

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

CHAUTAUQUA LAKE PROPERTY OWNERS
ASSOCIATION, INC.; et al.,

Petitioners-Plaintiffs,

**AFFIDAVIT OF ROY
JACOBSON**

-against-

Index No. 903982-25

THE STATE OF NEW YORK, et al.,

Respondents-Defendants.

In the Matter of the Application of

BUSINESS COUNCIL OF NEW YORK STATE, INC.,
et al.,

Petitioners-Plaintiffs,

Index No. 904423-25

-against-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, et al.,

Respondents-Defendants.

In the Matter of the Application of

VILLAGE OF KIRYAS JOEL, et al.,

Petitioners-Plaintiffs,

Index No. 904424-25

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, et al.,

Respondents-Defendants.

CHAUTAUQUA LAKE PARTNERSHIP, INC., et al.,

Petitioners-Plaintiffs,

-against-

Index No. 905313-25

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION, et al.,

Respondents-Defendants.

I. **FRESHWATER WETLANDS HISTORICALLY REGULATED IN NEW YORK STATE**

4. Freshwater wetlands are an ecological transition between dry land and deep water and they are characterized by certain hydrology, soils, and vegetation. Wetlands provide many benefits, including water storage to minimize flooding; wildlife habitat; protection of subsurface water resources, including groundwater aquifers; recreation; pollution treatment through the wetlands' ability to filter sediment and chemical pollutants; erosion control; education and scientific benefits by providing outdoor laboratories and classrooms; open space and aesthetic appreciation; sources of nutrients in freshwater food cycles and nursery grounds for freshwater organisms such as fish; habitat for rare plants; and preservation of rare plant and animal communities.

5. In response to concerns that thousands of acres of freshwater wetlands had been lost to unregulated draining, dredging, filling, excavating, building, and other harmful activities, the Legislature enacted the Freshwater Wetlands Act (Environmental Conservation Law [ECL] article 24) (the Act) in 1975. The Legislature also recognized that recurrent flooding aggravated or caused by the loss of freshwater wetlands has a serious negative effect on ecosystems and communities. In addition, there was a growing scientific awareness that a wetland in one region may be affected by activities on rivers, streams and wetlands located in other regions throughout the State (ECL 24-0105).

6. The Act provides DEC the authority to regulate the use and development of wetlands and wetland adjacent areas; the Act also requires a permit from DEC for certain activities in or around a regulated wetland. While hydrology, soils, and vegetation are important for determining and categorizing the various types of wetlands on the landscape, the Act focuses on the presence of wetland vegetation and outlines eight different types of wetland vegetation. Wetland vegetation is adapted to wet conditions that can persist for as little as two weeks in some forested wetlands to permanent inundation in submergent wetlands.

7. As originally enacted, the Act provided for the regulation of wetlands only if they were at least 12.4 acres in size or deemed of “unusual local importance” (ECL 24-0301[1], valid until January 1, 2025). As relevant here, the Act originally tasked the DEC Commissioner with classifying all regulated wetlands based on four values listed in ECL 24-0105: flood protection, wildlife habitat, open space, and water resources as well as the present condition of the wetlands. The 2022 amendments of the Act added an additional value, namely climate change mitigation through the accumulation and storage of large amounts of carbon.

Prior to 2025, DEC was Required to Identify Freshwater Wetlands throughout New York State and Promulgate Official Maps

8. Until January of this year, the Act directed DEC to study and inventory freshwater wetlands across the State (former ECL 24-0301). DEC developed tentative wetland maps illustrating the boundaries, as far as practicable, to inform the public and DEC of their approximate location (*see id.*), as certain

activities within a regulated wetland and its adjacent area require a permit (ECL 24-0701).

9. The former part 664 described the methods for classifying each wetland regulated under the Act and provided procedures for amending maps. This classification of individual wetlands would then be used by DEC staff when making permitting decisions under regulations governing wetlands permits once freshwater wetland maps were finalized. A full discussion of the mapping process under the original Act and the former regulations at 6 NYCRR part 664 is found in the affidavit of Matthew Walter.

II. 2022 AMENDMENTS TO THE FRESHWATER WETLANDS ACT

10. Amendments to the Act in 2022 (1) removed the mapping requirement effective January 2025, (2) established a new process for identifying DEC's jurisdiction under the Act, (3) redefined "freshwater wetland" to include wetlands of "unusual importance," and (4) effective in 2028, lowered the 12.4-acre threshold to 7.4 acres.

11. The most significant change to the Act is that it no longer requires DEC to promulgate maps depicting the approximate location of regulated wetlands. Instead, the Act created "a rebuttable presumption that mapped and unmapped areas meeting the definition of a freshwater wetland in this article are regulated and subject to permit requirements" (ECL 24-0301[4]). Notably, aside from the size threshold and some minor technical changes, the defining characteristics of "freshwater wetland" have not changed since the Act was enacted in 1975.

Additionally, the Act directs the Commissioner to maintain non-regulatory maps on DEC's website depicting the approximate location of wetlands. Property owners are free to use these informational maps when planning to develop, purchase, or sell a parcel.

12. The Act also now provides for a jurisdictional determination process to determine if a parcel of land includes regulated freshwater wetlands and/or a regulated adjacent area at no cost. The Act requires DEC to provide a definitive answer in writing within 90 days and ensures that a negative jurisdictional determination is a complete defense to regulation for five years.

13. The amended Act requires DEC to regulate wetlands 12.4 acres or greater (7.4 acres in 2028), but it also requires DEC to regulate a wetland, regardless of size, if it meets at least one of 11 new "unusual importance" criteria. (ECL 24-0107[9]). The 11 criteria are:

a. Watersheds with Significant Flooding – The Act protects a wetland of any size if it is "located in a watershed that has experienced significant flooding in the past or is expected to experience significant flooding in the future from severe storm events related to climate change" (ECL 24-0107[9][a]). Wetlands present a natural countermeasure that can reduce the adverse impact of increased and more severe storm events. While all wetlands can help to reduce flooding intensity, wetlands in watersheds with little water storage, large areas of impervious surface, and located close

to human infrastructure play a particularly significant role in reducing flooding impacts.

b. Urban Areas – The Act provides that a wetland shall be regulated if “it is located within or adjacent to an urban area, as defined by the United State census bureau” (ECL 24-0107[9][b]). Urban wetlands can be both scarce and accessible to many people. Such undeveloped open space provides important benefits to New Yorkers who may not have much contact with the natural world. Finally, urban wetlands provide some of the last remaining habitat for a vast array of wildlife including birds, reptiles, amphibians, and invertebrates such as bees and other insects.

c. Rare Plant Species – A wetland that “contains a plant species occurring in fewer than thirty-five sites statewide or having fewer than five thousand individuals statewide” is also regulated regardless of size (ECL 24-0107[9][c]). Preserving biological diversity is important for maintaining ecological services and function. Approximately 180 wetland plants are considered critically imperiled in New York State and their loss would have disproportionate impacts on biodiversity. Where specific wetlands support rare plant species, destruction of those wetlands may permanently threaten extinction of that species.

d. Rare Animal Species – For these same reasons, if a wetland “contains habitat for an essential behavior of an endangered or threatened species of special concern as defined under section 11-0535 [of the ECL] or

listed as a species of greatest conservation need in New York’s wildlife action plan,” it will be regulated (ECL 24-0107[9][d]).

e. Class I Wetlands – Class I wetlands, as defined in 6 NYCRR 664.5(a), shall be regulated regardless of size (ECL 24-0107[9][e]). These wetlands provide the most critical of the State’s wetland benefits, which are not limited to wetlands greater than 12.4 acres or 7.4 acres.

f. Unusual Local Importance Wetlands – Before January 1, 2025, DEC regulated smaller wetlands of “Unusual Local Importance” because they provided disproportional benefits compared to their size. The amended Act assures that these wetlands remain regulated under the new regulatory regime (ECL 24-0107[9][f]).

g. Vernal Pools Productive for Amphibian Breeding – A wetland shall be regulated regardless of size if “it is a vernal pool that is known to be productive for amphibian breeding” (ECL 24-0107[9][g]). Vernal pools are small, isolated wetlands that provide essential habitat for breeding, feeding, and the development of young for many species of amphibians and reptiles. Because of their small size and isolation, they generally receive limited protection under either federal or state regulatory regimes, which has made them vulnerable to destruction.

h. Located in a FEMA-designated Floodway (ECL 24-0107[9][h]). Floodways are located along rivers or other watercourses and maintain the natural conveyance capacity or flow of the river corridor. Wetlands located in

floodways provide disproportionate flood control benefits regardless of size and are critical for maintaining flood resiliency in a changing climate.

i. Previously Mapped by DEC – This statutory provision assures that previously regulated wetlands remain regulated under the new regulatory regime (ECL 24-0107[9][i]).

j. Local or Regional Significance (ECL 24-0107[9][j]) – The Act places special protection on wetlands that have “functions and values that are of local or regional significance” (ECL 24-0107[9][j]).

k. Significant for Protecting State’s Water Quality (ECL 24-0107[9][k]) – where the Commissioner determines a wetland is significantly important to protecting the state’s water quality, allowing the Commissioner to respond to an as-yet unrecognized or unforeseen threat to water quality (ECL 24-01079[9][k]).

III. DEC AMENDS 6 NYCRR PART 664 TO IMPLEMENT 2022 AMENDMENTS TO THE ACT

14. In response to the Act’s 2022 amendments, DEC immediately developed and implemented a multi-phased plan to inform stakeholders of the landmark changes to the Act, conducted general and targeted outreach, and collected feedback on informal proposals. DEC used this feedback to repeal and replace the former 6 NYCRR part 664.

15. DEC’s outreach involved multiple in-person and remote meetings and webinars with more than 30 stakeholder groups representing development

interests, agriculture, environmental advocacy, energy generation and transmission, environmental consultants, municipalities, land trusts, and state agencies. Several petitioners in this matter participated in early outreach, including the Business Council of New York State (Business Council), Chautauqua Lake Partnership, and Chautauqua Lake Property Owners Association. The purpose of these meetings was to both inform stakeholders of the changes to the law and gather initial feedback as to how DEC should develop updated regulations.

16. Based on these meetings, DEC decided to release a written draft of regulatory text to which stakeholders could respond and give informal feedback, prior to beginning the formal rule making process.

Advanced Notice of Proposed Rule Making and Development of Pre-proposal Regulatory Text

17. Based on the initial feedback from stakeholders, DEC recognized that several aspects of the new statutory regime were confusing. The advanced notice of proposed rule making (advanced notice) sought specific feedback on how best to clarify several provisions of the Act. These included the 11 new unusual importance criteria, the extent to which DEC would extend the “adjacent area” now that its jurisdiction was not limited to mapped wetlands, a new jurisdictional determination procedure, and a process for property owners to appeal positive jurisdictional determinations from DEC.

18. On January 3, 2024, DEC published the advanced notice in the State Register and DEC's Environmental Notice Bulletin, its official online notice bulletin.

19. The advanced notice included an introduction, outlined the fundamental changes to the Act passed in 2022, and described the purpose of the advanced notice. It also included draft regulatory language and asked for specific feedback on aspects of wetlands of unusual importance, extending adjacent areas, and jurisdictional determinations. DEC also held more than a dozen webinars attended by more than 1,300 participants.

20. In response, DEC received and carefully reviewed 2,600 written responses, the vast majority of which were generally supportive of the pre-proposal draft text. However, many responses expressed concerns regarding potential regulatory delay during the jurisdictional determination process, confusion over the new unusual importance criteria, the extension of the regulated wetland adjacent area, and new jurisdictional determination and appeals procedures. DEC used this critical feedback to address these concerns in the formal notice of proposed rule making and through other regulatory tools outside the scope of the rule making, like the development of standard operating procedures for wetland mapping and several proposed general permits.

Notice of Proposed Rule Making

21. DEC filed a notice of proposed rule making (proposed rule) with the Department of State for publication in the State Register on July 10, 2024. As

required by the State Administrative Procedure Act (SAPA), DEC developed and made available for public comment a complete proposed regulatory impact statement, rural area flexibility analysis, regulatory flexibility analysis, job impact statement, and proposed regulatory text to repeal and replace 6 NYCRR part 664. The public comment period was open for 71 days, during which DEC held three public hearings.

22. DEC received 4,908 timely public comments, more than half of which were form letters (standardized duplicates from various stakeholder groups and non-governmental organizations).

23. Petitioners allege (Chautauqua Lake Partnership Pet. ¶¶ 119-121, 145) that DEC failed to complete a sufficient review of comments and did not incorporate those comments into text changes and a final regulatory impact statement. This is incorrect.

24. Following the close of the public comment period, DEC reviewed the public comments, including the public hearing transcripts, to determine whether further revisions needed to be made and to begin developing an assessment of public comments.

25. DEC decided to further clarify the proposed rule and regulatory impact statement, adding clearer definitions, a more precise description of the jurisdictional determination process and the extension of regulated adjacent areas, and a clearer description of how DEC would identify endangered species habitat.

DEC determined that these additions were not substantial enough to warrant an additional notice and comment period.

26. Some comments expressed some confusion surrounding the jurisdictional determination process, specifically the difference between parcel and project jurisdictional determinations. In response, DEC provided specific definitions for parcel and project jurisdictional determinations and provided edits to the then-proposed rule to ensure that those terms were consistently defined.

27. Many comments also objected to the blanket 300- and 800-foot regulated adjacent areas proposed to be applied to nutrient-poor wetlands and vernal pools, respectively. DEC proposed the extension of the adjacent area beyond 100 feet to protect and preserve these particularly sensitive wetland types. Nutrient poor wetlands are highly sensitive to nutrient inputs associated with human development; research has shown that development within 300 feet can drastically change the plant community and functioning of these wetlands. Vernal pools require larger adjacent areas to assure the long-term viability of amphibian breeding that is predicated on having sufficient undisturbed upland areas surrounding the vernal pools. Research, which is cited on page 24 of the revised regulatory impact statement, has shown that the median core habitat required for amphibians breeding in vernal pools can extend approximately 800 feet from the vernal pool. Numerous public comments, including one from petitioner Business Council, advocated for a site-specific determination to extend the adjacent area, rather than a blanket provision. In consideration of these comments, DEC replaced

the blanket adjacent area extension with a requirement that DEC conduct an individual analysis of environmental conditions of each nutrient poor wetland or productive vernal pool before extending the adjacent area beyond 100 feet.

28. Each of these changes was noted and discussed in DEC's revised regulatory impact statement.

29. As described in DEC's assessment of public comment, some comments suggested changes to the proposed rule that were outside the scope of DEC's statutory authority under the Act, would have conflicted with express provisions of the Act, or would have posed significant implementation challenges to DEC that risked undermining its obligations under the Act. The most common of these suggestions included delaying implementation of the regulations for two to five years; narrowing the scope of, or completely eliminating, the urban area unusual importance criterion; and continuing to promulgate jurisdictional wetland maps. DEC considered and rejected each of these suggestions because they are beyond the scope of DEC's authority under the amended Act, or would conflict with the Act's January 1, 2025, effective date.

30. Other comments requested that DEC waive its statutory obligation to protect areas containing submerged aquatic vegetation and to exclude such areas if they are located in freshwater lakes. Many comments sought this waiver for Chautauqua Lake specifically.

31. DEC determined that such a waiver would be outside the scope of its authority under ECL 24-0107(1), which has always defined freshwater wetlands to

include submerged lands supporting aquatic and semi-aquatic vegetation, and which was unchanged by the 2022 amendments to the Act. Indeed, many of these areas were previously mapped as wetlands prior to 2025, including portions of Chautauqua Lake. DEC acknowledges that more areas, specifically unmapped areas, containing submerged aquatic vegetation that also meet the acreage threshold or unusual importance criteria will now be subject to protection under the Act. However, this is not a result of the regulatory amendments but rather the removal of the mapping requirement from the Act because, as DEC has long known, the former mapping procedures did not adequately account for areas with submerged aquatic vegetation. Likewise, other unmapped wetland areas, which are not in or around freshwater lakes, will also be regulated if they meet the acreage threshold or any of the unusual importance criteria.

32. On December 20, 2024, DEC filed the final rule making package (final rule) with the Department of State including the revised text, a summary of the revised text, a certificate of adoption, a summary of the revised regulatory impact statement, an assessment of public comment, the Department's Environmental Assessment Form including the negative declaration under the State Environmental Quality Review Act (SEQRA), as well as a statement indicating why the non-substantive changes to the final rule did not necessitate changes to, and resubmission of, the regulatory flexibility analysis, rural area flexibility analysis, or the job impact statement.

33. The final rule was published in the State Register on December 31, 2024. DEC made available on its website the full versions of the rule making documents that same day.

**DEC Considered Impacts and Costs Associated with the Final Rule
Consistent with SAPA**

34. Contrary to petitioners' allegations (Business Council Pet. ¶¶ 93, 100, 156-165; Kiryas Joel Pet. ¶¶ 142-151; Chautauqua Lake Property Owners Assn. Pet. ¶¶ 89-95; Chautauqua Lake Partnership Pet. ¶¶ 103-118, 141-144), DEC considered the final rule's costs to local governments and the regulated community. These costs included, for example, potential expenditures by local governments to develop written guidance documents related to the final rule, which are not required by the regulations. DEC considered these too speculative and indirect to meaningfully quantify across the State. Nevertheless, DEC acknowledged in the revised regulatory impact statement that the final rule may pose additional costs to the regulated community and local governments should they seek to conduct development activity within a regulated freshwater wetland. DEC specifically considered, and noted in the regulatory impact statement, that such costs could include hiring a consultant for more complex projects. These costs are typically associated with navigating the permitting process and have not changed as a result of the final rule. Of course, the volume of regulated wetlands across the State has increased and the number of wetlands permits that could be required is expected to likewise increase. However, quantifying these potential costs in a specific or

meaningful way would have required DEC to speculate as to the development plans across the State.

35. DEC itself will incur minimal costs from the new regulations. When the Legislature amended the Freshwater Wetlands Act in 2022, it also provided the funds to hire additional staff to conduct jurisdictional determinations, and such staff were hired prior to DEC's promulgation of these new rules. Those staff have transitioned from assisting with the rule making process to now carrying out jurisdictional determinations. DEC does not anticipate additional costs to implement the new part 664 regulations.

36. Other costs raised by petitioners are simply nonexistent or have not changed as a result of the final rule. For example, petitioners allege that DEC failed to consider the costs to the regulated community associated with seeking a jurisdictional determination (*see, e.g.*, Business Council Pet. ¶ 160). But jurisdictional determinations, as well as delineations conducted by DEC, are provided to the public at no cost. DEC acknowledged the fees associated with obtaining a freshwater wetlands permit on page 19 of the revised regulatory impact statement. Permit fees were previously established in statute, not the final rule, and are well within the typical costs of land development projects (*see* ECL 70-0117[8][a][ii]).

37. DEC also addressed reporting and paperwork requirements in its revised regulatory impact statement on page 22, section 6.

38. As the revised regulatory impact statement explains, DEC did not consider a no-action alternative to this rule making because the previous version of part 664 was significantly inconsistent with the 2022 amendments to the Act and operated within the framework of jurisdictional maps. During its review of the public comments and other feedback, DEC considered specific alternative provisions to those in the proposed rule. DEC discussed these many alternatives and why they were or were not ultimately incorporated into the final rule in its assessment of public comment.

39. DEC had also not considered adding a “cure period” because part 664 does not amend any violation or penalty provisions as described in section 202-b of SAPA. Regardless, DEC *did* include in the final rule a transition provision that allows certain projects in review or development during and after the rule making to proceed without considering expanded jurisdiction after January 1, 2025 (*see* 6 NYCRR 664.1[d]).

DEC Complied with the State Environmental Quality Review Act (SEQRA)

40. DEC analyzed the final rule’s potential adverse environmental impacts and determined that it is not expected to have any potentially significant adverse impacts.

41. DEC classified the rule making as unlisted because it did not fall within any of the Type I or Type II listed actions in 6 NYCRR part 617.4.

42. DEC did not classify the final rule as a “comprehensive resource management plan” under 6 NYCRR 617.4(b)(1) because the final rule is not a

comprehensive resource management plan as that expression is understood in the statewide regulations that implement SEQRA and is narrowly designed to guide DEC's implementation of the Act with respect to identifying jurisdiction and classifying regulated wetlands and does not itself prohibit any land uses or prescribe standards for permit issuance. Those components of the freshwater wetland program are contained in 6 NYCRR part 663, which was not amended as part of the final rule. Simply put, the final rule is not a comprehensive resource management plan, despite petitioners' insistence to the contrary (Business Council Mem of L at 11; Kiryas Joel Mem of L at 11).

43. DEC completed the Short Environmental Assessment Form (or Short EAF) to evaluate whether the final rule would have any significant adverse impacts on the environment.

44. After analyzing 11 separate potential impacts, DEC determined that the final rule would have no potentially significant impact on land use plans or zoning regulations, because DEC may consider such plans and regulations when reviewing individual, site-specific wetland permit applications and applying the standards in 6 NYCRR part 663.

45. Likewise, DEC determined that adoption of the final rule is expected to potentially have only a small adverse impact on the intensity of the use of land and will not necessarily result in a change in existing use. Of course, more future proposed activities may require a freshwater wetlands permit, but regulated activities and land uses, which are listed in 6 NYCRR part 663, have not changed.

46. DEC also considered whether the final rule would impair the character or quality of existing communities and determined that no impact could be expected because the final rule is narrowly designed to guide the DEC's identification of regulated freshwater wetlands.

47. Adverse impacts on environmental characteristics that caused the establishment of critical environmental areas are not anticipated. In fact, wetlands identified by local governments in their critical environmental area designations are protected because they are considered wetlands of unusual importance under the final rule.

48. DEC also determined that the final rule will likely not adversely impact existing levels of traffic or existing public infrastructure because such infrastructure would be pre-existing or exempt. In any event, the nature of a proposed project, including the need for public infrastructure is taken into consideration by DEC pursuant to the permit issuance standards in 6 NYCRR part 663.

49. DEC also determined that adoption of the final rule is not expected to impair the quality or character of important historic, archeological, architectural or aesthetic resources because the final rule does not impose any physical impacts on these resources. Additionally, the nature of these resources, where applicable, would be taken into consideration during review of an individual freshwater wetlands permit application.

50. Finally, DEC found that the final rule would not have an adverse impact to natural resources, cause further erosion or flooding, or create any hazard to environmental resources or human health and would, in fact, have a positive impact on all of those things. As previously discussed, wetlands provide essential ecological functions, help communities reduce flood risk, and provide water quality benefits which are essential for human health.

IV. CURRENT IMPLEMENTATION OF THE FINAL RULE AND THE DEVELOPMENT OF GENERAL PERMITS

Wetlands of Unusual Importance

51. As discussed above, the Act now also requires DEC to regulate wetlands less than 12.4 acres if they meet any of the 11 new unusual importance Criteria (ECL 24-0107[9]), which DEC clarified in response to public comment.

52. For example, based on specific public feedback and best available science, DEC developed regulatory criteria that identified watersheds with significant flooding using three reliable measures of flooding risk: 1) water runoff from impervious surfaces, 2) water storage capacity, and 3) proximity to human development and infrastructure (6 NYCRR 664.6[a]). The regulations established that wetlands of unusual importance for these criteria are located in watersheds within four kilometers (~2.5 miles) of urban areas that have 2% or greater of their area covered by impervious surface and less than 5% of their area in lakes, ponds, reservoirs, and wetlands. DEC established the four-kilometer proximity metric based on a modeling study conducted by the U.S. Environmental Protection Agency.

53. Regarding wetlands in urban areas, as protected in ECL 24-0107(9)(b), DEC provided a clarifying definition of “adjacent to an urban area” limiting jurisdiction to wetlands at least partially within an urban area and excluding wetlands located near, but not in, an urban area. DEC also specifically incorporated by reference the U.S. Census Bureau’s 2020 census report to identify Urban Areas (6 NYCRR 664.6[b]).

54. DEC also developed a process by which to identify regulated vernal pools, which are protected in ECL 24-0107(9)(g), after evaluating approaches by other Northeastern states and conducting a survey of relevant scientific literature, which I can provide to the Court upon request. The regulations use minimum egg mass counts of specific species documented in vernal pools or vernal pool complexes as criteria for determining productive amphibian breeding habitat for common and rare species. The regulations establish minimum egg mass counts that vary according to five unique geographic regions across the State to account for variability in amphibian productivity. Counting egg masses is a proven approach that has been used in other Northeastern states. The egg mass thresholds were based on a study of vernal pools conducted by New York Natural Heritage Program, which indicated vernal pools meeting these thresholds were, in fact, productive for amphibian breeding. To provide a consistent and transparent process for making jurisdictional determinations regarding vernal pools, the regulations require DEC to maintain an informational list of known vernal pools meeting regulatory criteria

and to publish updates to that list on the Environmental Notice Bulletin. (6 NYCRR 664.6[g].)

55. For wetlands of local or regional significance, as protected in ECL 24-0107(9)(j), the regulations clarify that for wetlands spanning the boundary of the Adirondack Park and thus partially under the Adirondack Park Agency's jurisdiction, those portions falling outside the Adirondack Park will be regulated as wetlands of unusual importance to ensure those wetlands receive appropriate protection in their entirety. Additionally, wetlands that local governments identify as critical environmental areas under 6 NYCRR part 617 will be regulated as wetlands of unusual importance (6 NYCRR 664.6[j].)

56. Finally, the regulations provide a process for the Commissioner to designate a wetland they deem important to protecting the State's water quality, as protected in ECL 24-0107(9)(k). The Commissioner's determination must be made in writing, must contain the reasons for the designation, and must be posted on DEC's website (6 NYCRR 664.6[k].)

Wetland Classification System

57. During DEC's outreach it became clear that the freshwater wetland classification criteria in the prior version of 6 NYCRR part 664 needed to be amended and simplified to account for advancements in wetland science during the 44 years since original promulgation and to allow for remote identification when conducting jurisdictional determinations under the new system. In addition, new

classification criteria had to be developed to account for the new statutory unusual importance criteria.

58. The original wetland classification system in the previous part 664 included 42 characteristics, many of which required field confirmations. The new, simpler classification system reduced those characteristics to 34, all of which are remotely identifiable so DEC could efficiently classify a wetland when it makes a jurisdictional determination.

Jurisdictional Determination Procedure and Consultation and Review of Positive Jurisdictional Determinations

59. The regulations distinguish between two types of jurisdictional determinations that DEC will provide upon request and at no cost: a parcel jurisdictional determination and a project jurisdictional determination.

60. Parcel jurisdictional determinations are available to any person, as required by ECL 24-0703(5), so that a landowner, developer, or interested purchaser may be informed of DEC's jurisdiction. Parcel jurisdictional determinations indicate whether a given parcel of land includes freshwater wetlands or regulated adjacent areas subject to State regulation; they also indicate wetland classification. A determination that no regulated wetlands are present is valid for five years.

61. A project jurisdictional determination assesses whether a proposed activity requires a permit because it is within a parcel containing either jurisdictional freshwater wetlands or regulated adjacent areas, using site-specific

project plans and a wetland delineation, conducted either by DEC or by a qualified third party.

62. Pursuant to ECL 24-0703(5), DEC has 90 days to provide an answer to a request for a jurisdictional determination. The challenged regulations allow a requestor to submit a 10-day notice letter to DEC via certified mail after the 90-day deadline has passed. Should DEC fail to make a jurisdictional determination within those 10 days, freshwater wetland jurisdiction for the subject parcel is waived for five years. (6 NYCRR 664.8[g].)

63. Because DEC conducts jurisdictional determinations remotely, DEC included an appeal process clarifying that only landowners who have received a positive jurisdiction may request an appeal with DEC (6 NYCRR 664.9[a]).

64. A landowner must first schedule an initial consultation, preferably on-site, as an initial opportunity to seek further clarity regarding the process and criteria DEC applied when making the positive jurisdictional determination (6 NYCRR 664.9[b]). This consultation also allows DEC's regional staff to note any clear discrepancies between the positive jurisdictional determination and what they are able to observe at the site, potentially resulting in an amended or rescinded jurisdictional determination without additional steps needing to be taken by a property owner. Because a landowner can seek such consultation at any time after issuance of a positive jurisdictional determination, both landowners at the time of the jurisdictional determination is issued and any successive landowner have an opportunity to appeal a positive jurisdictional determination, unlike the previous

regulatory scheme, which only afforded an appeal opportunity to property owners at the time of mapping.

65. If a landowner wishes to continue with an appeal, they must submit a complete appeal application as explained by 6 NYCRR 664.9(c). DEC must issue a decision in writing within 60 days of receiving that application, though that period may be extended by 30 days if an additional site visit is necessary (6 NYCRR 664.9[d]).

Permit Issuance Standards, Regulated Activities, and Activities Exempt from Regulation Have Not Changed

66. The final rule did not change the standards for issuing permits and the lists of activities that are either regulated or exempt from regulation contained in 6 NYCRR part 663.

67. Merely being regulated under the Act does not mean projects cannot be permitted under 6 NYCRR part 663 and many activities in wetlands or wetland adjacent areas are specifically exempt from the permit requirement under 6 NYCRR 663.4. The final rule primarily provides criteria and procedures for determining which wetlands are regulated under the Act and how those wetlands are classified. The final rule does not cover the permitting process beyond providing a classification for use under the freshwater wetland permit issuance standards in 6 NYCRR part 663. As mentioned above, no changes to part 663 have occurred since the regulations were promulgated by DEC in the 1980s.

68. Once jurisdiction is established, regulated activities located in wetlands and adjacent areas require permits. In fact, over the previous decade, DEC received an average of about 1,500 freshwater wetland permit applications each year and almost all of those permit applications have eventually resulted in an issued permit.

69. But not all activities within a jurisdictional wetland or its adjacent area are regulated. 6 NYCRR 663.4(d) describes all exempt activities, including ordinary external or internal maintenance and repair of existing functional structures or improved areas, establishing certain walking trails, mowing existing lawns, maintaining flower beds and gardens, installing and removing seasonal docks, resurfacing paved areas, and many others as found in the full regulatory provisions at 6 NYCRR 663.4(d).

Implementing the Final Rule and Looking Ahead

70. During the rule making process, DEC recognized that because the Act intentionally expanded DEC's jurisdiction, the final rule would likely result in a greater number of permit applications for certain categories of activities.

71. Two weeks after the final rule went into effect, DEC released its standard operating procedures for remote jurisdictional determinations and classification of freshwater wetlands under the new part 664, which will guide both DEC staff and the public in making jurisdictional determinations. This is more thoroughly discussed in the affidavit of Matthew Walter at ¶¶ 29-34.

72. Additionally, under the Uniform Procedures Act and ECL article 24, DEC released eight draft general permits designed to provide a streamlined permitting process for certain activities. The general permits will allow certain activities that generally meet permit issuance standards and could appropriately be authorized without needing either individual public notice or DEC staff consideration.

73. On June 13, 2025, DEC issued the Basic Freshwater Wetlands General Permit (GP-0-25-003), authorizing 10 activities that commonly occur in regulated wetlands and 100-foot adjacent areas (<https://dec.ny.gov/sites/default/files/2025-06/basicfwgp025003final.pdf>). Construction and modification of many residential, commercial, industrial, and public structures are covered under GP-0-25-003 including in-kind replacement of existing function structures and facilities, construction of driveways and parking areas, construction of home additions, and construction of accessory structures such as sheds, decks, and fire pits. DEC developed the list of activities within GP-0-25-003, in part, from outreach conducted with Chautauqua Lake stakeholders that occurred during October 2024.

74. On June 13, 2025, DEC modified and reissued two logging general permits (GP-0-23-004 and GP-0-23-005) that authorize activities in wetlands when crossing streams for the purposes of timber harvesting (<https://dec.ny.gov/sites/default/files/2025-06/timbergp023004.pdf>) (<https://dec.ny.gov/sites/default/files/2025-06/timbergp023005.pdf>).

75. On July 15, 2025, DEC issued the Solar Photovoltaic Projects (Less than 25 MW) General Permit (GP-0-25-004), authorizing activities within regulated wetlands and 100-foot adjacent areas associated with the construction of solar facilities with a generating capacity of no more than 25 MW (<https://dec.ny.gov/regulatory/permits-licenses/general-permits>). The general permit authorizes five activities: construction of temporary and permanent access roads; construction of power interconnections and collection lines; construction of solar photovoltaic infrastructure on existing paved areas, concrete pads, parking lots, and other structures; vegetation clearing, ground disturbance, and installation activities, and freshwater wetland mitigation activities.

76. DEC released six additional proposed general permits for public comment that included the following:

- a. Housing Development Freshwater Wetlands (GP-0-25-006)
(<https://dec.ny.gov/sites/default/files/2025-02/draftgp025006housingdvlpmnt.pdf>)
- b. Lake Shorelines Freshwater Wetlands General Permit (GP-0-25-007)
(<https://dec.ny.gov/sites/default/files/2025-02/draftgp025007lakeshorelines.pdf>)
- c. Management of Invasive Species (GP-0-25-008)
(<https://dec.ny.gov/sites/default/files/2025-02/draftgp025008mngmntinvspecies.pdf>)

d. Natural Gas Utility Right of Way Maintenance and Repair (GP-0-25-009) ([https://dec.ny.gov/sites/default/files/2025-](https://dec.ny.gov/sites/default/files/2025-02/draftgp025009naturalgasrow.pdf)

02/draftgp025009naturalgasrow.pdf)

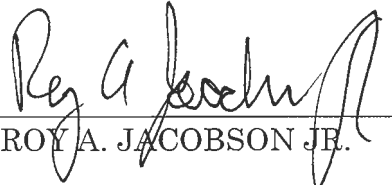
e. Electric Utility Right of Way Maintenance and Repair (GP-0-25-005) ([https://dec.ny.gov/sites/default/files/2025-](https://dec.ny.gov/sites/default/files/2025-02/draftgp025005electricutilityrow.pdf)

02/draftgp025005electricutilityrow.pdf)

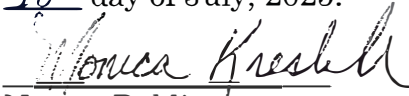
77. DEC has engaged stakeholders in the development and review of these draft permits, including several meetings with representatives of the New York State Builders Association, who are parties to this proceeding. DEC is currently assessing public comment and is revising these proposed permits and seeks to issue final versions within the coming weeks.

V. CONCLUSION

78. The administrative record demonstrates that DEC developed well-reasoned amendments to 6 NYCRR part 664 that is consistent with the Freshwater Wetlands Act and is supported by best available science, as well as with due process principles. The administrative record also shows that DEC satisfied each of its obligations under the State Administrative Procedures Act and the State Environmental Quality Review Act.


ROY A. JACOBSON JR.

Sworn to before me this
18th day of July, 2025.


Notary Public

MONICA KRESHIK, ESQ.
Notary Public, State of New York
No. 02KR6314859
Qualified in Rensselaer County
Commission Expires 11/17/26

**CERTIFICATE OF COMPLIANCE WITH
WORD COUNT LIMIT**

The undersigned attorney hereby certifies:

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