

STATE OF NEW YORK



**ANDREW W. GOODELL**  
ASSEMBLYMAN, 150<sup>TH</sup> DISTRICT  
MINORITY LEADER PRO TEMPORE

**GEORGE M. BORRELLO**  
SENATOR, 57<sup>TH</sup> DISTRICT  
RANKING MEMBER OF  
BUDGET AND REVENUE

September 9, 2024

Sean Mahar, Interim Commissioner  
New York Department of Environmental Conservation  
625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-4756

Re: Wetland Part 664 Comments

Dear Commissioner Mahar:

Thank you for your letter dated September 3, 2024, responding to our letter of June 18, 2024, regarding the nature and scope of the proposed DEC wetland regulations.

We appreciate your on-going efforts to solicit input from interested parties and your desire to develop a "simplified path for the residents of Chautauqua Lake and other shallow lakes ... to comply with Article 24." At the same time, however, we believe that it is important that the revised regulations do not exceed the statutory language or intent of the Environmental Conservation Law (ECL).

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

We acknowledge that prior DEC maps designated as wetlands small portions of the Chautauqua Lake shoreline to the east of Prendergast Point, south of Tom's Point, and north of Loomis Bay. We do not object to the continuation of those relatively small previously-designated wetlands. We strongly object, however, to the suggestion that "much of the South Basin and others bays and shoals with more than 12.4 contiguous acres of submerged vegetation have been functioning as wetlands for decades." The DEC has had an extensive presence on Chautauqua Lake, operates a fish hatchery and other facilities, and has been reviewing and approving numerous permits for decades. There is no reason to believe that the DEC simply overlooked these extensive alleged wetlands for 50-60 years!

While we also appreciate your reference to "areas of submerged vegetation that meet the statutory size threshold of 12.4 acres....," our concern is that the proposed regulations change the definition of a class 1 wetland, **which can be regulated regardless of size**, to include any wetland that is "**contiguous** to fresh surface waters having classifications of A, AA ...." Chautauqua Lake, Cassadaga

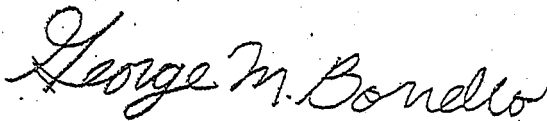
Lake, Findley Lake, Lake Erie, and Bear Lake are all class A lakes, which means that the new regulations would extend DEC jurisdiction over affected areas of submerged vegetation *regardless of size*.

To avoid that situation (and consistent with your letter and long-standing prior regulations), the DEC should continue the current definition of a class A wetland as those "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).

This distinction is especially important because the proposed regulations appear to automatically extend the DEC's authority to include a 100 foot buffer area around every wetland, even though the statutory language that authorizes a buffer area expressly restricts such a buffer area to specified activities within 100 feet that "*impinge upon or otherwise substantially affect* the wetlands." ECL 24-0701(2). To avoid ambiguity, 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."

It is essential that the proposed wetland regulations reflect the legislative intent behind the new statutory language, as well as a proper balance between environmental protection and the legitimate concerns of affected landowners. To that end, please ensure that the proposed amendments reflect our comments and concerns.

Sincerely yours,



George M. Borrello  
Senator, 57<sup>th</sup> District



Andrew W. Goodell  
Assemblyman, 150<sup>th</sup> District

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