COUCH WHITE LLP

ALITA J. GIUDA, ESQ.
agiuda@couchwhite.com 518.320.3414 direct 518.426.0376 fax

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Division of Fish and Wildlife
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233
wetlandregulatorycomments@dec.ny.gov

Re: Proposed Amendments – 6 NYCRR Part 664

To Whom it May Concern,

This firm represents the Chautauqua Lake Partnership ("CLP"), which is an all-volunteer, non-profit organization seeking to ensure that Chautauqua Lake is a healthy lake that can be enjoyed by all for fishing, swimming, and boating. CLP appreciates the opportunity to comment on the proposed amendments to 6 NYCRR Part 664.

CLP's members include property owners on Chautauqua Lake, and CLP also represents the interests of participating municipalities and private entities such as homeowners' associations and businesses around the lake for herbicide permitting. CLP seeks to improve the quality of Chautauqua Lake by keeping nuisance levels of invasive weeds in check. 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. CLP also facilitates herbicide permits on behalf of participating townships and villages in full compliance with all New York State Department of Environmental Conservation (DEC) requirements. These efforts help create a swimmable, boatable, fishable lake that properly limits invasive species and other aquatic vegetation impeding on the lake ecosystem.

As DEC may be aware, CLP has engaged in significant outreach to DEC regarding the development of this Part 664 proposal and its impact on Chautauqua Lake. 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. CLP submitted 263 letters to DEC during the Advanced Notice of Proposed Rulemaking process earlier in 2024. CLP's membership has already submitted more than 120 comments on this proposal, and further comment letters and participation in the public hearings will occur. Additionally, as part of its ongoing lake management and herbicide permitting, CLP has at least two meetings a year with DEC.

We write this letter primarily to object to the proposed Part 664 regulations on the grounds that Chautauqua Lake could be designated as a wetland, which not only would impact the ability

to properly manage it for recreational use, but would impact the property rights of those who live and recreate on Chautauqua Lake. The uncertainty of whether and how this decision would be made is a significant concern of CLP. The definitions and classification levels in proposed Part 664 are broad enough to include the entire perimeter of the lake, which presents at best uncertainty, and at worst, a significant impediment or outright stop of CLP's mission and a taking of countless property owners' rights.

Should the proposed Part 664 be adopted and Chautauqua Lake be determined to be a regulated wetland, this would create the requirement for an Article 24 Freshwater Wetland permit for any activity in the "wetland" and its 100-foot buffer. The requirements to file an Article 24 permit application are more complex and considerably more expensive than the existing permitting obligations. This requirement would also affect previously unpermitted, but authorized as of right activities such as dock and lift improvements, shoreline cleanup and maintenance, barrier maintenance and plant removal and harvesting, both on the lake and within a 100-foot buffer area around the lake. This would be a significant loss of currently useable land.

In addition to this a new, burdensome impact to everyday activities conducted by existing property owners on and near the lake, this also adds another layer of regulatory oversight to pesticide applications covered by DEC Article 15 permits and invasive species management requirements. Should freshwater wetland regulations restrict or prohibit CLP's existing invasive species management, invasive species would be expected to overtake the lake, which is contrary to other significant statutory obligations that DEC carries out.

CLP believes that DEC's Article 15 program sufficiently regulates the ecological system and overall health of the lake. As Article 15 permits are only required for submerged vegetation, any lake that requires an Article 15 permit could be designated as a freshwater wetland, subjecting it to an entirely unnecessary and duplicative additional permitting process pursuant to Article 24. Further, navigable waterway maintenance obligations would be impacted or even prohibited if Chautauqua Lake were designated a freshwater wetland. In addition to this, a local permitting process also exists for the lake and its lakefront area, which controls development. Adding yet another layer to this existing, significant permitting burden, particularly one that would be as cumbersome as proposed Part 664, is an unnecessary duplication, leads to complete uncertainty, and could lead to deprivation of property rights and procedural denial of due process. It certainly would harm recreational and tourism opportunities on Chautauqua Lake, and the economy.

Additionally, with respect to CLP's pesticide application activities, DEC's Pesticide Program is accustomed to the seasonality of aquatic pesticide use and associated permitting needs. Contrast this with Article 24 permits, which cover everything from land clearing and new construction to pesticide use that may occur in wetlands and the associated buffer area. Such a broad regulatory program would not be likely to consider or prioritize permit requests with

seasonal concerns. (Indeed, DEC may not be able to do so given its workload pursuant to the proposed Part 664 regulations.) Overall, an Article 24 permit would be expected to take longer, potentially significantly longer, than an Article 15 permit, and likely would not take into consideration the seasonal need of a pesticide application for Chautauqua Lake. This would not only create duplicative work, work at cross purposes, or competing deadlines with other DEC divisions, but would be expected to result in the issuance of a permit well after the target date of the project, effectively canceling the pesticide application project for that year.

If Chautauqua Lake were designated as a wetland, and a 100-foot buffer added around the lake, existing property values will be significantly impacted. Every day activities, use of the lake, and management of the lake, as described above, would be regulated. It would be expected that many, if not all of these activities would be curtailed or prohibited. Existing property rights would be significantly impacted, if not completely extinguished. At a minimum, existing property rights will be directly impacted due to both the impact on overall lake maintenance plus cost, complexity and uncertainty due to permitting requirements.

Overall, to introduce this additional layer of regulation, restriction, and permitting compliance obligations would be expected to significantly impact to recreational users and businesses that depend on lake recreation and tourism in the Chautauqua Lake area. These revenues are a major contributor to the Chautauqua County economy. Currently, Chautauqua Lakefront property tax revenues are at least 25% of the total county property tax levy. The types of impacts that would result from proposed Part 664 would significantly decrease these home values, which would have significant negative consequences to this southern tier, more rural county.

Proposed Part 664 Comments

Preliminarily, CLP objects to any designation of a lake as a wetland. It adds an unnecessary layer of regulation to a feature that already has several statutory programs to protect water quality, ensure proper management of pesticide application, and prevent the spread of invasive species. Requiring yet another permit for a lake will significantly increase the regulatory burden on property owners and groups like CLP that invest significant resources in maintaining the lake, and, given the breadth of regulation, create the likelihood of a regulatory taking.

The language of the regulations themselves demonstrate that it is not appropriate to designate a lake a wetland. The benefits listed in Part 664 are not applicable to, and in a number of instances, contradict, the notion of a lake as a wetland. *See* proposed 6 NYCRR 664.3(b)(4)(noting that wetlands "cleanse water that flows through them," and "serve as sedimentation areas, and filtering basins that absorb silt and organic matter, thereby protecting channels and harbors..."); (5) (regarding wetlands providing spawning and nursery grounds for fish, and noting that "the availability of these fish *in lakes and streams* may be adversely affected by the loss of wetlands contiguous to those waters.")(*emphasis added*); proposed 6 NYCRR 664.5

(noting that wetlands benefits include "their hydrological and pollution control features, their cover types and special features"); proposed 6 NYCRR 664.6(a)(9)(a Class I wetland is on "contiguous to fresh surface waters having classifications of A, AA, AA-S, A-S, or N..."); (b)(9)(same, for "fresh surface waters having classifications of B..."); (10) (same, for wetlands "contiguous to" various other classifications of "fresh surface waters"); (c)(3) (same, for wetlands "contiguous to fresh surface waters having classifications of C"); (d)(1) (same, for wetlands "contiguous to fresh surface waters having classifications of D")[1]

Finally, one of the characteristics to designate a wetland as a wetland of Unusual Importance is its location in an area of significant flooding, particularly, where "less than five percent of its surface area is comprised of floodwater storage zones in the form of lakes, ponds, reservoirs or wetlands." Proposed 6 NYCRR 664.6(a)(2). This demonstrates that a wetland is one type of feature that creates capacity to manage flooding, lakes, ponds and reservoirs are other, separate features.

The enabling statute, Environmental Conservation Law 24-0107, similarly indicates that a wetland contains features a lake just does not have.[2] *See* (1)(a)(describing common wetland features), (c) (including in the definition of "freshwater wetland" "lands and waters substantially enclosed by aquatic or semi-aquatic vegetation"). Plainly, a wetland is a feature where vegetation predominates, not a surface water body like Chautauqua Lake which is not "substantially enclosed" by vegetation. It is arbitrary and capricious to designate a lake as a wetland when a lake cannot provide many of these benefits, and in a number of instances, the benefits of wetland protection are intended to protect surface waterbodies like a lake that are near the wetland itself.

Further, the enabling statute renders semi-aquatic and aquatic vegetation jurisdictional (as described above) only where "necessary to protect and preserve" the vegetation. *See* ECL 24-0107(1)(c). Regulating a lake will violate this condition precedent. First, a healthy lake is not in need of protection and preservation based solely on the presence of semi-aquatic and aquatic vegetation. Second, imposing burdensome freshwater wetland permitting requirements upon Chautauqua Lake will restrict, or at a minimum make it much more difficult to maintain the lake in its current condition, as invasive species would grow and impact the lake's ecology, as well as other vegetation overgrowth. *See also* proposed 6 NYCRR 664.5(b)(12) & (c)(5) (designating a

[1] It is noted that Proposed Part 664 is excessively regulating potential wetlands by rendering wetland features DEC-jurisdictional on the basis that they are connected to surface bodies of water that DEC itself has determined do not warrant regulation or protection, such as Class C&D waters.

[2] This statutory scheme has been in place for several decades without resulting attempts to regulate lakes as freshwater wetlands. The recent statutory amendments resulting in Proposed Part 664 are geared towards protecting additional wetlands, with a focus on adding wetlands of unusual importance that are smaller than the 12.4 acre current threshold. Regulating lakes, in particular like Chautauqua Lake, would not be focused on smaller wetlands, and would add thousands upon thousands of acres of "wetlands" to DEC jurisdiction.

wetland as Class II wetland on the basis that it has fewer than 50% invasive species, which demonstrates DEC's intent to recognize water quality on the basis of minimizing the presence of invasive species). Put plainly, if Chautauqua Lake was designated a "freshwater wetland," the semi-aquatic or aquatic vegetation could be harmed, due to prohibitions on proper management, rather than protected and preserved.

The proposed Part 664 regulations should expressly exclude lakes. There are several examples that make clear that features, like lakes, that are regulated elsewhere will not be considered a "freshwater wetland." *See* proposed 6 NYCRR 664.5(a)(4) (excluding features that are tidally influenced where that feature is regulated by article 25); proposed 6 NYCRR 664.5(b)(4) (excluding features that are a Great Lakes Coastal Wetland). Proposed 6 NYCRR 664.2(o), which defines "freshwater wetlands," should be amended to add "navigable waters in an inland lake shall not be considered wetlands."

Absent such an exemption, the Regulated Activity Chart contained in 6 NYCRR 663.4 would require DEC review and issuance of authorizations or full-blown permits for a host of everyday activities for myriad existing property owners. Property owners cannot build a house on land they own within 100 feet of shore, would not be able to drill a well, or mow their lawns or maintain their lakefront property absent DEC authorization. Homeowners within the 100-foot buffer area cannot use pesticides or herbicides, or build, enlarge or replace a dock or other accessory to their single-family home without DEC review and approval.

Additionally, for surface water features, including lakes, additional freshwater wetlands permitting would be required for existing dams that could alter water levels. Ditches, swales and ponds that could be necessary for individual property owners or groups to pursue to protect the environment or lake would require additional permitting beyond the existing current requirements. Finally, Chautauqua Lake is a traditionally navigable water. Should ACOE recommend dredging, the proposed Part 664 regulations would add another layer of permitting, and potentially restrict an activity necessary for the lake's functionality.

Finally, as discussed above, the Regulated Activities in 6 NYCRR 663.4 do not contemplate seasonal activity such as CLP engages in at Chautauqua Lake. If Chautauqua Lake is regulated as a wetland, then Regulated Activities would need to specify seasonal activities to confirm that permit applications aren't required each year. These various hardships, restrictions and potential outright prohibitions are also significant for CLP and its members whose use and enjoyment of the lake, including boating, could be restricted or impossible without a freshwater wetland permit authorizing management and treatment of vegetation. Boating cannot be safely navigated in areas with invasive species vegetation growing to the heights it does in Chautauqua Lake without proper management by CLP.

Specific Regulatory Provisions

One of the more significant additions to proposed Part 664 is proposed Section 664.6, Wetlands of Unusual Importance. The 2022 statutory amendments to the ECL granted DEC authority to designate wetlands of any size as "Wetlands of Unusual Importance." This substantial increase in authority will create uncertainty in development statewide as it has for CLP and its work on Chautauqua Lake. Certain factors are enumerated in this new, expansive jurisdictional authority for Wetlands of Unusual Importance, however, at least two of them give DEC unbridled discretion to unilaterally restrict development and property rights.

These factors include wetland features where "it is determined by the commissioner to be of significant importance to protecting the state's water quality," and wetlands "classified by the department as a Class I wetland." ECL 0107(9)(k), (e). 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. 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 proposed 6 NYCRR 664.6(k) which requires only 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.* This provides no meaningful guideposts or 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.

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 to a small portion of a residential backyard. 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 proposed Part 664 regulations allow "any party" to request a delineation. This is extremely concerning and could be used to derail projects or interfere with neighbors' property rights and use of their home. 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. The right to seek a jurisdictional determination should be limited to property owners, 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. Further, the grounds for appeal should be broadened, or more specificity added to the grounds set forth in proposed 6 NYCRR 664.9(e).

Although not necessarily applicable to Chautauqua Lake, unless it was determined to be a nutrient poor wetland, the proposed Part 664 regulations are unnecessarily even stricter and more likely to result in a taking by imposing substantial increases in the buffer area for nutrient poor wetlands and vernal pools. The U.S. Supreme Court has recognized that excessive deprivation of property rights, particularly for wetlands, without a corresponding environmental benefit constitutes a regulatory taking.

The proposed Part 664 regulations should include a number of other updates and revisions. For example, the definition of "pollution" (proposed 6 NYCRR 664.2(aa)) requires guidance, as it could involve myriad substances (and even conditions). The regulated community is entitled to some notice of the scope of substances that could trigger jurisdiction or require compliance in a freshwater permit. Similarly, "Potential Environmental Justice Area" is too broad of a term. It is used as a basis to classify a wetland as a Class II wetland, subjecting the property to strict regulation and likely, prohibitions on activities, and as such, should not be subject to DEC's discretion. There needs to be clearly described characteristics as to what a "potential" environmental justice area is. Absent this, arbitrary outcomes would result, and the proposed regulations fail to advise the regulated community of whether or not their property is subject to listing on the basis of being located near a "Potential Environmental Justice Community."

The proposed Part 664 regulations use the term "wetland plant community" in a number of places. This term should be defined. Further, any information submitted to DEC per the statute from agencies and natural resource groups should be vetted for scientific integrity. Property rights shouldn't be impacted based on inadequate data. In the discussion of vernal pools in proposed 6 NYCRR 664.6(g), letters or numbers should be added to provide clarity and ease of use for these provisions.

Comments on SAPA Documents

The Regulatory Impact Statement ("RIS") claims that there are no "direct" costs from the regulation. This 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. 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.

It is noted that proposed Part 664 contemplates DEC offering delineations to minimize cost. However, the backlog would be expected to be unpredictable at best, and substantial and a road block to any development at worst. In general, DEC's capacity to oversee, administer and enforce this program is doubtful, given existing workload and the freshwater wetland program's

new, massive scope. This will be to the detriment of every existing property owner who would now need to comply with proposed Part 664 and for future activities that trigger proposed Part 664. Given the potential enforcement consequences if the delineation isn't 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. If jurisdiction were found, those individuals then have to expend funds for an appeal and/or for a permit. Those costs would likely be significant, if not exorbitant, and should be evaluated in the RIS.

Further, the benefits of wetlands needs to be more carefully described, as even the most beneficial qualities of wetlands have their limits. A wetland, for example, can lose vegetation or be lost if too many toxins are introduced to it. More significantly, the costs and any purported benefits resulting from turning a lake into a regulated wetland should be described in the RIS. The potential impacts and significant costs that would result are described throughout this letter, and many of the benefits provided by wetland protection would not be realized by designating a lake a wetland. A lake has so many significant differences from a wetland that trying to reglate a lake as a wetland would be like trying to fit a square peg into a round hole.

Finally, we note that a proposed regulatory change of this magnitude should be subject of meaningful comment and meaningful DEC review. This process should not be curtailed because of the timing of publishing the proposed Part 664 regulations and the upcoming statutory deadline. We encourage DEC to take the time needed to review comments and make necessary, meaningful revisions. Should an extended public comment period be warranted, or an amended rulemaking, this must occur to ensure fairness, due process, and compliance with the State Administrative Procedure Act.

Should DEC wish to discuss any of these comments further CLP would be happy to have a meeting or provide further information.

Very truly yours,

Alita J. Giuda, Esq.
Partner

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