. Consistent with the statutory language and intent, it is my hope that the above recommendations reflect a more appropriate balance and will be enacted by the DEC in the final regulations.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Andrew M. Molitor". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Andrew M. Molitor