

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

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

Petitioners-Plaintiffs,

Index No. 903982-25

-against-

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-

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

Index No. 905313-25

Respondents-Defendants.

RESPONDENTS' COMBINED MEMORANDUM OF LAW

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IN OPPOSITION TO THE PETITIONS

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PRELIMINARY STATEMENT

Freshwater wetlands play an outsized role in New York’s ecosystems, providing everything from flood protection and pollution control to opportunities for recreation and outdoor education. Recognizing that the State was falling short in protecting these valuable resources due to technological and legal limitations, the Legislature amended the Freshwater Wetlands Act in 2022. The Legislature reworked both the criteria for protected wetlands and the process for determining whether a property or project contains such a wetland. Soon after, as required by the amended Freshwater Wetlands Act, the Department of Environmental Conservation (DEC) amended its regulations at 6 NYCRR part 664 to reflect the new statutory text and public feedback, including that from many of the petitioners in these proceedings.

Petitioner Chautauqua Lake Property Owners Association (Property Owners) challenges the Legislature’s 2022 amendments to the Freshwater Wetlands Act as well as, along with the other petitioners, DEC’s amended regulations. The Property Owners have not carried their extraordinarily heavy burden to show that “no set of circumstances exists under which the Act would be valid” (*Matter of Moran Towing Corp. v Urbach*, 99 NY2d 443, 448 [2003]). Nor has any petitioner shown that DEC, when it implemented the Legislature’s clear and specific directives, violated the New York State

Constitution, the State Administrative Procedure Act or the State Environmental Quality Review Act. To the contrary, the administrative record demonstrates that DEC drafted regulations that are neither vague nor overstep their legislative mandates, took a hard look at the potential adverse environmental impacts of the regulations, and complied with New York's rulemaking requirements. Accordingly, the Court should dismiss the petitions.

FACTUAL BACKGROUND

A. Freshwater Wetlands Act and DEC's Implementing Regulations

Freshwater wetlands often exist in the liminal spaces between dry land and deep water and are characterized by certain vegetation and soils, as well as how water moves through the wetland (Affidavit of Roy Jacobson at ¶ 4). Although traditionally viewed as unproductive wastelands, morasses, and swamps, by the 1970s there was a growing understanding of the significant role in flood control wetlands play, not only in their immediate vicinity but regionally (Jacobson aff ¶ 5). In 1975, the Legislature enacted the Freshwater Wetlands Act (the Act) to "preserve, protect and conserve" New York's freshwater wetlands "and the benefits derived therefrom," including recreation, flood and pollution control, wildlife habitat, and erosion control (ECL 24-0103, 24-0105[7]; Mem in Supp of 1975 Act, Bill Jacket at 4).

As directed by the Legislature, the Department promulgated regulations in 1980, found at 6 NYCRR parts 663, 664, as relevant here. Part 663—unamended since 1985—explained the activities compatible with various types of wetlands and their “adjacent areas” and set standards for DEC permits governing activities in those areas. Part 663 also exempted certain activities from regulation, including lawfully existing uses; recreational or commercial fishing or aquiculture; walking trails or moorings; agricultural activities; and ordinary maintenance and repair of structures such as bridges, highways, culverts, docks, beaches, and landscaped or paved areas (6 NYCRR 663.4[d]). The regulations also fleshed out the legislative directive that DEC inventory and classify freshwater wetlands across the State, specifically by creating wetlands maps, as well as a process to classify wetlands according to their characteristics.

DEC then began identifying and mapping freshwater wetlands in the State on a painstaking county-by-county basis (Affidavit of Matthew Walter ¶ 5). The limits of technology and science in the 1970s and 1980s constrained both the process and the resulting protections, as described more fully in the affidavits of DEC scientists Roy Jacobson and Matthew Walter.

The wetlands maps that resulted often failed to identify partially submerged (“submergent”) wetlands or those in forested areas (Walter aff ¶¶ 8, 9). Thus, many of the wetlands that met the existing statutory

definition—approximately 1.2 million acres by 2020—were not included on the regulatory maps (Walter aff ¶ 11, 14). Equally importantly, the maps were out of date almost immediately. Because the process was so onerous and because wetlands change, the maps did not depict all wetlands meeting the statutory definition (*id.*).

B. 2022 Amendments to the Freshwater Wetlands Act

Recognizing the shortcomings of the original Act, as well as the growing understanding of the important role wetlands play in climate change mitigation and resilience, the Legislature amended the Act in 2022 (*see generally* ECL 24-0105, 24-0107). The Legislature created a rebuttable presumption that any wetland meeting its definition is regulated (ECL 24-0301[4]). The Legislature did away with the need to create regulatory maps, instead devising a new process for identifying wetlands. The Legislature directed the Department to maintain existing maps for purely informational purposes, drawing upon a wide variety of public and private sources, that are more easily revised to reflect changes from natural accretion or erosion (ECL 24-0301[1], [5]). When a property owner wants to determine if a particular parcel contains regulated wetlands or a regulated adjacent area, the Legislature directed DEC to so determine at no cost (ECL 24-0703[5]). Upon determining that a wetland *is* regulated, DEC must delineate its boundaries

on its own initiative or upon written request by a landowner (ECL 24-0301[4], 24-0703[5]).

The statutory framework has always specifically identified the vegetation that characterizes wetlands. Notably, the 2022 amendments did not change that. Nor did the amendments change the fact that lands submerged below, or the lands and waters “substantially enclosed” by, characteristic wetland vegetation are regulated. The 2022 amendments did add 11 categories of wetlands of “unusual importance” to the definition of a regulated wetland and lowered by five acres the size threshold for regulated wetlands as of 2028 (ECL 24-0107; Jacobson aff ¶ 10) (by 2028, wetlands of 7.4 acres will be regulated). Wetlands of unusual importance are those that, regardless of size, are now regulated and include those located in an area that has experienced or will likely experience significant flooding, “is located within or adjacent to an urban area, as defined by the United State census bureau,” contains or is habitat for rare flora and/or fauna, falls within the criteria for a Class I wetland, was previously mapped by DEC as a regulated wetland or one of unusual local importance, is a vernal pool productive for amphibian breeding, is locally or regionally significant, or significantly protects the State’s water quality (ECL 24-0107[9]).

C. DEC Promulgated New Regulations at 6 NYCRR part 664

After the Legislature directed DEC to amend its regulations to implement the amended Act, DEC undertook public outreach across the State to inform stakeholders of changes to the statute and gather public input (Jacobson aff ¶ 14). Several petitioners, including the Business Council of New York State, the Chautauqua Lake Partnership, and the Chautauqua Lake Property Owners Association participated in these meetings (*id.* ¶ 15). DEC made its draft regulations available prior to the formal notice and comment period through its advanced notice of proposed rulemaking, as well as numerous public webinars (*id.* ¶¶ 15-17). This feedback identified language that needed more clarification or that stakeholders found confusing, including the Act's new criteria for wetlands of unusual importance, the extent of the regulated adjacent area, and the new jurisdictional determination procedure and appeal process (*id.* ¶ 20). DEC received more than 2,600 written responses to its advanced notice of proposed rulemaking and incorporated that feedback in its formal notice of proposed rulemaking (*id.*; R0001-1366, 1420-1445). DEC also began developing standard operating procedures for remote mapping, as well as draft general permits (*id.* ¶ 20; Walter aff ¶¶ 29-34).

In July 2024, DEC published its notice of proposed rulemaking, including updating its wetland classification system, clarifying the

Legislature’s “unusual importance” criteria and detailing the processes for making and appealing jurisdictional determinations (R1420-1424; Jacobson aff ¶¶ 21-33). The notice of proposed rulemaking included a proposed regulatory impact statement, rural area flexibility analysis, regulatory flexibility analysis, job impact statement, and proposed regulatory text (R1367-1424; Jacobson aff ¶ 32). DEC analyzed the potential costs of the new regulations, noting that the regulations would likely result in costs to the regulated community and local governments, such as hiring consultants, although the regulated community had incurred such costs under the prior regulations (R3174-3178; Jacobson aff ¶ 34).

During the subsequent public comment period, DEC received some 4,900 comments and held three hearings (Jacobson aff ¶¶ 36-37). In response, DEC defined, in the final rule, the two types of jurisdictional determinations (*id.* ¶ 26). It also created a transition period to delay applicability of the regulations for those projects already in progress at the effective date (6 NYCRR 664.1[c], [d]). Additionally, following comment by petitioner Business Council of New York State, DEC removed a provision that automatically extended adjacent areas for nutrient-poor wetlands and vernal pools, requiring instead a case-by-case analysis before DEC could impose such extended adjacent areas (Jacobson aff ¶ 27). DEC rejected other suggestions, including narrowing the unusual importance criteria or excluding freshwater

lakes containing submerged aquatic wetland vegetation, because both changes would have conflicted with the statute, thus exceeding the scope of DEC's statutory authority under ECL 24-0107 (*id.* ¶¶ 29-31).

On December 20, 2024, DEC filed with the Department of State the final rulemaking package. DEC also finalized its environmental assessment and negative declaration under the State Environmental Quality Review Act (SEQRA), in which DEC explained that because the regulations expand State protection of wetlands, they “will lead to a reduction in adverse impacts on these wetlands” (R3117).

D. New Part 664 Regulations: Freshwater Wetlands Jurisdiction and Classification

The new regulations at 6 NYCRR part 664 took effect January 1, 2025. As relevant here, they implemented the Legislature's directives to change the definition of a freshwater wetland to include wetlands of unusual importance and institute procedures for jurisdictional determinations to assess the presence of a regulated wetland.

The Legislature prescribed the 11 categories of wetlands of unusual importance; DEC then further explained the categories where necessary. For example, DEC developed regulatory criteria to identify watersheds with significant flooding risk such that the wetlands in those areas would be automatically protected (6 NYCRR 664.6[a]; *Jacobson aff* ¶¶ 24, 52). DEC

also clarified the criteria for wetlands of unusual importance in urban areas, limiting its own jurisdiction to exclude wetlands located near, but not in, urban areas (6 NYCRR 664.6[b]; Jacobson aff ¶ 25). DEC also defined vernal pools (6 NYCRR 664.2[ag]) and set forth a process to identify regulated vernal pools, based on numbers of observed amphibian egg masses (6 NYCRR 664.6[g]; Jacobson aff ¶ 26). DEC also explained the extent of the Adirondack Park Agency's wetlands jurisdiction and procedures by which DEC's Commissioner can designate a wetland as important for the protection of the State's water quality (6 NYCRR 664.6[j], [k]; Jacobson aff ¶ 53).

The regulations establish procedures by which DEC will determine, on a case-by-case basis, whether a parcel contains a regulated wetland and/or a regulated wetland-adjacent area and whether a project is jurisdictional thus requiring an ECL article 24 permit (6 NYCRR 664.8). When someone requests a jurisdictional determination, DEC staff will use a standard operating procedure to analyze available data, including any submitted by the requester (Jacobson aff ¶ 71; Walter aff ¶¶ 29-30). DEC then has 90 days to provide a determination; if it fails to do so, the requester can submit a notice letter, and if DEC still fails to respond within 10 days of receiving that notice, DEC waives wetland jurisdiction for five years (6 NYCRR 664.8[e], [f]; Jacobson aff ¶ 62).

In the event that DEC determines a parcel does contain a regulated wetland or adjacent area, only the property owner may appeal that determination (6 NYCRR 664.9[a]). Notably, the new process allows the existing property owner to appeal a positive jurisdictional determination, unlike the previous regulatory scheme, which allowed only the owner at the time of mapping to challenge a regulatory determination (Jacobson aff ¶ 64). 6 NYCRR 664.9 sets forth the appeal procedures, which a property owner can use at any point after DEC has issued a positive jurisdictional determination (*see also* Jacobson aff ¶¶ 63-65).

The new regulations did not alter any of DEC's permitting standards, procedures, or enforcement, which are found at 6 NYCRR part 663 and were last amended in 1985. And as the amendments to ECL article 24 did not change the statutory characteristics of freshwater wetlands in ECL 24-0107(1), the regulations did not add to or change any of those regulatory characteristics.

E. These Proceedings

In April 2025, three sets of petitioners challenged the amended regulations (*Matter of Business Council of New York State v DEC* [Business Council proceeding], *Matter of Village of Kiryas Joel v DEC* [Kiryas Joel proceeding], and *Matter of Chautauqua Lake Partnership v DEC* [Partnership proceeding]; one group of petitioners challenged both the regulations and the

statute (*Matter of Chautauqua Lake Property Owners Association v State of New York* [Property Owners proceeding]). The proceedings are now joined in Albany County.

ARGUMENT

POINT I

DEC COMPLIED WITH SEQRA

When promulgating the new part 664 regulations, DEC took a hard look at the rulemaking's potential adverse environmental impacts, rationally concluded there were none, and provided a reasoned elaboration of this decision. What it did *not* do is review the potential environmental impacts of the decisions of the Legislature, which are exempt from SEQRA (*see* 6 NYCRR 617.5[c][46]; *Citizens for an Orderly Energy Policy v Cuomo*, 78 NY2d 398, 415 [1991]; *see also, e.g., Adirondack Council, Inc. v Town of Clare*, 71 Misc 3d 1215[A] [Sup Ct, St. Lawrence County 2021]). Petitioners' repeated attacks (Business Council Petition ¶¶ 122-123; Kiryas Joel Petition ¶¶ 108-109; Partnership Petition ¶¶ 122-126) on the scope of regulated wetlands jurisdiction, including the regulation of submergent wetlands (ECL 24-0107[1]), regulated wetland-adjacent areas (ECL 24-0701[2]), and designation of certain wetlands as wetlands of unusual importance (ECL 24-0107[9]; 6 NYCRR 664.6) are not subject to SEQRA. Petitioners' remaining claims that the Department violated SEQRA are unfounded (Business Council Petition

¶¶ 8, 93-96, 114-138; Kiryas Joel Petition ¶¶ 78-82, 102-125; Partnership Amended Petition ¶¶ 122-126, 170-181).

Judicial review of a SEQRA determination is “limited to whether the agency identified the relevant areas of environmental concern took a hard look at them and made a reasoned elaboration of the basis for its determination.” (*Matter of Friends of P.S. 163, Inc. v Jewish Home Lifecare, Manhattan*, 30 NY3d 416, 430 [2017]; see also *Matter of Creda v City of Kingston Planning Bd.*, 212 AD3d 1043, 1047 [3d Dept 2023]). “Courts review an agency’s substantive obligations [under SEQRA] in light of a rule of reason.” (*Matter of Friends of P.S. 163, Inc.*, 30 NY3d at 430). A negative declaration is properly issued, where, as here, “the agency has made a thorough investigation of the problems involved and reasonably exercised its discretion” (*Matter of Elizabeth St. Garden, Inc. v City of New York*, 42 NY3d 992, 995 [2024]). “Nothing in [SEQRA] requires an agency to reach a particular result on any issue, or permits the courts to second-guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence” (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]).

A. DEC identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ for the basis of its determination of non-significance.

In promulgating the amended part 664 regulations, DEC reviewed and identified appropriate areas of environmental concern, took the necessary “hard look” at the proposed action, rationally determined that the regulations would not have any significant effect on the environment, and issued a negative declaration that provides a reasoned elaboration (*see* R1371-1376).

A lead agency need not discuss “every conceivable environmental impact” to meet its obligations pursuant to SEQRA (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 307 [2009]), and “generalized community objections or speculative environmental consequences are not sufficient to establish a SEQRA violation.” (*Matter of Heights of Lansing, LLC v. Village of Lansing*, 160 AD3d 1165, 1168 [3d Dept 2018]). “[T]he degree of detail with which each environmental factor must be discussed will necessarily vary and depend on the nature of the action under consideration” (*Matter of Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 668-689 [1996]). And if an agency finds that proposed regulations will have no significant adverse effects or only beneficial environmental impacts, it is not arbitrary or capricious to use an environmental assessment form (EAF) and issue a negative declaration (*Matter of United Petroleum Assn. v Williams*, 102 AD2d 491, 494 [3d Dept 1984], *aff'd* 65 NY2d 708

[1985]; *Matter of Gernatt Asphalt Prods.*, 87 NY2d at 689–90; *Matter of Gabrielli v Town of New Paltz*, 93 AD3d 923, 924 [3d Dept 2012]).

Early on in the rulemaking process, DEC evaluated the potential environmental impacts of the regulations, an evaluation it has “considerable latitude” in conducting (*see Matter of Jackson*, 67 NY2d at 417, citing ECL 8-0109[8]). DEC completed a short EAF, which included a description of the proposed regulations, analyzed 11 potential environmental impacts, and provided a reasoned elaboration of DEC’s decision to issue a negative declaration (R1371-1376; *Jacobson* aff ¶¶ 40, 43-50). DEC determined that the adoption of the regulations would have no or a small adverse impact on each of the 11 potential impacts it identified (R1375; *Jacobson* aff ¶¶ 40, 43-50).

To the extent petitioners challenge the level of detail with which each factor was discussed (Partnership Amended Petition ¶ 123; Business Council Petition ¶ 93; Kiryas Joel Petition ¶ 78), DEC had the discretion to determine whether there was a need to explain why any particular aspect of the adoption of the regulations would not have a significant adverse impact on the environment (*see, e.g., Matter of Village of Ballston Spa v City of Saratoga Springs*, 163 AD3d 1220, 1224 [3d Dept 2018] [noting that where none of the impacts identified in part 1 or 2 of the EAF were identified as potentially moderate or large, agency had discretion to determine whether it needed to

explain why the project would not have a significant adverse impact on the environment, and was not required to assess each small adverse impact identified in part 3 of the EAF]). DEC rationally issued a negative declaration, noting on the short EAF that new part 664 would *expand* protections to previously unprotected wetlands throughout the State, leading to a reduction in adverse impacts on jurisdictional wetlands as more projects would be required to avoid, minimize, and mitigate impacts to wetlands through the long-established permitting regime in part 663 (R1376).

The concerns raised by petitioners here, including concerns that part 664 will lead to potential adverse impacts on density of land use, urban sprawl, agricultural lands, community character and future population growth, are generalized community objections and speculative environmental consequences that may or may not arise in the future and cannot form the basis of a failure to take a hard look claim SEQRA claim. DEC cannot be expected to analyze every conceivable environmental impact of future permitting decisions for regulated activities that may or may not occur in jurisdictional wetlands, especially considering that the regulations at issue here do not set permit issuance standards and any such impacts will occur at the permit review stage, when detailed, site-specific information would be available (*see, e.g., id.*; *see also Matter of Town of Copake v New York State Off. of Renewable Energy Siting*, 216 AD3d 93, 103 [3d Dept 2023]).

B. Petitioners in the Business Council and Kiryas Joel proceedings lack standing to assert their SEQRA claims.

The Business Council and Kiryas Joel petitioners lack standing to raise SEQRA challenges to DEC’s promulgation of the regulations. A petitioner seeking to raise a SEQRA challenge must demonstrate “that it would suffer direct harm, injury that is in some way different from that of the public at large.” (*Matter of Hohman v Town of Poestenkill*, 179 AD3d 1172, 1173 [3d Dept 2020] [internal citations and quotation marks omitted]). The alleged direct harms must be environmental, as the Court of Appeals has consistently held that “economic injury [alone] does not confer standing to sue under SEQRA” (*Matter of Association for a Better Long Is., Inc. v New York State Dept. of Env’tl. Conservation*, 23 NY3d 1, 9 [2014]), and “[p]etitioners must have more than generalized environmental concerns to satisfy that burden.” (*Matter of Hohman*, 179 AD3d at 1175 [internal citations and quotation marks omitted]).

The Kiryas Joel and Business Council petitioners allege economic injuries, which are not within SEQRA’s zone of interests. Specifically, they complain about “fewer housing opportunities, reduced local tax revenues, increased housing costs, job losses, sprawl, and an acceleration of outmigration to other states” (*see* Business Council Petition ¶ 16, Kiryas Joel Petition ¶ 13). But “the zone of interests . . . of SEQRA encompasses the

impact of agency action on the relationship between the citizens of this State and their environment. Only those who can demonstrate legal injury to that relationship can challenge administrative action under SEQRA” (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 777 [1991]; see also *Matter of Association for a Better Long Is.*, 23 NY3d at 9 [“economic injury alone does not confer standing to sue under SEQRA, since it is not within the zone of interests sought to be protected by the statute”]). And the environmental concerns petitioners do raise—potential impacts of the regulations on agricultural land resources and community character—are speculative and conjectural, speculating that such impacts “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” (see *Business Council Petition* ¶¶ 93, 122-123, *Kiryas Joel Petition* ¶¶ 78, 108-109).

These generalized, speculative, and conjectural environmental concerns are insufficient to demonstrate any unique or distinct injury that these petitioners will suffer as a result of DEC’s promulgation of the freshwater wetlands regulations that is not generally applicable to the public at large (*Society of Plastics*, 77 NY2d at 777-778 [concluding that plaintiff lacked standing to maintain SEQRA challenge because they failed to allege any threat of cognizable injury it would suffer, “different in kind or degree from

the public at large”]; *see also Matter of Port of Oswego Auth. v Grannis*, 70 AD3d 1101, 1104 [3d Dept 2010] [where petitioners failed to allege “anything other than . . . speculative ecological injury to the general public,” court found they lacked standing to bring SEQRA challenge to DEC’s issuance of a certification of a Clean Water Act general permit]). Accordingly, the Business Council and Kiryas Joel petitioners have not identified a non-speculative injury within SEQRA’s zone of interests. Because the interests these petitioners seek to protect are primarily economic, and environmental injuries alleged, if any, are too speculative and generalized, petitioners in the Business Council and Kiryas Joel proceedings do not have SEQRA standing and the first cause of action in each petition should be dismissed.

C. DEC properly designated promulgation of 6 NYCRR part 664 as an Unlisted Action.

Partnership petitioners (and, if the Court finds that the Business Council and Kiryas Joel have standing to raise SEQRA claims), next argue that promulgation of the new 6 NYCRR part 664 regulations constituted a Type I action presumptively requiring the preparation of an environmental impact statement (EIS) (*see* Partnership Amended Petition ¶¶ 167-182, Business Council Petition ¶¶ 111-117, Kiryas Joel Petition ¶¶ 97-103), an argument unsupported by the regulations or relevant caselaw.

The SEQRA regulations classify actions as Type I (6 NYCRR 617.4), Type II (6 NYCRR 617.5) or Unlisted (6 NYCRR 617.2[al]), depending on an action's potential effects on the environment. Type I actions are “those actions and projects that are more likely to require the preparation of an [EIS]” (6 NYCRR 617.4[a]). These are generally large-scale land use or development projects that involve the alteration of significant acreage of land (*see, e.g.*, 6 NYCRR 617.4[b] [list of Type I actions]). Unlisted actions are “all actions not identified as a Type I or Type II action” in the SEQRA regulations or an agency's own SEQRA procedures (6 NYCRR 617.2[al]) and, unlike Type I actions, Unlisted actions carry no presumption of significance (*Matter of Clean Air Action Network of Glens Falls, Inc. v Town of Moreau Planning Bd.*, 235 AD3d 1124, 1127 fn. 3 [3d Dept 2025] [quoting *Matter of Di Veronica v Arsenault*, 124 AD2d 442, 443 [3d Dept 1986]).

DEC properly classified the promulgation of the new 6 NYCRR part 664 regulations as an Unlisted action and accordingly prepared a short EAF (6 NYCRR 617.4[b]; *see also* Jacobson aff ¶¶ 41-43). Although promulgation of some regulations, like the adoption regulations that authorize large-scale alterations of land or nonagricultural uses over a certain threshold in agricultural districts, could be a Type I action (*see, e.g., Copake*, 216 AD3d at 98), such regulations are unlike the freshwater wetlands regulations. The freshwater wetlands regulations at 6 NYCRR part 664 do not authorize

development projects that alter substantial acreages of land (*compare id. at* 98-99 [noting that, because challenged regulations authorized the “siting of massive renewable energy facilities, the regulations will alter agricultural property” requiring Type I designation]), but rather set the procedures and standards for identifying which wetlands are subject to regulation and the factors for identifying wetland classifications (*see, e.g., Matter of Heights of Lansing, LLC v Village of Lansing*, 160 AD3d 1165, 1166-1167 [3d Dept 2018] [town complied with SEQRA where it adopted zoning change from commercial to residential use, and town identified zoning change as an Unlisted action and completed a short EAF]; *Matter of 61 Crown St., LLC v City of Kingston Common Council*, 217 AD3d 1144, 1147 [3d Dept 2023] [where zoning code amendment did not change allowable uses within the zoning district, zoning code amendment was an Unlisted, not a Type I, action]).

The Business Council and Kiryas Joel petitioners rely on *Copake* in support of their argument that the adoption of 6 NYCRR part 664 should have been classified as a Type I action, and misconstrue the Third Department to have “held that ORES should have classified the action of regulation as a Type I action that carries the presumption of requiring preparation of an environmental impact statement” (*see* Business Council Mem of Law at 11; Kiryas Joel Mem of Law at 11). However, *Copake* held

that “[w]hen reading both 6 NYCRR 617.2 and 617.4 together, the promulgation of regulations is clearly *not intended to be excluded* from type I action designation” (*id.* at 98 [emphasis added]), but its full discussion of the facts before it does not demonstrate that the promulgation of any and all types of regulations *must* be Type I actions. Considering the nature of the regulations at issue in the case and the type of projects those regulations would be authorizing, the Third Department went on to conclude that, because the challenged regulations “authorize[d] *the siting* of massive renewable energy facilities, the regulations will *alter agricultural property*,” their promulgation should have been classified as a Type I action (216 AD3d at 98 [emphasis added]). Additionally, the challenged regulations in *Copake* contained standard permitting conditions designed to avoid adverse environmental impacts, further necessitating more thorough SEQRA review (*id.* at 96-97).

Unlike the regulations at issue in *Copake*, the regulations challenged here do not specify types of activities that are regulated and require a permit in jurisdictional wetlands, nor any permit terms or conditions, or permit issuance standards and criteria (e.g., avoidance, minimization and mitigation criteria). They merely set criteria and procedures for identifying and classifying wetlands subject to DEC jurisdiction (*see Jacobson* aff ¶ 42). As DEC noted in its negative declaration, the regulations themselves will have

only a beneficial environmental effect. Unlike the large-scale renewable energy permits addressed in *Copake*, freshwater wetlands permits under 6 NYCRR part 663 remain subject to SEQRA, so any site-specific adverse environmental impacts arising from those permits will be more meaningfully examined than would be possible under a broad-scale assessment of part 664.

Nor is the adoption of the regulations an action similar to those identified in 6 NYCRR 617.4(b), such as the adoption of changes in the allowable uses within any zoning district affecting 25 or more acres of the district (*id.* [b][2]), transfer of 100 or more contiguous acres of land by a state or local agency (*id.* [b][4]), or a project or action, other than the construction of residential facilities, that involves the physical alteration of 10 acres (*id.* [b][6][i]). Citing no authority (*see* Business Council Mem of Law at 11; Kiryas Joel Mem of Law at 11; Partnership Mem of Law at 20), petitioners claim that promulgation of the regulations constitutes “the adoption [by DEC] of a comprehensive resource management plan” (*see* Business Council Petition ¶¶ 113-114; Kiryas Joel Petition ¶¶ 99-100; Partnership Amended Petition ¶¶ 167-168). This is untrue (*see* Jacobson *aff* ¶ 41-42).

Land use, resource management, and comprehensive zoning plans (6 NYCRR 617.4[b][1]) are “parks, preserve, or other state land master plans; state energy and solid waste management plans” ([SEQRA Handbook 4th ed. at 18](#)), as well as the formation of an agricultural district (*id.* at 196). DEC’s

regulatory amendments in response to the Legislature’s updating of the Freshwater Wetlands Act is nothing like a comprehensive resource management plan, because part 664 identifies procedures for identifying wetlands subject to jurisdiction and wetland classification, it does not proscribe the land uses that are exempt from regulation or those that require ECL article 24 permits nor does it set permit issuance standards (*see Jacobson aff ¶ 42*). Moreover, DEC’s interpretation of its own regulations is entitled to deference (*see Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 174 [2019] [“Judicial deference to an agency’s interpretation of its rules and regulations is warranted”]). Thus, although a component of a comprehensive freshwater wetland regulatory regime, part 664 is not a state land management plan, nor does it establish a comprehensive plan to govern development within designated areas within the State.

Nor do the amended regulations dictate the types of activities that may occur on jurisdictional wetlands across the State. There is no support for the Partnership petitioners’ even broader claim that the adoption of the new regulations is “an action that admittedly impacts over 1 million new acres of land,” warranting a Type I designation (Mem of Law at 20). The Partnership petitioners erroneously rely on *Jorling v Freshwater Wetlands Appeals Bd.*, 147 Misc 2d 165 (Sup Ct, Richmond County 1990) to claim that the adoption of part 664 requires an EIS (Partnership Mem of Law at 20). However,

Jorling addressed whether the Freshwater Appeals Board could consider a “permit limbo” in determining whether landowners had suffered unnecessary hardship as a result of DEC's delay in mapping regulated freshwater wetlands. Likewise, because this case does not involve large-scale state land acquisitions, *Matter of Knight v New York State Dept. of Env'tl. Conservation*, 110 Misc 2d 196 (Sup Ct, Monroe County 1981) is inapplicable.

POINT II

DEC COMPLIED WITH SAPA

A. DEC Sufficiently Discussed Costs

When promulgating the new part 664, DEC complied with all rulemaking requirements under the State Administrative Procedure Act (SAPA), including considering the costs of the regulation, analyzing any reporting requirements arising from the regulation, and considering alternatives. Thus, petitioners' allegations of SAPA violations have no merit.

Under SAPA, agencies are required to analyze the cost of implementing and complying with a proposed rule (SAPA §§ 202[f][vi], 202-a[3][c]). Courts have defined these costs as the “additional expenditures required” by the regulations (*Matter of Industrial Liaison Comm. of Niagara Falls Area Chamber of Commerce v Williams*, 72 NY2d 137, 145 [1988]). However, agencies need not examine indirect costs where SAPA does not specifically give such a directive (*Matter of Pacific Salmon Unlimited v New York State*

Dept. of Env't. Conservation, 208 AD2d 241 [3d Dept 1995]). Similarly, agencies are not required to consider speculative costs that “might possibly occur at some unknown future date” in their cost analysis (*Matter of Binghamton-Johnson City Joint Sewage Bd. v New York State Dept. of Env'tl. Conservation*, 159 AD2d 887, 889 [3d Dept 1990]). An agency’s rulemaking must be “in substantial compliance” with its SAPA obligations (SAPA § 202[8]; *Matter of Industrial Liaison Comm.*, 72 NY2d at 144).

DEC’s regulatory impact statement complied with SAPA. DEC rationally concluded that the new regulations did not have any direct costs to the regulated community or local government because they merely update the definition of a regulated wetland, outline the jurisdictional determination process, and require no additional expenditures by the regulated community (R3175).

It is true that the regulated community might incur costs if they were to develop a regulated wetland or adjacent area, triggering 6 NYCRR part 663 (R3175). But DEC evaluated those costs, even though they are hypothetical, explaining the permit fee structure as well as the potential indirect cost of delineating the precise boundaries of regulated wetlands, provided at no cost by DEC or by professional consultants hired by the applicant (R3176). Further, DEC analyzed the rule’s likely cost savings, as

the result of flood damage prevention and protection of drinking water quality (R3176-3178).

DEC was not required to analyze indirect or speculative costs of the freshwater wetlands regulations in its regulatory impact statement. Section 202-a(3)(c) requires an agency's regulatory impact statement to include "the costs for the implementation of, and continuing compliance with, the rule to regulated persons . . . [and] to the agency and to the state and its local governments." In *Matter of Pacific Salmon Unlimited*, the Third Department rejected the argument that agencies are required to analyze indirect effects when the statutory provision merely provides that they consider costs without specifying whether these be direct or indirect, stating that if the Legislature had intended the agency to consider indirect costs, "it would have so provided" (208 AD2d at 245).

Likewise, agencies need not consider speculative costs that "might possibly occur at some unknown future date" in their regulatory impact statements (*Matter of Binghamton-Johnson City Joint Sewage Bd.*, 159 AD2d at 889). In *Binghamton-Johnson*, the Third Department did not require DEC's cost analysis to account for the potential that the petitioners would have to change their water treatment systems sometime in the future to maintain compliance with the regulations (*id.*). The Court concluded that future water quality was hard to predict because it would be affected by

different variables, so any future technological changes and related costs in response to river conditions were too speculative for DEC to consider (*id.*). Similarly, the Fourth Department rejected an argument that the Department of Taxation and Finance had to consider “the speculative possibility” of adverse actions by nonregulated actors that could theoretically result from the challenged rule (*Seneca Nation of Indians v State of New York*, 89 AD3d 1536, 1537-1538 [4th Dept 2011], *lv denied* 18 NY3d 808 [2012]).

The costs petitioners would have DEC analyze are both indirect and speculative. For example, DEC did not need to calculate the cost that municipal governments may incur in creating guidance to advise local property owners, as some petitioners allege (Property Owners Petition ¶ 91). While DEC considered such costs, it ultimately deemed them to be both “speculative and indirect” because the regulations do not require that the municipalities develop such guidance (*Jacobson aff* ¶ 34). Therefore, this does not fall into the definition of costs that must be included in a regulatory impact statement.¹

DEC also did not need to include an analysis of the cost of hiring outside professional consultants to perform wetlands delineations, as some

¹ To the extent petitioners allege that DEC failed to analyze mitigation costs that arise during the permitting process, such claim is untimely because the wetlands permitting scheme is outlined in NYCRR part 663, which DEC did not amend.

petitioners allege, because this is not a mandatory cost, and it is purely speculative (Kiryas Joel Petition ¶ 146; Business Council Petition ¶ 160). Parties can submit a written request to DEC to receive a free delineation or they can choose to hire a professional consultant (R3176). Since paying for a delineation is entirely discretionary, it cannot be considered an “additional expenditure required” (*id.*). Furthermore, it would be speculative to attempt to estimate the costs of a consultant as this would require DEC to predict where in the State developers may seek a delineation, the potential projects that will seek delineation, which of these projects would choose a professional consultant, and what these professional consultants might charge (Jacobson aff ¶ 48). Since these costs are both speculative and discretionary, they need not be included in DEC’s regulatory impact statement.

Petitioners also assert conclusory allegations of hypothetical costs but present no evidence to support them. These allegations include “rendering much of the State undevelopable . . . fewer housing opportunities, reduced local tax revenues, increased housing costs, job losses, sprawl, and an acceleration of outmigration to other communities” (Kiryas Joel Petition ¶ 13; Business Council Petition ¶ 16). With no evidence to show these effects are likely to occur, they are just hyperbolic speculation. In the same way, allegations that landowners will be hesitant to use their land are speculative (Partnership Amended Petition ¶ 105). SAPA does not require DEC to

consider purely theoretical costs when there is no evidence regulated entities will incur them (*Seneca Nation of Indians*, 89 AD3d at 1538).

Similarly, DEC did not need to analyze the cost of third parties seeking delineations on another's property. Petitioners allege that since anyone can request a wetland delineation on any property, property owners can be harassed and projects can be obstructed by others seeking delineations (Partnership Amended Petition ¶ 99).² First, this is another mere possibility with no evidence to suggest it will occur (*Seneca*, 89 AD3d at 1538). Second, there is no additional cost to a delineation requested by a third party, or by any party, for that matter, as DEC will provide a wetland delineation at no cost.

Additionally, DEC did not need to report costs to itself as petitioners allege because these costs are not "additional expenditures required" (Business Council Petition ¶ 161). The regulations did not cause DEC to expend any additional funds or time. While DEC did hire additional staff specifically to conduct jurisdictional determinations, these hirings occurred prior to the proposal of the challenged regulations and were funded by the

² ECL 24-0703(5) and 6 NYCRR 664.8 allow any person to request a jurisdictional determination (remotely conducted by DEC). By contrast, a wetland delineation requires DEC staff to access the subject property and is only available to a property owner who has received a positive jurisdictional determination (6 NYCRR 664.8[b]).

budget in which the 2022 Amendments were passed; those staff have transitioned from assisting with the rulemaking process to carrying out jurisdictional determinations (Jacobson aff ¶ 35). Thus, the regulations themselves did not result in any additional cost to DEC.

B. DEC Analyzed the Regulations' Reporting Requirements

Agencies are also required to include “a statement describing the need for any reporting requirements, including forms and other paperwork, which would be required as a result of the rule” (SAPA § 202-a[3][d]). DEC’s regulatory impact statement explicitly provided that the rule does not require any paperwork and does so in substantial compliance with SAPA § 202-a(3)(d) (R3178). Thus, because there are no reporting requirements for part 664 for DEC to describe in a regulatory impact statement, petitioners’ allegations that DEC failed to describe these are simply unfounded (Business Council Petition ¶ 153; Kiryas Joel Petition ¶ 139).

Part 664 neither directly requires a permit nor demands a jurisdictional determination. It is part 663, which DEC did not amend, that requires a permit for certain activities on wetlands and imposes related paperwork (6 NYCRR 663.4). Part 664 sets out the procedure to define which wetlands are to be regulated under part 663 but does not itself require permits or paperwork. Although this may indirectly cause a regulated entity to be subject to part 663, section 202-a(3)(d) does not expressly mandate that

agencies report paperwork that occurs as an indirect result of the regulation (*Pacific Salmon*, 208 AD2d at 241).

Furthermore, while it is true that parties seeking a jurisdictional determination under part 664 must submit a short request form to the DEC, part 664 does not mandate a jurisdictional determination. The regulation reads: “Any person *may* submit to the department a request for a parcel jurisdictional determination” (6 NYCRR 664.8[a] [emphasis added]). It is up to the individual landowner whether they would like to get a jurisdictional determination. Alternatively, they could hire a consultant to conduct the parcel jurisdictional determination and submit that to DEC (Walter aff ¶ 34) or simply avoid developing in regulated areas altogether (6 NYCRR 664.8[a]; R3176). These options are permissible and do not require submittal of the jurisdictional determination form.

C. DEC Analyzed Regulatory Alternatives

Finally, there is no merit to petitioners’ claim that DEC inadequately assessed alternatives. An agency must include a statement describing any significant alternatives it considered and the reasons it decided not to incorporate them into the final rule (SAPA § 202-a [3][g]). The enabling statute for a regulation can limit the alternatives that an agency can consider (*Seneca Nation of Indians v State of New York*, 31 Misc 3d 1242, *4 [Sup Ct, Erie County 2011]). After all, “[a]n agency is only required to consider

alternatives ‘to the extent consistent with the objectives of applicable statutes’ as the agency could not pick an option that violates the statute (*Binghamton-Johnson*, 159 AD2d at 888). In *Binghamton*, this meant that the DEC’s regulatory impact statement did not need to address the petitioner’s proposed alternative of relocating wells because the court held that alternative would not have been consistent with the enabling statute’s objective of abating and preventing pollution (*id.*).

While DEC need not address alternatives that are inconsistent with the statute, DEC did acknowledge a possible no-action alternative but dismissed it as being inconsistent with the statute. Petitioners allege DEC’s failure to consider taking no action made the regulatory impact statement insufficient (Business Council Petition ¶¶ 154-155; Kiryas Joel Petition ¶¶ 140-141). However, as the regulatory impact statement explains, the 2022 Amendments necessitated the rulemaking to clarify and implement the statute (R3178-3179). If the DEC had taken no action, the former mapping regime and wetlands classifications would have remained in place in direct conflict with ECL article 24. DEC properly declined to consider taking no action.

DEC likewise did not need to consider an alternative to 6 NYCRR part 664 in which lakes would not be considered wetlands, as the Partnership petitioners argue (Amended Pet. ¶ 145). Treating “lakes” as non-wetlands

would be contrary to the Act's purpose "to preserve, protect, and conserve freshwater wetlands and the benefits derived therefrom" (ECL 24-0103). Indeed, submergent wetlands (which are often portions of lakes) have always been eligible for regulation since the Act's inception in 1975 (*see, e.g., Matter of Lake George Assn. v NYS Adirondack Park Agency*, 228 AD3d 52 [3d Dept 2024] [upholding grant of freshwater wetlands permit for herbicide application in portions of Lake George]; *see also* Walter aff ¶ 9). However, inadequate maps and the former mapping requirement prevented such wetlands from being properly regulated (R3091-3092, 3100; Walter aff ¶ 9). This was an unfortunate side effect of the mapping requirement that the Legislature never intended and explicitly sought to fix with the 2022 Amendments (Walter aff ¶ 9). If the DEC were to establish regulations that exempted lakes, it would be violating the Act.

POINT III

THE FRESHWATER WETLANDS ACT AND REGULATIONS AS AMENDED ARE CONSTITUTIONAL.

In amending ECL article 24 and in promulgating part 664, the Legislature and DEC acted well within constitutional bounds. Both the amended statute and the regulations are sufficiently specific as to provide adequate notice to the public of their statutory and regulatory obligations. As such, petitioners' constitutional challenges must fail.

In general, a party making a facial constitutional challenge to a statute or regulation “has the extraordinary burden of proving beyond a reasonable doubt that the challenged provision suffers wholesale constitutional impairment” (*Matter of Owner Operator Ind. Drivers Assn., Inc. v New York State Dept. of Transp.*, 40 NY3d 55, 61 [2023] [cleaned up]). Indeed, “a facial challenge must fail so long as there are circumstances under which the challenged provision ‘could be constitutionally applied’” (*id.*, quoting *Matter of Moran Towing Corp.*, 99 NY2d at 445). “In other words, the challenger must establish that no set of circumstances exists under which the Act would be valid” (*id.* at 448). The U.S. Supreme Court has warned that “when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program” (*Erznoznik v City of Jacksonville*, 422 US 205, 216 [1975]). “[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction” (*id.*). For the reasons explained below, petitioners fail to carry their heavy burden to sustain facial challenges to the 2022 amendments to the Act and the part 664 regulations.

A. Statute and Regulations Provide Due Process Protections

1. The Act's Rebuttable Presumption is Constitutional.

Petitioners have not met their “extraordinary burden” of showing that the 2022 amendments’ rebuttable presumption is unconstitutionally vague.³ As an initial matter, “legislative enactments are entitled to a strong presumption of constitutionality, and courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible” (*Sullivan v New York State Joint Commn. on Pub. Ethics*, 207 AD3d 117, 129 [3d Dept 2022], quoting *White v Cuomo*, 38 NY3d 209, 216 [2022]).

Further, rebuttable presumptions generally do not violate due process, particularly where the evidence largely rests with the regulated person (*Sanford v Rockefeller*, 35 NY2d 547, 555 [1974]). A rebuttable presumption is valid if there exists “a rational connection between the facts needed to be proven and the fact presumed,” and there is a fair opportunity to challenge the presumption (*Matter of Unification Theological Seminary v City of*

³ Although only the Property Owners petitioners seek to annul the 2022 amendments (Petition at 43 [wherefore clauses]), all petitioners at various points allege that the statutory amendments are impermissibly vague (Business Council Petition ¶¶ 166-196; Kiryas Joel Petition ¶¶ 156-186; Partnership Amended Petition ¶¶ 148-153).

Poughkeepsie, 210 AD2d 484, 485 [2d Dept 1994], citing *Matter of Casse v New York State Racing & Wagering Bd.*, 70 NY2d 589, 595 [1987]; see also *Department of Hous. Preserv. & Dev. of City of N.Y. v Joseph*, 85 Misc 3d 137(A) at *2 [App Term, 2d Dept, Apr. 4, 2025]).

ECL 24-0301(4) creates a rebuttable presumption that a wetland meeting the statutory definition of “freshwater wetland” in ECL 24-0107 is, in fact, a regulated wetland, regardless of whether it is on an official wetland map. Thus, it is simply untrue that all lands in the State are presumptively regulated wetlands; to the contrary, only those meeting the detailed definition in the statute are presumptively regulated (*contra* Property Owners Mem of Law at 19). Once DEC makes a positive jurisdictional determination, a property owner (and only a property owner) may appeal that decision pursuant to well-defined procedures (6 NYCRR 664.9).

The mere fact that the Legislature decided to change the mechanism by which a regulated parcel is identified does not render that change unconstitutional (Business Council Mem of Law at 22-25; Property Owners Mem of Law at 18-19; Kiryas Joel Mem of Law at 22-24). And it is irrelevant that the previous method for providing notice to affected property owners was deemed to comply with due process principles (Property Owners Mem of Law at 18-19). The Act’s flexible standards further its goal of greater wetland

protection across a variety of landscapes, while still being sufficiently objective. The rebuttable presumption passes constitutional muster.

2. The New part 664 are not impermissibly vague.

The new regulations are also consistent with due process principles because they are sufficiently definite (*contra* Partnership Mem of Law at 15-17; Business Council Petition ¶¶ 46-49, 101-105, 175-196; Kiryas Joel Petition ¶¶ 165, 176-186). A party making a facial challenge on vagueness grounds carries the “heavy burden of showing that the statute is impermissibly vague in *all* of its applications” (*id.* at 421). “In other words, that a statute or regulation would be unclear in hypothetical situations at its periphery does not render it facially, unconstitutionally vague” (*Matter of Independent Ins. Agents & Brokers of N.Y., Inc. v New York State Dept. of Fin. Servs.*, 39 NY3d 56, 65 [2022]). The “degree of vagueness that the Constitution tolerates ... depends in part on the nature of the enactment,” such that “economic regulation is subject to a less strict vagueness test” (*Hoffman Estates v Flipside, Hoffman Estates, Inc.*, 455 US 489, 499 [1982]). And civil, as well as penal statutes, are subject to the due process clause’s test for vagueness (*Matter of Kaur v New York State Urban Dev. Corp.*, 15 NY3d 235, 256 [2010] [internal quotation marks omitted], *cert denied sub nom Tuck-It-Away, Inc. v New York State Urban Dev. Corp.*, 562 US 1108 [2010]).

When examining whether a statute or regulation is void for vagueness, courts apply a two-part test (*People v Stephens*, 28 NY3d 307, 312 [2016] [cleaned up]). First, the court determines “whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden” (*Stuart*, 100 NY2d at 420 [cleaned up]). Next, the court considers “whether the enactment provides officials with clear standards of enforcement so as to avoid resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application” (*Stephens*, 28 NY3d at 312, quoting *Stuart*, 100 NY2d at 420-421). Accordingly, a “statute, or a regulation, is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement” (*Matter of Independent Ins. Agents & Brokers of N.Y., Inc.*, 39 NY3d at 63-64 [cleaned up]).

If, however, the statute or regulations use “terms having an accepted meaning long recognized in law and life,” it “cannot be said to be so vague and indefinite” as to be void for vagueness, “even though there may be an element of degree in the definition as to which estimates might differ” (*Stephens*, 28 NY3d at 312-313, quoting *People v Cruz*, 48 NY2d 419, 428 [1979]). Further, courts have found environmental regulations passed the

void-for-vagueness test even though they contained “broad and flexible statutory terms” (*US v McDougall*, 25 F Supp 2d 85, 94-95 [SDNY 1998], quoting *New York Coalition of Recycling Enters. v City of New York*, 158 Misc 2d 1, 15 [Sup Ct, NY County 1992]). The Legislature need not create “rigid formulas in field where flexibility in the adaptation of the legislative policy to infinitely variable conditions constitutes the very essence of the programs. Rather, the standards prescribed by the Legislature are to be read in light of the conditions in which they are to be applied” (*Matter of Nicholas v Kahn*, 47 NY2d 24, 31 [1979]).

First, the terms flagged by the Partnership petitioners as unconstitutionally vague—“pollution,” “potential environmental justice area,” and “wetland plant community” (Partnership Mem of Law at 28)—can hardly be insufficiently definite. “Pollution” has long been defined in the general definitions section of the Environmental Conservation Law (ECL 1-0303[19]); likewise, since 2019, ECL article 48 has recognized and defined “environmental justice” and, since 2003, DEC has had an [environmental justice policy \(CP-29\)](#),⁴ which has defined a “potential environmental justice area.” Finally, “wetland plant community” is just what it appears to be--a community of different wetland plants--and is a term long used by federal

⁴ All urls for links are also provided in the Table of Authorities.

and state governments, including the [U.S. Environmental Protection Agency](#) and the [U.S. Department of Agriculture](#), as an indicator of various types of wetlands across the country. Such common, well-established terms are not impermissibly vague.

Likewise, DEC's definition of and procedure for identifying regulated "vernal pools" is sufficiently definite (*contra* Business Council Mem of Law at 24-25, 29-31; Kiryas Joel Mem of Law at 23-24, 29-30). The Legislature protected vernal pools "known to be productive for amphibian breeding" (ECL 24-0107[9][g]). Based on its expertise and extensive scientific literature (Jacobson aff ¶ 54), the Department rationally used established minimum egg mass counts for specific amphibian species, based on geographic area, as criteria for determining if a vernal pool is one the Legislature intended to protect, i.e., one "known to be productive for amphibian breeding" (ECL 24-0107[9][g]; *see also* 6 NYCRR 664.6[g]; Jacobson aff ¶ 54). The regulatory criteria provide reasonable people adequate notice of what is regulated and to protect against arbitrary enforcement. Although there certainly may be hypothetical situations, such as those posited by petitioners (Business Council Mem of Law at 24-25; Kiryas Joel Mem of Law at 23-24), in which there is some dispute as to whether there is a regulated adjacent area of regulated vernal pools on a neighboring property, such site-specific disputes do not render the regulations void for vagueness. But such situations must

still involve wetlands that meet the statutory and regulatory definitions, not simply a “wet spot on a neighbor’s property” (Business Council Mem of Law at 24; Kiryas Joel Mem of Law at 24). As such, it is constitutional.

Finally, the statutory and regulatory explanations for wetlands of unusual importance, as well as the associated criteria for Class I wetlands, pass the void-for-vagueness test. The statutory provisions at ECL 24-0107(9) are broad and flexible such that they sufficiently protect wetlands that are particularly important to ecosystems and public health, but that flexibility is necessary to encompass the “infinitely variable conditions” in which these wetlands appear (*Nicholas*, 47 NY2d at 31). And the regulations further refine these definitions, providing more specificity such that a “person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited,” and contains standards that direct DEC to consistent enforcement (*Independent Ins. Agents & Brokers of N.Y., Inc*, 39 NY3d at 63-64; *see also* *Jacobson* aff ¶¶ 13, 51-56). And petitioners fail to provide any support for their claim that the modified wetland classification criteria at 6 NYCRR 664.4 are in any way unconstitutionally vague (Property Owners

Petition ¶¶ 106-108). Accordingly, the statute and regulations meet due process standards.⁵

B. Regulations are Consistent with the Statutory Language

“A regulatory agency ‘is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication’” (*Matter of Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 608-609 [2018], quoting *Matter of Acevedo v New York State Dept. of Motor Vehs.*, 29 NY3d 202, 221 [2017]; see all *Matter of General Elec. Capital Corp. v New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 NY3d 249, 254 [2004]). In general, “an agency can adopt regulations that go beyond the text of [the enabling] legislation, provided they are not inconsistent with the statutory language or its underlying purpose” (*Matter of General Elec. Capital Corp.*, 2 NY3d at 254).

The Act explicitly directs the DEC Commissioner to study and assess freshwater wetlands in the State, to classify freshwater wetlands, and promulgate regulations (ECL 24-0301, 24-0903[1]). Additionally, the Department has broad statutory authority to protect and enhance the State’s

⁵ For the reasons discussed in this section, DEC’s use of these regulatory terms is also rational (*contra* Property Owners Mem of Law at 21-22; Business Council Mem of Law at 29-30; Kiryas Joel Mem of Law at 29-30; Partnership Mem of Law at 10-11). Thus, even if petitioners had standing to challenge the rationality of these terms, which they do not (*see infra* at 47-51), there is no merit to that argument.

natural resources by, among other things, “promulgating any rule or regulation, standard or criterion” (ECL 24-0301[1][b]). Thus, petitioners’ assertion that DEC crossed the “line between administrative rule-making and legislative policy-making,” as in *Matter of Boreali v Axelrod* (71 NY2d 1 [1987]), or is otherwise ultra vires, is undercut by the statutory text.

Comparing the Act with the Department’s new part 664 regulations reveals that there is no merit to Partnership petitioners’ argument (Mem of Law at 17-19) that the regulations are ultra vires or otherwise not consistent with the Act. The regulatory provisions that petitioners challenge as ultra vires—including shallow lakes within the definition of wetlands and designating Class I wetlands or those of significant importance to the State’s water quality—directly mirror the statutory language.

Turning first to shallow lakes, portions of those waterbodies have always been included in the statutory definition of freshwater wetland. The Act has long defined freshwater wetlands as “lands *and submerged lands*” and has also included in the definition the waters above those lands (ECL 24-0107[1] [emphasis added]). And substantial portions of shallow lakes, such as Chautauqua Lake, have likewise been long regulated as freshwater wetlands. As the affidavit of DEC Region 9 Permit Administrator Lisa Czechowicz explains, under the previous version of 6 NYCRR part 664, several areas along Chautauqua Lake were mapped as regulated freshwater wetlands and

DEC has required permits for regulated activities, such as aquatic vegetation harvesting and herbicide application, in these areas and the 100-foot adjacent area (Affidavit of Lisa M. Czechowicz at ¶¶ 7-8). And none of the municipalities that applied for freshwater wetlands permits to manage invasive plants in Chautauqua Lake experienced any delay in conducting that management (*id.* at ¶ 13). Excluding lakes from the regulatory definition of “freshwater wetland” would directly contradict the statutory language and would, itself, be ultra vires.

For the same reason, there is no merit to petitioners’ challenge to the designation of wetlands that are of significant importance to the State’s water quality (6 NYCRR 664.6[k]) as ultra vires. This designation comes directly from ECL 24-0107(9)(k): “it is determined by the [C]ommissioner to be of significant importance to protecting the state’s water quality.” The accompanying regulations merely specify that the Commissioner’s decision must be in writing, based on substantial evidence, contain the justification, and be posted on DEC’s website (6 NYCRR 664.6[k]). Such a procedural provision is a far cry from a regulation that unlawfully creates new policy or value judgments beyond that set forth by the Legislature.

Next, the statutory and regulatory text belies the Property Owners petitioners’ claim that the shift from official wetlands maps to “informal jurisdictional determinations” and DEC’s supposed “refusal to provide a

meaningful appeals process” (Mem of Law at 19). As discussed above, the mere fact that the Legislature decided to change how it determines the extent of DEC’s regulatory authority does not warrant voiding the statute or the regulations. And the statutory and regulatory text make clear that the jurisdictional determination process is a formal one (6 NYCRR 664.8, “Jurisdictional Determination Procedure”) and there is a full and fair opportunity to appeal a positive jurisdictional determination (6 NYCRR 664.9, “Consultation, and Review of Positive Jurisdictional Determinations”). The procedures in these regulations conform with all due process protections, providing property owners with the opportunity to administratively challenge DEC determinations (*id.*). And should DEC decide on appeal that the subject property contains a regulated wetland or adjacent area, the property owner may always challenge such a determination through a CPLR article 78 proceeding.

Finally, the Business Council and Kiryas Joel petitioners’ claim (Business Council Petition ¶¶ 186-196; Kiryas Joel Petition ¶¶ 176-186) that DEC’s permitting standards are ultra vires is baseless. DEC did not amend any of those standards, found in 6 NYCRR part 663. Part 663 took effect upon the effective date of each county’s regulatory maps (6 NYCRR 663.11), the last of which was finalized in 1995 (Walter aff ¶ 6). Any facial challenge to 6 NYCRR part 663 is more than 20 years too late.

C. The Regulations Do Not Improperly Delegate Regulatory Authority to Private Parties

Next, petitioners assert that allowing non-property owners to request a jurisdictional determination improperly delegates lawmaking powers to private individuals (Property Owners Mem of Law at 23, Business Council Mem of Law at 25, Kiryas Joel Mem of Law at 24, Partnership Mem of Law at 16-17). This is incorrect.

Both the statute and the regulations state that any person can request a jurisdictional determination. As Roy Jacobson, the head of DEC's wetlands program, explains, this allows for interested purchasers or developers to seek relevant information from DEC (Jacobson aff ¶ 60). It is also consistent with the prior iteration of the statute and regulations, where any person could submit evidence for or propose changes to draft regulatory wetlands maps (former ECL 24-0301). However, if DEC issues a positive jurisdictional determination, only the property *owner* may appeal that decision (ECL 24-0301[2]; 6 NYCRR 664.9[a]); Jacobson aff ¶ 63). Contrary to Property Owners petitioners' claims (Petition ¶¶ 123-127), the new regulations do not allow a private party to restrict any rights or create any obligations on another person. Property owners with regulated wetlands have never had a right to hide those regulated wetlands or otherwise evade their obligations under the Act, and a request to DEC from a third party for a formal jurisdictional

determination does not change or add any legal obligations that do not already exist. And, as discussed above, part 664 has ample opportunity for a property owner to dispute any finding that a wetland falls under the regulatory definition.

D. Article 24 and 6 NYCRR part 664 Do Not Violate Home Rule Law

Although the statutory and regulatory amendments changed how DEC determines whether a wetland is regulated under the Act, it did not alter the longstanding ability of local governments to assert regulatory control over wetlands within their jurisdiction (*contra* Property Owners Petition ¶¶ 128-134).

Neither the amendments to the Act nor the new regulations violate the home rule protections in article IX, § 2(c) of the New York State Constitution and the Municipal Home Rule Law. Under the amended Act, local governments may still receive DEC approval to create their own comprehensive local wetlands regulatory process (ECL 24-0803). Further, neither the statutory amendments nor the new regulations eliminate this process, as alleged by the Property Owners petitioners (Petition ¶¶ 130-133); such opportunities for local regulatory control are preserved at ECL 24-0501, 24-0803, as well as at 6 NYCRR part 665. As such, the Property Owners petitioners fail to even facially assert a violation of municipal home rule

powers because the new 6 NYCRR part 664 did not alter or eliminate any of municipal governance protections they cite. Accordingly, these petitioners' fifth cause of action should be dismissed.

POINT IV

THE PETITIONERS ARE NOT INJURED BY THE PART 664 REGULATIONS, WHICH, IN ANY EVENT, ARE RATIONAL

A. Petitioners lack standing to challenge part 664

A petitioner seeking to challenge government agency action in an article 78 proceeding “has the burden of demonstrating an injury in fact . . . in order to have standing to challenge that action.” (*Stevens*, 40 NY3d 505, [internal citations omitted]). “The injury-in-fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered a cognizable harm that is not tenuous, ephemeral, or conjectural but is sufficiently concrete and particularized to warrant judicial intervention” (*id.*).

Petitioners have not suffered any injury in fact. Petitioners have not been subjected to any final determinations by DEC affecting their property rights, as petitioners either have not submitted a request for a jurisdictional determination, or have failed to fully exhaust their administrative remedies following issuance of a positive jurisdictional determination. Unless and until DEC imposes on petitioners the requirements of 6 NYCRR part 664 to their detriment, “allegations that they are affected by those requirements through

an encumbrance on their property or the imposition of costs are too speculative” (*Matter of Association for a Better Long Is., Inc.*, 23 NY3d at 9, citing *Matter of Gordon v Rush*, 100 NY2d 236, 242 [2003]). The mere possibility that petitioners may need to apply for a jurisdictional determination to determine whether properties they own contain regulated wetlands does not constitute injury (*see, e.g., Matter of New York Blue Line Council, Inc. v Adirondack Park Agency*, 86 AD3d 756, 761-762 [3d Dept 2011] [petitioners lacked standing to challenge rulemakings because mere fact that petitioners had to endure Agency review process was not a concrete injury and petitioners’ anticipated injuries were based on events that may or may not occur in future administrative proceedings and could be prevented by further administrative action]).

Petitioners have simply not been injured, despite their claims that the new regulatory regime has expanded DEC’s jurisdiction to their detriment (Business Council, Kiryas Joel, Property Owners Petitions, Partnership Amended Petition *passim*). To the contrary, DEC already issued permits authorizing Chautauqua petitioners to undertake management activities for the control of invasive species in the lake (*Czechowicz aff ¶¶ 12-13*). Not only were they issued permits, but DEC worked diligently to ensure a jurisdictional determination was issued for the lake shortly after the adoption

of the new regulations, to ensure there were no delays in the permit application process or ultimate herbicide application (*id.*).

Additionally, because petitioners failed to exhaust their administrative remedies, they cannot seek annulment of the regulations on the ground that they are arbitrary and capricious. It is well established that, before objecting to the acts of an administrative agency, a petitioner “must exhaust available administrative remedies . . . before litigat[ing] in a court of law (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). This “afford[s] the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its expertise and judgment” (*id.*). Thus, any challenge at this stage is unripe.

The Partnership and Property Owners petitioners claim they have been harmed by DEC’s jurisdictional determination covering wetlands in and along the shores of Chautauqua Lake, but, upon information and belief, they did not seek an administrative appeal of said jurisdictional determination, nor have they sought to appeal of the permits DEC issued authorizing invasive species management activities, and they undertook the action they sought the permits for (*see Czechowicz aff ¶¶ 12-15*). Petitioners New York Development Group/Rowland, LLC and Windsor Ridge Partners, LLC in the Business Council proceeding and petitioners in the Kiryas Joel proceeding allege that they own certain properties that contain jurisdictional wetlands

and as a result they can no longer conduct planned development activities on said properties (Business Council Petition ¶¶ 31-33, 35-36; Booth aff; Arluck aff; Kiryas Joel Petition ¶ 19; Szegedin aff ¶¶ 17-23). Rowland claims it has been injured because it is now unable to develop two parcels that contain wetlands subject to DEC jurisdiction, but it failed to appeal the jurisdictional determination issued for said parcels, nor has it submitted an application for an ECL article 24 permit for its proposed development (*see* Answer to Business Council Petition ¶ 33). As for Windsor Ridge and Kiryas Joel, both allege harms to proposed development plans as a result of DEC's expanded wetlands jurisdiction affecting property they own, but these petitioners have not even submitted requests for jurisdictional determinations to determine whether 6 NYCRR part 664 has in fact expanded the acreage of jurisdictional wetlands on said properties. Petitioners must allow the regulatory process to play out before challenging it as irrational.

B. The new regulatory regime at part 664 is rational

Even if petitioners have been injured, which they have not, the new regulations at part 664 are rational.⁶ “If a determination is rational it must

⁶ To the extent petitioners challenge the rationality of definitions and standards in the regulations that have not been modified since the Act's initial enactment and original promulgation of the regulations over 40 years ago, including but not limited to the definition of freshwater wetlands to include waters of the State and adjacent areas, such challenges are barred by the statute of limitations and should be dismissed as untimely.

be sustained even if the court concludes that another result would also have been rational” (*Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 34 NY3d 184, 195 [2019]; *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]). Courts give great deference to agency determinations “which frequently involve[] technical and scientific issues more properly entrusted to the expertise of an agency, rather than a court” (*Aldrich v Pattison*, 107 AD2d 258, 267-269 [2d Dept 1985]), particularly in the environmental context (see *Matter of Citizens' Envtl. Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 57 AD3d 1279 [3d Dept 2008]). Additionally, “the practical construction of the statute by the agency charged with implementing it, if not unreasonable, is entitled to deference by the courts” (*id.* at 1280 [citations omitted]).

1. The New Jurisdictional Determination Process Allows for Clear and Concise Identification of Regulated Wetlands.

As recognized by the Legislature, and evident from years of experience of DEC staff working under the prior regulatory framework, a complete overhaul was clearly necessary to ensure an accurate and functional process to identify jurisdictional wetlands (see Mem in Supp, part QQ; Walter aff ¶¶ 5-9). As explained in the Walter Affirmation, the maps previously relied on to determine the location, size, and boundaries of jurisdictional wetlands

were highly inaccurate, inadequate, and already outdated upon promulgation (Walter aff ¶¶ 10-14). The new jurisdictional determination process (Jacobson aff ¶¶ 59-65), coupled with advances in technology that facilitate remote analysis, allows DEC to conduct initial jurisdictional determinations efficiently and effectively (Walter aff ¶¶ 29-34). The process by which DEC staff conduct remote jurisdictional determinations is detailed in the Department's [standard operating procedures](#), which identify every mapping dataset DEC staff use to conduct remote jurisdictional determinations (Walter aff ¶ 29). Not only does this provide clarity and consistency across staff conducting remote jurisdictional determinations, it also allows individuals requesting jurisdictional determinations for proposed projects, with the assistance of technical staff, to anticipate if there are any wetlands that meet regulatory criteria within their proposed project area (Walter aff ¶ 34).

While DEC conducts remote wetland determinations upon initial request, pursuant to 6 NYCRR 664.8(b), once a positive parcel jurisdictional determination has been issued, the landowner⁷ can request DEC staff to delineate the boundary of any regulated wetland identified on the parcel, at

⁷ The regulations only permit landowners to request delineations and appeal jurisdictional determinations. Although petitioners take issue with the ability of any person to seek a jurisdictional determination of a parcel, this requirement was set by the Legislature (*see supra*, III.C).

no cost to the landowner. The regulations also provide for a consultation and appeal process following the issuance of a positive jurisdictional determination (6 NYCRR 664.9), which allows further opportunity to clarify facts that may be inconsistent with remote data, resulting in an amendment to or rescission of the jurisdictional determination based on such facts where appropriate. In addition to providing parcel jurisdictional determinations, DEC also promulgated new regulations detailing the process for requesting, seeking consultation on, and appealing project jurisdictional determinations (*see* 6 NYCRR 664.8, 664.9). As set in the regulations, requests for project jurisdictional determinations must contain site-specific development plans and a wetland delineation completed or verified by DEC (6 NYCRR 664.8[c]). This detailed procedural framework ensures that DEC, working with landowners and project developers, has the most accurate and up to date scientific information available to it to determine the locations and boundaries of jurisdictional wetlands.

2. Freshwater wetlands in and surrounding lakes have always been regulated and it is not arbitrary and capricious to continue to regulate them.

Mischaracterizing it as a redefinition of “freshwater wetlands,” the Partnership and Property Owners petitioners first take issue with the application of 6 NYCRR part 664, and the entirety of the freshwater wetlands regulatory regime (Partnership Amended Petition ¶¶ 61-87; Property Owners

Petition ¶¶ 112-121). They argue that DEC’s exercise of jurisdiction over lakes is arbitrary and capricious. But the Act has always been interpreted to apply to waters across the State. Any other interpretation would be absurd and would require a complete disregard of scientific evidence to the detriment of wetland ecosystems and the numerous benefits they provide. ECL 24-0107(1) expressly defines “[f]reshwater wetlands” as “lands *and waters* of the state” (emphasis added) that meet certain other statutory criteria, and this statutory language expressly including waters of the state has not changed since the ECL article 24 was first enacted (*compare* L. 1975, c. 614, § 1 to L.2022, c. 58, pt. QQ, § 17). There is no merit to petitioners’ argument that certain wetlands characteristics and benefits (*see* ECL 24-0107[1] and 24-0105) indicate that the Legislature intended to exclude lakes from regulation (Partnership Mem of Law at 6-7). To the contrary, the statute expressly provides that freshwater wetlands that contain “lands and *submerged lands*” supporting various aquatic or semi-aquatic vegetation (*see* ECL 24-0107[1][a]-[b]), “lands and waters substantially enclosed by aquatic or semi-aquatic vegetation” (*id.* at [1][c]) and “*the waters overlying* the areas

set forth in (a) and (b) of [ECL 24-0107[1]] and the lands underlying paragraph (c) of [ECL 24-0107(1)]” (*id.* at [1][d] [emphasis added]).⁸

As noted by DEC’s experts, the vegetation characteristic of wetlands is adapted to wet conditions and can be permanently inundated in submergent wetlands (Jacobson *aff* ¶ 6). Not only have lakes always been subject to regulation under the Act, but portions of Chautauqua Lake have always been jurisdictional and subject to DEC regulation even under the previous 6 NYCRR 664 (Czehowicz *aff* ¶ 7). The mere fact that additional portions of Chautauqua Lake are now subject to regulation does not make the amendments irrational (*id.* at ¶ 9). The Legislature made the critical decisions at issue: eliminating the mapping requirement and regulating wetlands of unusual importance. These decisions combined with advances in technology since the promulgation of the original freshwater wetlands maps result in expanded potential jurisdiction (*see* Walter *aff* ¶ 9). DEC conducted extensive outreach, including outreach to the Chautauqua Lake community, to ensure a clear and transparent explanation for the basis of this expansion in jurisdictional areas in the lake was available to community members (*See*

⁸ Additionally, the Legislature recently rejected proposals to exempt inland navigable lakes of a certain size from regulation as wetlands (NY State Senate Bill 2023-S9799; NY State Senate Bill 2025-S3656) is further evidence of the legislative intent to regulate freshwater wetlands in and surrounding lakes.

Jacobson aff ¶ 15; R1288; *see also* [Meaning of the Revised Wetlands Act for Chautauqua Lake](#)). Furthermore, DEC has proposed several general permits, including Management of Invasive Species (GP-0-25-008) and Lakes and Shorelines Freshwater Wetlands General Permit (GP-0-25-007), and is in the process of evaluating feedback from the public on these general permits (Jacobson aff ¶¶ 76-77). The proposed general permits will create a more efficient permitting process for activities that generally meet permit issuance standards, with expedited application review by DEC staff and without the need for individual public notice (Jacobson aff ¶ 72).

3. Adjacent areas have always been regulated and it is rational to continue to regulate them.

Similarly, the Business Council and Kiryas Joel petitioners challenge regulations that have long been in place: the regulation of wetland-adjacent areas. These petitioners take issue with regulation of the adjacent area surrounding jurisdictional wetlands, arguing that the regulation of a 100-foot buffer around the boundaries of a jurisdictional wetland is arbitrary and capricious. This argument fundamentally misconstrues how the Act's regulatory regime applies to adjacent areas because it assumes that development within adjacent areas is outright prohibited, which is not the case (*see* 6 NYCRR part 663; Jacobson aff ¶¶ 66-69).

Both former and current ECL 24-0701(2) specifically mandate the regulation of activities “located not more than *one hundred feet* from the boundary of such wetland,” and anticipated the need for DEC to regulate “a *greater distance* from any such wetland . . . where necessary to protect and preserve the wetland.” (emphasis added). To provide further clarity as to how to measure the adjacent area from the boundary of a jurisdictional wetland, DEC provided a definition for “regulated adjacent area” at 6 NYCRR 664.2(ac), a definition identical to that included in the former version of the regulations (*see* former 6 NYCRR 664.2[b]).

DEC also promulgated 6 NYCRR 667.4(a), identifying those situations where DEC may require a larger adjacent area to protect and preserve wetlands, as authorized pursuant to ECL 24-0701(2). DEC may extend the adjacent area for nutrient poor wetlands and productive vernal pools, following a site-specific analysis of the environmental conditions of the wetland to determine the distance and location required for the extended adjacent area (6 NYCRR 667.4[a]). In its response to public comments and the regulatory impact statement, DEC explained in detail why extending an adjacent area for nutrient poor wetlands and productive vernal pools might be necessary. Vernal pools and nutrient-poor wetlands are both critical and particularly sensitive to activities beyond the generally applicable 100-foot adjacent area (*see* R3095-3096, R3108, R3168-3170).

As noted by petitioners, DEC had initially proposed a set distance for extended adjacent areas for all nutrient—poor and productive vernal pools, 300 and 800-feet, respectively (R3169-3170) in its initial rulemaking and sought feedback on that proposed requirement. Following review of public comments advocating for site-specific determinations to extend adjacent areas, including from Business Council petitioners, DEC reconsidered these set distances and determined that it would be more reasonable to conduct individual analyses of environmental conditions of each nutrient poor wetland or productive vernal pool prior to determining whether to extend the adjacent area beyond 100 feet and what distance and configuration the adjacent area should be if extended (*id.*; see Jacobson aff ¶¶ 27-28). To the extent petitioners argue that regulation of activities within adjacent areas is irrational, DEC did not determine as part of the rulemaking at issue here what activities are exempt from regulation and what activities require an ECL article 24 permit. Those requirements were set long ago in 6 NYCRR part 663, and any challenge now is untimely.

CONCLUSION


For these reasons, as well as those explained in the accompanying affidavits and the administrative record, DEC respectfully requests that the Court deny the petitions and dismiss all four proceedings.

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Albany, New York

Respectfully submitted,

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WORD COUNT CERTIFICATION

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