SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of the Application of

BUSINESS COUNCIL OF NEW YORK STATE, INC., NEW YORK STATE ECONOMIC DEVELOPMENT COUNCIL, NEW YORK STATE BUILDERS ASSOCIATION INC., NEW YORK CONSTRUCTION MATERIALS ASSOCIATION, INC., ASSOCIATED GENERAL CONTRACTORS OF NEW YORK STATE, LLC, NEW YORK STATE ASSOCIATION OF REALTORS® INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS, NATIONAL WASTE & RECYCLING ASSOCIATION, BARBERA HOMES & DEVELOPMENT, INC., NEW YORK DEVELOPMENT GROUP / ROWLAND, LLC, NEW HAMPTON LUMBER CO., INC., and WINDSOR RIDGE PARTNERS LLC,

Petitioners-Plaintiffs,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and a Declaratory Judgment Pursuant to Section 3001 of the Civil Practice Law and Rules

- against -

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and AMANDA LEFTON, as Acting Commissioner of the New York State Department of Environmental Conservation,

Respondents-Defendants.

VERIFIED PETITION AND COMPLAINT

Index No.:
RJI No.:
Date Filed:

Petitioners-Plaintiffs Business Council of New York State, Inc., New York State Economic Development Council, New York State Builders Association Inc., New York Construction Materials Association, Inc., Associated General Contractors of New York State, LLC, New York State Association of REALTORS® Inc., National Federation of Independent Business, National Waste & Recycling Association, Barbera Homes & Development, Inc., New York Development

Group/Rowland, LLC, New Hampton Lumber Co., Inc., and Windsor Ridge Partners LLC ("Petitioners"), by and through their attorneys, Whiteman Osterman & Hanna LLP, as and for its Verified Petition and Complaint alleges as follows:

PRELIMINARY STATEMENT

1. "New York faces a housing crisis that requires bold actions and an all-hands-on-deck approach. . . . Every community in New York must do their part to encourage housing growth to move our State forward and keep our economy strong. The New York Housing Compact is a comprehensive plan to spur the changes needed to create more housing, meet rising demand, and make our state a more equitable, stable, and affordable place to live."[1]

2. In fact, in January 2023, Governor Hochul's mandate to fix New York's clear housing crisis sought to "remove barriers to housing production" and called for the immediate building of at least 800,000 new homes for New Yorkers.[2]

3. Many builders, including a number of the Petitioners, answered that call, and proposed new housing and other development projects that would help to fill the void that Governor Hochul identified.

4. Governor Hochul's words in January 2023, underscoring the desperate state of the New York housing market and the significant need for affordable housing throughout the state especially, however, rang hollow in the hallways of the New York State Department of Environmental Conservation ("DEC").

[1] https://www.governor.ny.gov/news/governor-hochul-announces-statewide-strategy-address-new-yorks-housing-crisis-and-build-800000#:~:text=%E2%80%9CNew%20York%20faces%20a%20housing,and%20keep%20our%20economy%20strong.

[2] https://www.nysar.com/wp-content/uploads/2025/04/GA_Freshwater_Wetlands_Comments_NYSAR_March_2025.pdf

5. Rather than working to facilitate the development of new housing and other development needed to support the housing market, DEC undermined those important goals by crafting new freshwater wetlands regulations that increased the number of regulated wetlands and their adjacent areas by well more than 3.5 million acres statewide, to a total of 5.1 million acres.

6. In fact, the total number of acres of newly regulated wetlands and adjacent areas in New York cannot even yet be determined, because DEC has deferred any attempt to give property owners prior notice of the regulations' impact. Instead, DEC has chosen to place the burden on property owners to ask DEC for a wetlands jurisdictional determination for each and every parcel in the State on which any development is contemplated, creating a rebuttable presumption that wetlands are on every parcel.

7. The new regulations, at 6 NYCRR Part 664, coupled with existing wetland permit regulations at 6 NYCRR Part 663, will have a severe impact on residential, commercial, and industrial investment and development, as well as preexisting and new aggregate mines, particularly in urbanized and suburban areas where municipalities have already invested billions of taxpayer dollars in water, sewer, and stormwater infrastructure to support economic activity and growth.

8. Indeed, because the new regulations deem all wetlands of any size in urban areas as having "unusual importance," regardless of the areas' individualized environmental characteristics, the regulations will encourage and lead to further suburban sprawl, contrary to the smart growth principles on which Governor Hochul's housing mandate was based.

9. Furthermore, all wetlands identified in urban areas are designated in the Wetlands Regulations as Class I and II, the highest classes subject to the most strict regulations.

10. The Wetlands Regulations provide that the standards for getting a permit for regulated activities (building a house, mining, aggregate, commercial, and industrial development) is as follows: "Class I wetlands provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances. A permit shall be issued only if it is determined that the proposed activity *satisfies a compelling economic or social need that clearly and substantially outweighs the loss of or detriment to the benefit(s)* of the Class I wetland" (6 NYCRR § 663[5][e] [emphasis added]). "Class II wetlands provide important wetland benefits, the loss of which is acceptable only in very limited circumstances. A permit shall be issued only if it is determined that the proposed activity *satisfies a pressing economic or social need that clearly outweighs the loss of or detriment to the benefit(s) of the Class II wetland*" (*id.* [emphasis added]).

11. During the public comment period, the regulated public expressed their clear concerns about how the proposed regulations would be used, especially in urban areas, to effectively shutter development. Moreover, they presented the Department with many examples of how regulating not only the wetlands (as the federal government arguably currently regulates them) but also adding the 100-foot adjacent upland area, would significantly impair their constitutionally protected property rights.

12. Because the Wetlands Regulations regulate the 100-foot buffer area (and larger buffers for nutrient poor wetlands and vernal pools) as if they are within the wetlands themselves, any activity in the regulated upland adjacent areas must meet either of the impossibly difficult standards above, which will render development in urban area, especially, economically impracticable.

13. Indeed, strict application of the Wetlands Regulations to urban areas, which are defined based on the U.S. Census Bureau definition, results in absurd outcomes, because the definition of "urban areas" encompasses a number of relatively small localities, with rural characteristics, including but not limited to Conesus Lake, Corinth, Walden, and Clifton Springs, among others. Thus, any wetlands within those largely rural communities are automatically subject to the Class II restrictions.

14. For the typical homeowner or purchaser, the Wetlands Regulations impose a terrible burden because they are presumed to know that a wetland, such as a tiny, seasonal vernal pool, may exist on a neighbor's property, to which they have no access but which may throw a portion of a regulated adjacent area of 100 feet or larger onto their property.

15. Moreover, DEC has proposed wholly insufficient so-called General Permits in draft form. These General Permits leave the burden on the property owner and require them to essentially apply for a General Permit—a costly and lengthy process—which will result in substantial and significant State regulation of most projects to a degree not previously experienced by New York State property owners.

16. By rendering much of the State undevelopable from a practical or economic feasibility perspective, the new wetlands permit structure will have far-reaching economic consequences, including fewer housing opportunities, reduced local tax revenues, increased housing costs, job losses, sprawl, and an acceleration of outmigration to other states.

17. Accordingly, Petitioners have been compelled to bring this combined declaratory judgment action and CPLR Article 78 proceeding to annul as arbitrary and capricious and declare void the new wetlands regulations that became effective on January 1, 2025 (the "Wetlands Regulations"), and to enjoin DEC's enforcement thereof.

18. As is set forth in further detail below, and in the accompanying memorandum of law, the Wetlands Regulations should be invalidated because DEC failed to comply with the requirements of the State Environmental Quality Review Act (Environmental Conservation Law ("ECL") §§ 8-0101–8-0117) ("SEQRA") and the underlying regulations (6 NYCRR Part 617); failed to comply with the State Administrative Procedure Act ("SAPA") in promulgating the regulations; the Wetlands Regulations are arbitrary and capricious in various aspects, including but not limited to, the unsupported increase in regulated adjacent areas, i.e. wetland buffer areas, in which development is foreclosed without an expensive and time consuming permit process; and the Wetlands Regulations are unconstitutionally vague, in that they fail to give property owners adequate notice of the areas that are subject to DEC's wetlands jurisdiction, subjecting property owners throughout the state to significant civil and criminal penalties, and DEC's permitting standards authorize arbitrary and discriminatory application.

19. Each and every one of these errors takes on heightened significance when they are considered in the midst of the severe statewide housing shortage and affordability crisis that Governor Hochul is seeking to address.

20. Indeed, DEC's Wetlands Regulations directly undermine the Governor's mandate to increase development immediately to mitigate the lasting impacts that the housing crisis is having on New Yorkers.

21. In light of these and numerous other procedural and substantive failures and violations of New York State law, as demonstrated fully herein and in the accompanying memorandum of law, the Wetlands Regulations should be annulled and DEC should be enjoined from enforcing them.

PARTIES AND VENUE

22. The Business Council of New York State, Inc. is a trade association and the leading business organization in New York State, representing the interests of large and small firms throughout the state. Its membership is made up of more than 3,000 member companies, local chambers of commerce and professional and trade associations, including those interested in the construction industry who are subject to or harmed by the new Wetlands Regulations. The Business Council's principal offices are located at 111 Washington Avenue, Suite 400, Albany, NY 12210.

23. New York State Economic Development Council is a trade association and the state's principal organization representing economic development professionals. Its more than 900 members include the leadership of Industrial Development Agencies and Local Development Corporations, commercial and investment banks, underwriters, bond counsels, utilities, chambers of commerce, higher education institutions, and private corporations, including those who are subject to or harmed by the new Wetlands Regulations. The purpose of NYSEDC is to promote the economic development of the state and its communities, to encourage sound practices in the conduct of regional and statewide development programs, and to develop education programs that enhance the professional development skills of our members. NYSEDC's principal offices are located at 111 Washington Avenue, 4th Floor, Albany New York 12210.

24. New York State Builders Association Inc. is a trade association representing the home building industry and strives to create a strong business environment and ensure its members' ability to provide quality housing for all New Yorkers. Its members include those in the construction industry who are subject to or harmed by the new Wetlands Regulations. The New York State Builders Association's principal offices are located in East Schodack, New York.

25. New York Construction Materials Association Inc. is a statewide not-for-profit trade association representing companies engaged in the production and recycling of construction aggregates (sand, gravel, and crushed stone), ready-mixed concrete and asphalt for public and commercial infrastructure projects in New York State. The materials produced and recycled by its members are essential to every construction project in New York and are subject to or harmed by the new Wetlands Regulations. New York Construction Materials Association's principal offices are located at 11 Century Hill Drive, Latham, New York 12110.

26. Associated General Contractors of New York State, LLC is a trade association and the leading voice of the building and heavy highway construction industry, representing contractors and related companies dedicated to the ideals of skill, integrity and responsibility, including those in the construction industry who are subject to or harmed by the new Wetlands Regulations. Associated General Contractors of New York State's principal offices are located at 10 Airline Drive, Suite 203, Albany, New York 12205.

27. New York State Association of REALTORS® Inc. is a not-for-profit trade organization representing more than 60,000 of New York State's real estate professionals. NYSAR's members will be harmed, represent property owners and home buyers who will also be harmed, by the new Wetlands Regulations due to the decrease in property values caused by the Regulations' restrictions on development. NYSAR's principal offices are located at 130 Washington Avenue, Albany, New York 12210.

28. National Federation of Independent Business is a nonprofit, nonpartisan, member-driven organization that advocates on behalf of America's small and independent business owners in New York and across the country. Some of NFIB's members own property that is or are in the

construction industry and are subject to or harmed by the new Wetlands Regulations. NFIB's principal offices in New York are located at 111 Washington Ave., Suite 107, Albany, NY 12210.

29. National Waste & Recycling Association is a trade association representing the waste and recycling industry, including nearly 700 members that are publicly traded and privately owned local, regional and Fortune 500 national and international companies. Some of NWRA's members participate in the construction industry in New York, and thus will be harmed by the new Wetlands Regulations. NWRA's principal offices are located at 1550 Crystal Drive, Suite 804, Arlington, VA 22202.

30. Barbera Homes & Development, Inc. is a residential property developer with many property interests throughout the Capital District area. Petitioner's land holdings include lands which are affected by the Wetlands Regulations because they contain and/or are adjacent to new State regulated wetlands and their adjacent areas. Petitioner as a developer of housing in the now urban, Capital District Region, has been and will be adversely impacted by the Wetlands Regulations rendering real estate subdivisions economically impractical as a result of regulating wetlands of any size along with the 100-foot adjacent upland area.

31. New York Development Group/Rowland, LLC ("Rowland") is a real property owner in the Town of Milton, Saratoga County. Rowland is affiliated with Capital Region Builders & Remodelers Association, which is a member of New York State Builders Association, Inc., an organizational petitioner in this litigation. Rowland's land holdings include lands which are affected by the Wetlands Regulations because they contain and/or are adjacent to new State regulated wetlands and their adjacent areas.

32. As demonstrated in the accompanying affirmation of Geoffrey Booth, Rowland's land holdings include lands which are affected by the Wetlands Regulations because they contain

and/or are adjacent to new State regulated wetlands and their adjacent areas. In particular, Rowland has been uniquely harmed by the application of the new Wetlands Regulations because Rowland was in the process of obtaining approval for a project to construct a mixed-use development, including two 4-story, 27-unit multi-family buildings, one 7,900 sq. ft. commercial building, and one 5,400 sq. ft. commercial building with associated access drives and parking areas, on two parcels totaling 10.54 acres in the Town of Milton, Saratoga County. Prior to adoption of the Wetlands Regulations, Rowland received a federal wetlands permit to disturb 0.196 acres of a 4.13-acre federal wetland for construction of the proposed building and parking areas.

33. In April 2025, Rowland received a positive jurisdictional determination for new DEC wetlands, because DEC determined that one parcel contains a Class II wetland because it is located in an "urban" area and the other parcel contains a Class I wetland because it is contiguous to fresh surface water. The addition of the 100-foot regulated adjacent area surrounding those regulated wetlands under the Wetlands Regulations restricts approximately 55% of the overall 10.54-acre parcel and eliminates all economically feasible development on the parcels.

34. Petitioner New Hampton Lumber Co., Inc. is a lumber and building materials business in the construction industry, a real property owner in the Town of Wawayanda, Orange County, and a member of National Federation of Independent Business, which is affected by the Wetlands Regulations because its property contains regulated wetlands and adjacent areas and its business will be impacted by the Wetlands Regulations' development restrictions. In particular, New Hampton Lumber Co. has been uniquely harmed by the application of the new Wetlands Regulations because its property was not previously regulated under the former Freshwater Wetlands Act, and now has a regulated wetland and adjacent area on site, which will drastically impair its ability to further develop or sell the land.

35. Petitioner Windsor Ridge Partners LLC is a real property owner in the Town of Lancaster, Erie County, which is affected by the Wetlands Regulations because its property contains regulated wetlands and adjacent areas. In particular, Windsor Ridge has been uniquely harmed by the application of the new Wetlands Regulations because it was in the process of obtaining approval for Phase II of a residential subdivision, containing 179 detached single-family homes and all related site improvements on 117 acres of land. Windsor Ridge Partners previously completed Phase I of the approved subdivision and has been working to obtain the required approvals for the subdivision for more than ten years. It also has previously completed necessary infrastructure improvements for the project, including off-site sanitary sewer improvements.

36. As a result of application of the Wetlands Regulations, the Phase II Windsor Ridge subdivision proposal will now result in an additional 1.44± acres of regulated wetlands and 4.10± acres within the mandatory 100-foot regulated adjacent area on the property that were not previously regulated prior to the adoption of the Wetlands Regulations. Accordingly, Windsor Ridge will be required reconfigure its development plans and will likely lose buildable lots, after years of planning and substantial investments, to comply with the new Wetlands Regulations.

37. Respondent New York State Department of Environmental Conservation is a governmental agency responsible for carrying out the State's environmental policy pursuant to ECL § 3-301, including the Freshwater Wetlands Act (ECL 24-0101 et seq.). DEC adopted and is charged with enforcement of the Wetlands Regulations that are challenged in this hybrid proceeding.

38. Respondent Amanda Lefton is the Acting Commissioner of the New York State Department of Environmental Conservation, the public official responsible for adopting and enforcement of the Wetlands Regulations that are challenged in this hybrid proceeding.

BACKGROUND

The Original Freshwater Wetlands Act

39. The Freshwater Wetlands Act and Tidal Wetlands Act, added to the ECL in 1975 and 1973 respectively as ECL Articles 24 and 25, established it to be the public policy of the state to preserve wetlands by limiting their use and development.

40. As originally enacted, ECL §24-0301(1) limited the state permit program to freshwater wetlands of 12.4 acres (5 hectares) or greater, or to wetlands formally determined by DEC to be of "unusual local importance," or of an acre or more within the Adirondack Park that are adjacent to a stream or lake as "shown on the freshwater wetlands map" (ECL 24-0107[1]).

41. As the Court of Appeals noted in *Drexler v Town of New Castle* (62 NY2d 413, 417 [1984]), "the statute defines 'freshwater wetlands' as only those lands and waters 'shown on the freshwater wetlands map' and it defines the 'freshwater wetlands map' as that 'promulgated by [DEC]['] … . Consequently, only those lands or waters satisfying either the size or the importance criterion are shown on the State-prepared map and constitute 'freshwater wetlands' within the meaning of the statute."

42. The Freshwater Wetlands Act, as enacted in 1975, was designed to strike a balance between preservation and protection of wetlands on the one hand, and reasonable economic use and development on the other (ECL § 24-0103; *see Spears v Berle*, 48 NY2d 254, 260 [1979]).

43. Part of this balancing was reflected in the procedures imposed upon DEC for mapping wetlands. These procedures were intended to ensure that DEC's wetlands maps were accurate and that property owners and local governments have ample notice and opportunity to comment on any proposal to designate land to be subject to this regulation, thereby satisfying their constitutional rights to due process of law.

44. In particular, DEC's wetlands mapping began with a tentative map of wetlands of more than 12.4 acres, which was required to "set forth the boundaries of such wetlands as accurately as is practicable to inform the owners thereof, the public, and the department of the approximate location of the actual boundaries of the wetland" (ECL 24-0301[3]).

45. DEC was then required to hold a public hearing on the tentative wetlands map "in order to afford an opportunity for any person to propose additions or deletions from such map" (ECL 24-0301[4]). To be sure that property owners knew about the potential regulation of their lands, the former ECL provisions required DEC to "give notice of such hearing to each owner of record as shown on the latest completed tax assessment roles, of lands designated as such wetlands as shown on said map and also to the chief administrative officer and clerk of each [impacted] local government," and to publish notice of any public hearing "at least once, not more than thirty days nor fewer than ten days before" it occurred, in two newspapers having general circulation." (ECL 24-0301[4]).

46. Following the public hearings, the Commissioner of DEC was required to promulgate the final DEC wetlands maps, and then to "give notice of such order to each owner of lands" so designated, by certified mail, and to publish notice of the designation order in two local newspapers of general circulation.

47. Thus, prior to January 1, 2025, freshwater wetlands in New York were understandably defined to "mean[] lands and waters of the state as shown on the freshwater wetlands map" that contain defined water and vegetative conditions (*see* ECL former § 24-0107[1][a]-[d]).

48. And because DEC was obligated to map those areas, property owners could easily know when their lands were subject to DEC's wetlands jurisdiction.

49. Indeed, from the 1980s until 2015, DEC maintained clear wetlands maps, with no or little difficulty, and project sponsors and property owners were able to easily ascertain and thus design their projects to avoid these large regulated wetlands and their adjacent areas.

The 2022 Budget Bill Significantly Amends the Freshwater Wetlands Act

50. On April 1, 2022, Governor Kathy Hochul signed into law a massive budget bill, Chapter 58 of the Laws of 2022, in which Part QQ thereof extensively amended the Freshwater Wetlands Act.

51. In particular, the 2022 amendments sought to drastically reduce the minimum size of regulated wetlands from 12.4 acres to 7.4 acres (effective January 1, 2028).

52. And the 2022 amendments included in the definition of freshwater wetlands not only "area[s] of at least twelve and four-tenths acres," whether mapped or not, but also those that "if less . . . are of unusual importance, and which contain any or all of" a variety of listed water and vegetation features (ECL § 24-0107(1)(a)-(d)). By including areas of unusual importance to include all areas "located within or adjacent to an urban area, as defined by the United States Census Bureau," any wetland within an urban area is now regulated, because it meets one of 11 criteria, regardless of its individual characteristics, like the presence of occupied habitat of threatened or endangered species, species of special concern, or species of "conservation need."

53. Another key component of the 2022 legislation is that Section 2 of Part QQ removes the requirement that freshwater wetlands be mapped before they can be subject to regulation by DEC. It makes clear that DEC's existing maps "are not necessarily determinative as to whether a permit is required" to develop land either within or adjacent to a potential freshwater wetland. It also allows DEC to connect wetlands, never previously mapped individually, where the wetlands are within 50 meters of each other and have some sort of hydrologic connection.

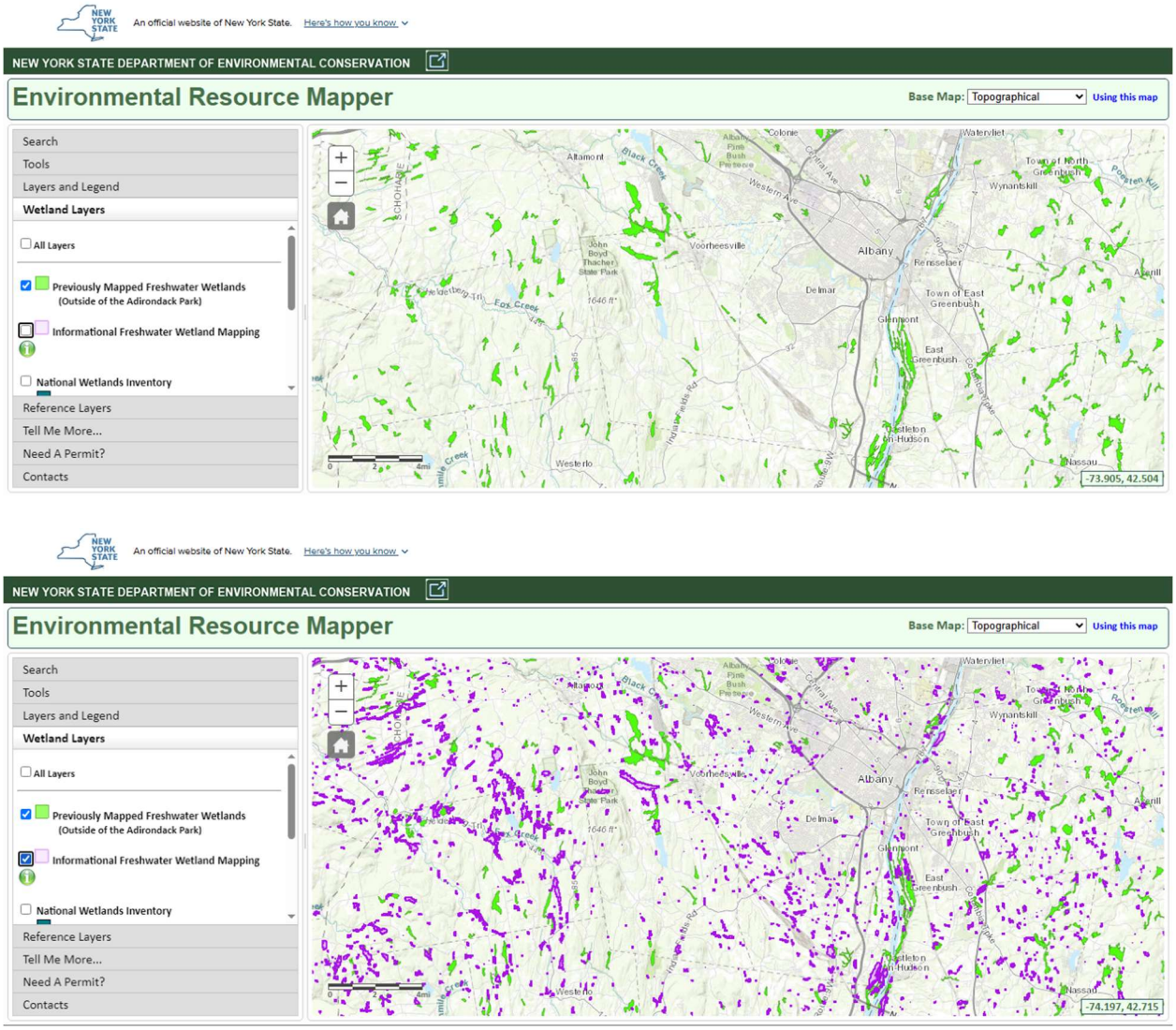
54. From now on, DEC's wetlands maps are merely advisory and need not follow the prior map adoption and revision process. Significantly, the new law establishes "a rebuttable presumption that mapped and unmapped areas meeting the definition of freshwater wetlands . . . are regulated and subject to permit requirements" (ECL § 24-0301(4)). This presumption can be overcome by a field verification which is conducted by DEC or by a third party and approved by DEC. Such approvals are effective for five years.

55. Stated succinctly, until now, the Freshwater Wetlands Act only granted DEC authority to regulate wetlands of a certain size or local importance identified on DEC's map. However, the 2022 budget legislation expanded DEC's role by changing the definition of areas that constitute a regulated freshwater wetland and omitting the threshold mapping requirement.

56. Because the legislation also removed the wetlands mapping mandate, and the notice that it provided to landowners that their lands were subject to the Department's jurisdiction, it now places the entire burden on each and every landowner throughout the state to determine, after a lengthy and costly process before DEC, whether its lands are subject to DEC's wetlands jurisdiction.

57. Indeed, the Legislature created a "rebuttable presumption" that the formerly mapped and now also the unmapped wetlands areas of the state are subject to DEC wetlands jurisdiction if they meet the definition of a freshwater wetland, which property owners cannot know simply by reading the legislation and its attendant regulations or by looking at any available mapping on the DEC website.

58. DEC reportedly contracted with Cornell University to prepare the purple wetland layer on the Environmental Resource mapper. These purple wetlands are shown throughout the state and far exceed any previous mapping of regulated wetlands in the State:



59. Indeed, a quick review of the "purple wetland layer" shows stormwater basins as regulated wetlands, fails to show structures existing as of January 1, 2025, and shows wetlands where no wetlands exist.

60. Similarly, the "purple wetland layer" does not show wetlands that have previously been delineated and are known to exist. This presents an utter trap for the property owner who is desperately trying to understand whether he or she can build a house or anything else on their lot.

61. In sum, landowners must now provide their own due process because the State has absolved itself of any responsibility to do so without extensive and costly administrative proceedings.

The New DEC Freshwater Wetlands Regulations

62. On December 31, 2024, DEC announced the adoption of the new Wetlands Regulations, 6 NYCRR Part 664, based on statutory amendments adopted by Chapter 58 (Part QQ), Laws of 2022. The revised regulations (the Wetlands Regulations) took effect on January 1, 2025 (Affirmation of Robert S. Rosborough IV, affirmed on April 30, 2025 ["Rosborough Aff."], Ex. A).

63. In the Wetlands Regulations, DEC implemented changes that drastically expand its regulatory jurisdiction and establish new procedural steps for obtaining State wetland jurisdictional determinations.

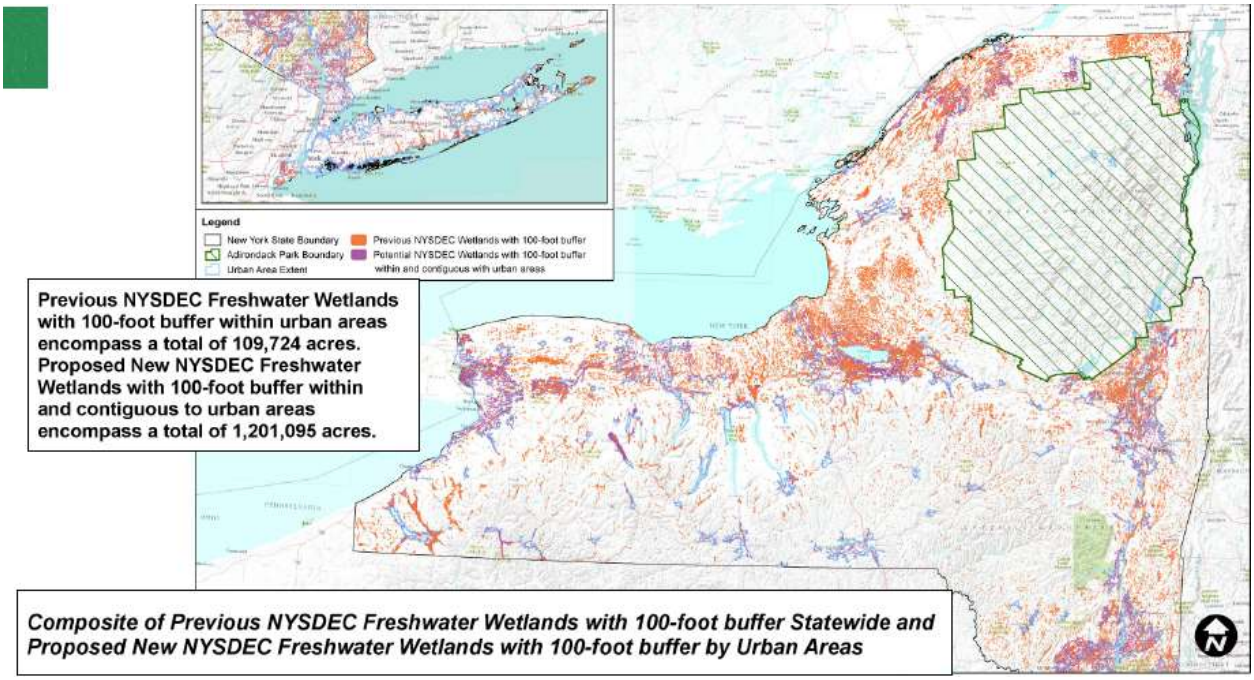
64. As noted above, the prior law provided that, to be regulated by the state, a wetland must be either 12.4 acres in size or of "unusual local importance."

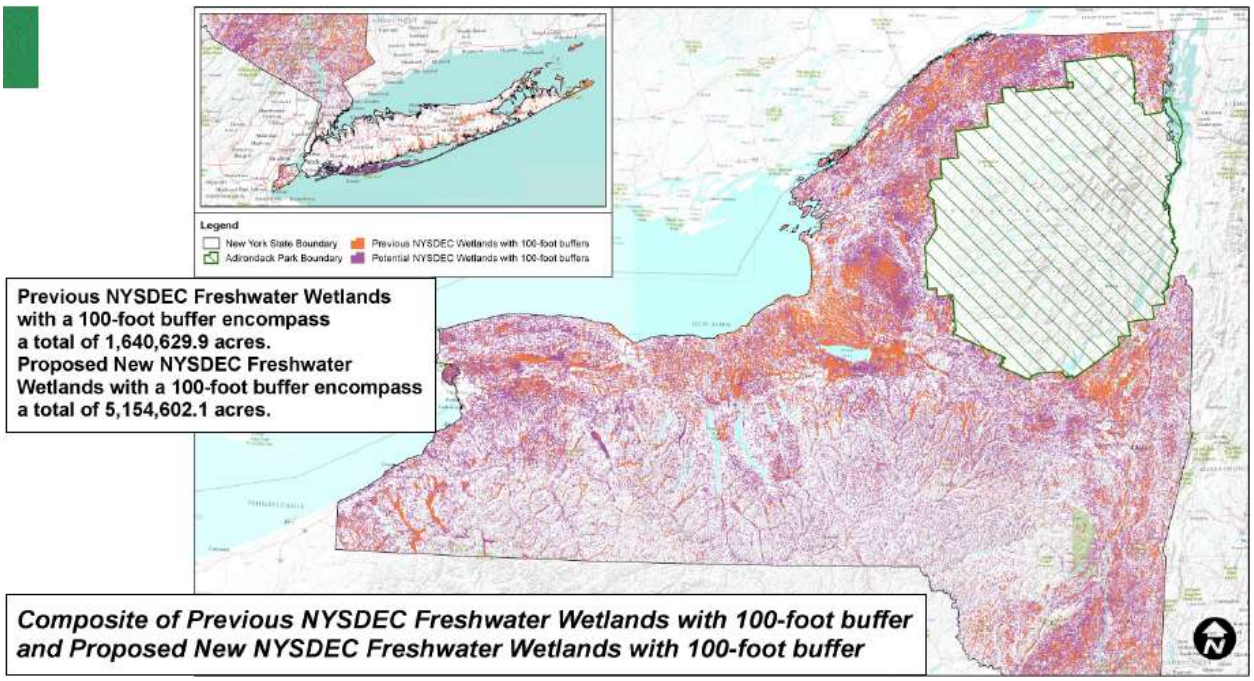
65. The new law keeps the 12.4-acre figure until January 1, 2028, but provides that a wetland of any size can be regulated if it is of "unusual importance," and it is sufficient to have any one of eleven listed characteristics, some of which are ambiguously broad. For example, any wetland "located within or adjacent to an urban area" is deemed of unusual importance, even if unmapped.

66. This is a considerable expansion of DEC authority, which has drastically increased by at least 3.5 million acres the lands that are subject to DEC's wetlands jurisdiction. Indeed, although DEC refused to quantify the considerable expansion of its wetlands jurisdiction resulting

from the new Wetlands Regulations, Petitioners' consultants were able to compile maps using publicly available information to show just how extensive DEC's jurisdiction has been expanded.

67. As the following maps demonstrate—the first showing the regulated wetlands and adjacent areas prior to January 1, 2025, and the second showing the regulated wetlands and adjacent areas under the new Wetlands Regulations—the expansion of DEC's wetlands jurisdiction is staggering:





68. As the statute, ECL § 24-0107(9)(b), provides, "Unusual importance" means "a freshwater wetland, regardless of size, that possesses one or more of the following characteristics as determined by the department pursuant to regulations… it is located within or adjacent to an urban area, as defined by the United States census bureau."

69. The accompanying regulations, in 6 NYCRR 664.6(b) provide that "[a] freshwater wetland, regardless of size, is of unusual importance and, therefore, regulated if it possesses one or more of the following characteristics, as determined by the department . . . it is located within or adjacent to an urban area, as defined and identified by the United States Census Bureau."

70. Indeed, the Wetlands Regulations establish an amorphous and expansive definition of wetlands of "Unusual Importance," which includes 11 criteria, including all wetlands areas in urban areas, that will effectively cover the entire state.

71. Under the Wetlands Regulations, DEC is required to classify each jurisdictional wetland under a classification system utilizing four separate classes that rank wetlands according

to their ability to perform wetland functions and provide wetland benefits. The most beneficial are ranked Class I, and descend from there (6 NYCRR 664.4).

72. This classification system is based on a recognition that not all wetlands are equally beneficial (6 NYCRR 664.5).

73. Under 6 NYCRR 664.5(b)(13), Class II wetlands include wetlands within an urban area.

74. Correspondingly, Part 664.6(b) defines "wetlands of unusual importance" as any wetland in an urban area.

75. The flaw here is that the Class II rating, at least, and per se determination that a wetland in an urban area qualifies as a "wetland of unusual importance" does so without any consideration of the ecological significance of the property.

76. While both the statute (ECL § 24-0107(9)(b)) and the accompanying regulations (6 NYCRR 664.6(b)) provide that that a freshwater wetland is of "unusual importance" if it is located within or adjacent to an urban area, neither provide any reasoned explanation for this classification. Neither the statute nor the accompanying regulations establish any rational bases for their determination that a wetland, solely based on its location within or adjacent to an urban area, without regard to any other characteristics, to be of "unusual importance."

77. For example, under the new regulations, a wetland of any size, is considered to be of "unusual importance," even if it does not serve as a habitat for any species whatsoever.

78. Moreover, the Wetlands Regulations adopt an upland buffer area in which development will almost assuredly be prohibited called a "Regulated Adjacent Area," and is regulated the same as the wetland itself.

79. This extends the Department's jurisdiction well beyond the now unknown boundaries of a freshwater wetland and onto any upland property within at least 100 feet outside of the wetland boundary, or beyond 100 feet for "nutrient poor wetlands" or "vernal pools" where the Regulated Adjacent Area is up to Department Staff's unfettered discretion.

80. Furthermore, as noted, property owners throughout the state can no longer rely on the former DEC Freshwater Wetlands Maps that provided notice of the areas that were subject to the Department's wetlands jurisdiction, but instead must seek a "Jurisdictional Determination" from the Department to determine if they must go through the burdensome wetlands permit application process.

81. During the "Jurisdictional Determination" process, the Department must conduct a formal assessment to decide whether a parcel meets the criteria to be a regulated freshwater wetland under the Freshwater Wetlands Act and determine if it is a Class I, II, III, or IV wetland.

82. In particular, for development projects, including housing, the Department has to first make a parcel jurisdictional determination and then make a separate project jurisdictional determination, reviewing project plans and decide whether the project proposes to disturb any land not only within a regulated wetlands, but also within the associated Regulated Adjacent Area 100 feet or more outside of a wetland.

83. DEC is permitted up to 90 days from the date of a request to make a Parcel Jurisdictional Determination, and then an additional 90 days to go to the field to verify the wetlands boundaries on the site. But the regulations provide for even more time if DEC itself decides that the weather conditions are not right to make that determination. To builders, however, those significant delays could drastically impair, if not kill, a needed housing project. It can also

adversely affect even the purchase of land if a party has to wait over one half a year to find out if there are any State regulated wetlands on the property.

84. If DEC determines that the property is subject to the Department's wetlands jurisdiction, the property owner has only two options: (1) appeal the determination to the DEC Commissioner, which will only further delay the provision of housing, or (2) go through the burdensome and costly process to apply for a DEC wetlands permit.

85. Moreover, DEC's Jurisdictional Determinations only last for five years after which they may be revisited and revised at the agency's discretion, only further impairing the property owners' rights to develop and use their lands. That is especially so, because previously made DEC wetlands delineations were deemed to have expired as of January 1, 2025, in favor of the new jurisdictional determination scheme, no matter when those delineations were made or the investments that a property owner had made in a property in reliance on them.

86. Moreover, given the regulatory environment in the State and length of time it takes to get project approvals, the five-year duration for DEC wetlands jurisdictional determinations is likely to be insufficient to last from the initial proposal through construction for many projects.[3]

87. Notably, under the Wetlands Regulations, "any person" may request a Jurisdictional Determination, including those who do not own or have any interest in the land or the project. That means that any person or group who is opposed to a housing or other development project could use the Jurisdictional Determination process to attempt to delay, interfere with, and increase the cost of a housing project in an effort to thwart it.

[3] DEC in its presentation on the new Freshwater Wetlands program stated numerous times that only five staff are available to issue Parcel Jurisdictional Determinations at DEC headquarters for the entire State. Moreover, of those five staff, two were dedicated to solar projects only, leaving the remaining three staff to make all of the remaining jurisdictional determinations throughout the state.

88. The regulations, however, make no provision for avoiding this kind of abuse of the process. Indeed, ECL § 24-0301(5) expressly authorizes the DEC to "accept information from . . . environmental organizations or other private agencies, regarding the location of freshwater wetlands."

89. As a result of these significant expansions of DEC's wetlands regulatory authority, more than 5.1 million acres of land in New York will be effectively foreclosed from development, including for the housing that Governor Hochul emphasized was so urgently needed, and the industries, such as mining aggregate that are absolutely necessary for housing and any type of infrastructure maintenance and economic development.

90. For example, although the Mined Land Reclamation program established substantial vested rights in the Life of Mines for such aggregate quarries, among others, vested rights that have been recognized in the New York Court of Appeals on several occasions, DEC staff have disregarded such vested rights, in violation of the law.

91. In fact, DEC staff, in seeking to impose new regulatory authority over these approved Life of Mines are requiring applicants seeking mining renewals to go out and delineate new freshwater wetlands where the mine or quarries, due to grandfathering and vested rights, should not be subject to regulation under the new Freshwater Wetlands program at all.

DEC's Regulatory Review of the New Wetlands Regulations Was Patently Deficient

92. Under SEQRA, the lead agency must identify relevant areas of concern, take a hard look, and provide a reasoned elaboration of its determination of significance

93. DEC, in its SEQRA review, failed to provide any meaningful analysis of the regulations' potential adverse impacts on the density of land use, sprawl, inclusion of urban areas within the definition of areas of unusual importance, impact of agricultural land resources,

community character, and the future population growth that 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.

94. Moreover, DEC's approximate wetlands map and other SEQRA documents do not even attempt to estimate the lands that will be impacted by the new unmapped regulated areas beyond a conclusory recognition that DEC's jurisdiction will increase at least twofold, and thus cannot have analyzed the environmental impacts from the regulation of these unidentified regulated areas.

95. Rather, DEC's entire perfunctory SEQRA review was contained in a mere five sentences, only two of which explained DEC's rationale:

> "DEC has determined that the revisions to 6 NYCRR Part 664 will not have any significant adverse impacts on the environment. The purpose of this rule making is to implement amendments to the Freshwater Wetlands Act (ECL Article 24) adopted on April 9, 2022, that, among other changes, expanded protections to previously unprotected wetlands throughout the state. These changes fundamentally altered the statutory framework of ECL Article 24, and this action is necessary to clarify statutory provisions and guide DEC's implementation of the changes to the Freshwater Wetlands Act that take effect January 1, 2025. *The purpose of the Freshwater Wetlands Act is to preserve, protect, and conserve freshwater wetlands and this action will substantially increase the amount of wetlands across the state regulated under the Freshwater Wetlands Act. The expanded scope of regulatory jurisdiction will lead to a reduction in adverse impacts on these wetlands as more projects will be required to avoid, minimize, or mitigate impacts through the long established permitting process*."

(Rosborough Aff., Ex. B [emphasis added]).

96. That limited and perfunctory environmental review, which merely assumes without any analysis whatsoever that the new Wetlands Regulations will be beneficial, fundamentally failed DEC's SEQRA obligations.

97. Indeed, DEC merely checked the "No Impact" box for each and every category of environmental assessment, and called that good enough. That is not what SEQRA requires, and DEC, being the agency charged with implementing the SEQRA regulations, knows better.

98. Tellingly, in its Revised Regulatory Impact Statement, DEC examined the criteria identified in ECL § 24-0107(9) used to determine whether a freshwater wetland is of "unusual importance," and determined that the criterion in ECL § 24-0107(9)(b) that the wetland "is located within or adjacent to an urban area, as defined by the United States census bureau" is "clear enough for the department to implement without any further clarification in regulation" (Rosborough Aff., Ex. C).

99. In other words, DEC did not make any attempt to further explain or clarify this requirement in the new regulations. Thus, the directive of 6 NYCRR 664.6(b) that a freshwater wetland is of "unusual importance" if it is located within or adjacent to an urban area is clearly arbitrary and capricious, as this classification lacks any rational basis.

100. DEC's failure to substantially comply with the regulatory impact statement requirements under SAPA and the New York Constitution also warrant the annulment of the Wetlands Regulations, as DEC wholly failed to identify and estimate the cost both to the Department and to the regulated community of compliance with the new Wetlands Regulations (Rosborough Aff., Ex. C).

101. The Wetlands Regulations are also unconstitutionally vague.

102. Under ECL § 71-2303(1)(a), "[a]ny person who violates, disobeys or disregards" any provision of the Freshwater Wetlands Act is subject to a civil penalty of up to $11,000 for every such violation. In the case of a continuing violation, each day shall constitute a separate violation.

103. Under ECL § 71-2303(2), any person who violates any provision of the Freshwater Wetlands Act is deemed guilty of a violation punishable by "a fine of not less than two thousand nor more than five thousand dollars." For a second and each subsequent offense, such person shall be guilty of a misdemeanor, i.e. a crime.

104. Statutes providing for criminal penalties must be closely scrutinized to determine whether a statute is unconstitutionally vague.

105. Under the circumstances presented, the Wetlands Regulations are an unconstitutionally vague regulation of land use in that they fail to clearly identify the areas and/or properties that are actually subject to its restrictions.

106. In light of these and numerous other procedural and substantive failures and violations of New York State law, Petitioners were compelled to bring this proceeding to challenge the Wetlands Regulations and to seek to enjoin DEC from enforcing them.

AS AND FOR A FIRST CAUSE OF ACTION
(CPLR Article 78 Claim Challenging SEQRA Compliance)

107. Petitioner repeats and realleges all of the foregoing allegations set forth in this Petition and Complaint with the same force and effect as though set forth at length herein.

108. Under SEQRA, the lead agency, here DEC, must identify relevant areas of concern, take a hard look, and provide a reasoned elaboration of its determination of significance.

109. Pursuant to DEC's regulations implementing SEQRA, "actions" subject to SEQRA include: "agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions" and "adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that may affect the environment" (*see* 6 NYCRR § 617.2[b][2] and [3]).

110. Adoption of the new Wetlands Regulations was thus an action subject to SEQRA review.

DEC Failed to Properly Classify the Action as a Type I Action Under SEQRA

111. Actions that require SEQRA review are classified as either Type I, Type II, or Unlisted (*see* 6 NYCRR §§ 617.2[b], [aj], [ak], [al]).

112. Type I actions refer to those actions that are more likely to have a significant adverse environmental impact (as identified in § 617.4); Type II actions are exempt from review under SEQRA (*see id.* § 617.5); and Unlisted actions are those that are neither Type I nor Type II (*see* 6 NYCRR § 617.2[al]).

113. DEC's SEQRA regulations expressly provide that "the adoption by any agency of a comprehensive resource management plan" is a Type I action (*see* 6 NYCRR § 617.4[b][1]).

114. The adoption of the new Wetlands Regulations qualifies as a comprehensive resource management plan for the management of wetlands throughout New York, and thus was a Type I action under SEQRA.

115. For Type I actions, a presumption of environmental significance attaches that the action will result in a significant environmental impact and an environmental impact statement must be prepared by the lead agency.

116. Upon information and belief, DEC failed to classify the action as a Type I action, and thus attempted to avoid the presumption that its action would result in a significant adverse environmental impact.

117. Rather, DEC blithely and without any supporting analysis simply concluded that the Wetlands Regulations would be wholly beneficial.

DEC Failed to Take a Hard Look at the Potentially Significant Environmental Impacts Caused by the Adoption of the New Wetlands Regulations

118. "All 'actions' subject to SEQRA (i.e., Type I and unlisted actions) initially require the preparation of an EAF, whose purpose is to aid an agency "in determining the environmental significance or nonsignificance of actions. After reviewing the EAF, if the lead agency . . . determines that the action may include the potential for at least one significant adverse environmental impact," a positive declaration must be issued and completion of an EIS becomes necessary" (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 519 [2004]).

119. For Type I actions, at the determination of significance phase the lead agency must: "(1) consider the action as defined in sections 617.2(b) and 617.3(g) of this Part; (2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern; (3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and (4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation" (*see* 6 NYCRR 617.7[b]).

120. Under the governing SEQRA regulations, 6 NYCRR 617.7(c) sets forth the criteria for determining the environmental significance of an action, which includes whether the action effects "a substantial change in the use, or intensity of use, of land… or in its capacity to support existing uses" (6 NYCRR 617.7[c][1][viii]). The consequences of a proposed action must also be considered, including the "geographic scope" and "magnitude" of the impact (6 NYCRR 617.7[c][3][v]-[vi]).

121. As the New York courts have routinely held, "the threshold for a positive declaration and a subsequent EIS is relatively low. By contrast, the standard for a negative declaration – which obviates the need for an EIS and terminates SEQRA review – is relatively high, requiring the lead agency to determine either that there *will* be no adverse environmental impacts or that the identified adverse environmental impacts *will* not be significant" (*Clean Air Action Network of Glens Falls, Inc. v Town of Moreau Planning Bd.*, 235 AD3d 1124, 1127 [3d Dept 2025] [cleaned up]).

122. While DEC did complete a Short EAF to evaluate whether the Wetlands Regulations have potentially significant adverse impacts (Rosborough Aff., Ex. B), DEC's SEQRA review failed to provide any meaningful analysis of the regulations' potential adverse impacts on the density of land use, sprawl, inclusion of urban areas within the definition of wetlands of unusual importance, impact of agricultural land resources, community character, and the future population growth that 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 predominantly outside of urban areas.

123. For example, because the Wetlands Regulations define all wetlands within urban areas as having "unusual importance," regardless of their specific environmental characteristics, any development of these areas and the 100-foot adjacent buffer areas surrounding them will be precluded. Doing so, will only push development further outside of those urban areas, resulting in significant sprawl, which could potentially change the community character adjacent to the affected urban areas, impact population growth trends, reduce available agricultural lands as those lands are proposed for development to accommodate the sprawl from the urban areas, and alter development densities in numerous areas of the state.

124. DEC's perfunctory SEQRA analysis, however, does not even mention these significant impacts, much less take a hard look at them. And that is just one area that DEC wholly failed to analyze.

125. Indeed, as Part 2 of the Short EAF shows (Rosborough Aff., Ex. B), DEC simply checked off boxes to indicate that "[n]o, or small impact may occur" for all environmental assessment categories listed on the form, without any explanation or elaboration whatsoever (*see Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau*, 82 AD3d 1377, 1379 [3d Dept 2011]).

126. It is perplexing to consider how the Wetlands Regulations, which drastically affect more than 3.5 million newly regulated acres, and a total of more than 5.1 million acres, across countless properties throughout the state in both urban and rural communities, could be considered to have "no, or small impact" on any of the categories listed on the Short EAF, i.e., the "geographic scope" and "magnitude" of the environmental impact necessitated a full environmental impact statement ("EIS"), not a short form EAF review.

127. Indeed, the new Wetlands Regulations even admit that DEC does not know the geographic extent and thus the potential environmental impact of its action. As the DEC Short EAF provides, "this action will substantially increase the amount of wetlands across the state regulated under the Freshwater Wetlands Act" (Rosborough Aff., Ex. B).

128. But, DEC failed to undertake any effort, even at a generalized concept level (*see generally* 6 NYCRR § 617.10), to assess the environmental impact of adding millions of newly regulated acres to DEC's jurisdiction.

129. Nor could it have, because the elimination of the DEC freshwater wetlands mapping in favor of the wetlands jurisdictional determination process means that DEC does not know where the newly regulated areas of the state are, what their environmental characteristics are, whether

additional regulation was necessary or whether they were already sufficiently protected, and how properties adjacent to the new wetlands and their associated 100-foot buffer areas will be affected by sprawl and its associated effects on population, community character, and land uses.

130. Rather, DEC was content to assume that no significant adverse environmental impacts would result, and impermissibly deferred its SEQRA obligations to an undefined later date in the future.

131. The Wetlands Regulations will undoubtedly have a moderate to large impact on all categories listed in the EAF. Thus, the Wetlands Regulations should have been deemed to have a significant impact on the environment, necessitating the completion of an EIS.

132. That is especially the case because, as a Type I action, the adoption of the new Wetlands Regulations was presumed to have a significant adverse environmental impact.

133. DEC's conclusory SEQRA review utterly failed to rebut that heavy presumption.

134. Given the foregoing, DEC utterly failed, at the initial determination phase, to properly and fully identify relevant areas of environmental concern for the Wetlands Regulations and take a hard look at them, as required by SEQRA.

DEC Failed to Provide Reasoned Elaboration of Its Determination of Nonsignificance

135. In addition, DEC failed to set forth in its determination of nonsignificance for the Wetlands Regulations any reasoned elaboration for its determination, and failed to provide reference to any supporting documentation (*see* 6 NYCRR 617.7[b]).

136. In fact, DEC's attempt to comply with the reasoned elaboration requirement was a mere two sentences. After describing the action, Part 2 of DEC's EAF conclusorily determines that no significant adverse environmental impacts will result and reasons: "[t]he purpose of the Freshwater Wetlands Act is to preserve, protect, and conserve freshwater wetlands and this action

will substantially increase the amount of wetlands across the state regulated under the Freshwater Wetlands Act. The expanded scope of regulatory jurisdiction will lead to a reduction in adverse impacts on these wetlands as more projects will be required to avoid, minimize, or mitigate impacts through the long established permitting process" (Rosborough Aff., Ex. B).

137. The purpose of SEQRA, however, is to give "the protection and enhancement of the environment, human and community resources . . . appropriate weight with social and economic considerations in determining public policy, and that those factors be considered together in reaching decisions on proposed activities. Accordingly, it is the intention of this Part that a suitable balance of social, economic and environmental factors be incorporated into the planning and decision-making processes of state, regional and local agencies. It is not the intention of SEQR that environmental factors be the sole consideration in decision-making" (6 NYCRR § 617.1[d]).

138. DEC failed to undertake any such analysis, merely assumed that the significant environmental impacts of the new Wetlands Regulations would be beneficial because more lands and projects will be regulated, and failed to provide any elaboration, much less a reasoned one, for that conclusion.

139. In short, even though the promulgation of the Wetlands Regulations constitutes an "action" within the plain meaning of DEC's own SEQRA regulations, and a Type I action at that, DEC wholly failed to comply with any of SEQRA's procedural or substantive mandates.

140. Accordingly, the Wetlands Regulations should be annulled in their entirety.

AS AND FOR A SECOND CAUSE OF ACTION
(Failure to Comply with SAPA and the NY Constitution)

141. Petitioner repeats and realleges all of the foregoing allegations set forth in this Petition and Complaint with the same force and effect as though set forth at length herein.

142. Article IV, section 8 of the New York State Constitution requires that:

> No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state. The legislature shall provide for the speedy publication of such rules and regulations by appropriate laws.

N.Y. Const. art. IV, § 8.

143. This provision is implemented by SAPA.

144. Section 102(2)(a) of SAPA defines a "rule" as

> "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency, including the amendment, suspension or repeal thereof."

145. The definition excludes "forms and instructions, interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" (SAPA § 102(2)(b)(iv); however, blanket requirements and fixed standards that are to be generally applied in the future, regardless of individual circumstances, are rules subject to the SAPA rule-making procedures.

146. DEC is an administrative agency subject to the provisions of SAPA.

147. The Wetlands Regulations are a "rule" subject to the requirements under SAPA because it sets blanket requirements and fixed standards for what qualifies as a regulated freshwater wetland and contains standards that substantially alter or can determine the result of future agency adjudications.

148. Therefore, DEC was required to follow the procedures set forth in SAPA before enacting and implementing the Wetlands Regulations.

149. In order for a purported "rule" to have legal effect, it must be promulgated in accordance with the procedures set forth in SAPA and the New York State Constitution. The Agency must provide notice of proposed rule-making with the Secretary of State for publication in the State Register, afford the public an opportunity to submit comments on the proposed rule, and file the final rule with the Department of State for publication in the State Register.

DEC's Regulatory Impact Statement is Woefully Insufficient to Assess the True Impact of the Wetlands Regulations

150. Additionally, SAPA mandates that administrative agencies submit a regulatory impact statement with each rule that it proposes.

151. The regulatory impact statement must include: the statutory authority for the rule; the needs and benefits for the rule; projected costs associated with the rule; reporting requirements resulting from the rule; a description of mandates on local governments under the rule; a statement identifying rules that may duplicate, overlap, or conflict with the rule; a statement regarding alternative approaches, if any, considered by the agency and detailed reasons why those alternatives were not included; a statement identifying if the rule exceeds minimum federal standards for the same or similar subjects; and a compliance schedule for regulated entities (SAPA § 202-a[1]).

152. While DEC did prepare a Regulatory Impact Statement on the Wetlands Regulations, which it later revised, its Revised Regulatory Impact Statement is wholly insufficient to comply with the regulatory impact review that SAPA mandates (Rosborough Aff., Ex. C).

153. DEC's Revised Regulatory Impact Statement does not 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," in violation of SAPA § 202-a(3).

154. Although DEC's Revised Regulatory Impact Statement does contain a "statement regarding alternative approaches," it does not provide a sufficient "discussion of such alternatives and the reasons why they were not incorporated into the rule," in violation of SAPA § 202-a(3).

155. Indeed, as the Revised Regulatory Impact Statement states, "a no action alternative was never considered" (Rosborough Aff., Ex. C)

156. Pursuant to SAPA § 202-a(3)(c), the Revised Regulatory Impact Statement must contain "[a] statement detailing the projected costs of the rule, which shall indicate: (i) the costs for the implementation of, and continuing compliance with, the rule to regulated persons; (ii) the costs for the implementation of, and continued administration of, the rule to the agency and to the state and its local governments; and (iii) the information, including the source or sources of such information, and methodology upon which the cost analysis is based; or (iv) where an agency finds that it cannot fully provide a statement of such costs, a statement setting forth its best estimate, which shall indicate the information and methodology upon which such best estimate is based and the reason or reasons why a complete cost statement cannot be provided."

157. Further, as the Revised Regulatory Impact Statement provides, "[t]he regulated community, including local governments, will not be required to expend any additional costs unless they seek to conduct a development activity within a regulated freshwater wetland or regulated adjacent area" (Rosborough Aff., Ex. C).

158. This is flatly contradicted by the experience of local government, which will unquestionably all need State wetland permits for necessary infrastructure and its maintenance, in urban areas especially.

159. The Revised Regulatory Impact Statement goes on to provide that "[l]andowners, other persons, or official bodies, having good cause, may submit written requests for the

department to perform wetland delineations at no cost, pursuant to ECL § 24-0301(2). Regulated parties with large and complicated development projects that impact regulated wetlands may prefer to hire professional consulting firms to assist in wetland delineation and all the other aspects of the land development process. These projects usually require professional services because they typically involve federal permitting and may require highly technical mitigation plans to compensate for losses of wetlands" (Rosborough Aff., Ex. C).

160. The Revised Regulatory Impact Statement makes no attempt to set forth even an estimate of the costs to regulated parties to hire professional consulting firms to assist in wetland delineation.

161. Nor does the Revised Regulatory Impact Statement even attempt to estimate the different costs to DEC from the change to the mandatory wetlands mapping procedures under the former Freshwater Wetlands Act to the new jurisdictional determination procedures under the new Act and Wetlands Regulations.

162. Only DEC would know what its costs were to prepare the formerly required wetlands maps, and only DEC could estimate what its costs would be to perform the wetlands jurisdictional determinations now required under the 2022 amendments, since such a determination must now be sought for each and every development project throughout the state, or else a landowner could face criminal or civil sanction under the statute for failing to do so.

163. Given DEC's admittedly limited resources, the State Administrative Procedure Act required that the Department make those assessments of the costs of the new drastically increased regulatory scheme, or to assess whether its resources are sufficient to perform all wetland delineations which will be required under the Wetlands Regulations within the strict timelines provided by the Legislature.

164. DEC was also required to assess the increased costs of reviewing and determining wetlands permit applications, as well as the impact of the appeal of such denials administratively, on the Department's resources.

165. Therefore, DEC failed to properly account for the costs associated with the Wetlands Regulations, in violation of SAPA § 202-a(3).

AS AND FOR A THIRD CAUSE OF ACTION
(The 2022 Amendments to the Freshwater Wetlands Act and the New Wetlands Regulations are Unconstitutionally Vague)

166. Petitioner repeats and realleges all of the foregoing allegations set forth in this Petition and Complaint with the same force and effect as though set forth at length herein.

167. The Fourteenth Amendment of the United States Constitution provides, in pertinent part, that no state shall "deprive any person of life, liberty or property, without due process of law."

168. Article I, § 6 of the New York State Constitution similarly provides, in pertinent part, that "[n]o person shall be deprived of life, liberty or property without due process of law."

169. A statute is unconstitutionally vague within the meaning of the Due Process Clause if it does not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he or she may act accordingly, and is written in a manner that permits or encourages arbitrary or discriminatory enforcement.

170. If a statute's prohibitions are not clearly defined, then the statute is void for vagueness.

171. Any violation of the Freshwater Wetlands Act subjects a property owner to both civil and criminal penalties.

172. Under ECL § 71-2303(1)(a), "[a]ny person who violates, disobeys or disregards" any provision of the Freshwater Wetlands Act is subject to a civil penalty of up to $11,000 for

every such violation. In the case of a continuing violation, each day shall constitute a separate violation.

173. Under ECL § 71-2303(2), any person who violates any provision of the Freshwater Wetlands Act is deemed guilty of a violation punishable by "a fine of not less than two thousand nor more than five thousand dollars." For a second and each subsequent offense, such person shall be guilty of a misdemeanor, i.e. a crime.

174. Statutes providing for criminal penalties must be closely scrutinized to determine whether a statute is unconstitutionally vague.

The 2022 Amendments to the Freshwater Wetlands Act and the Wetlands Regulations Fail to Identify and Give Property Owners Reasonable Notice of the Regulated Areas

175. Under the circumstances presented, the 2022 amendments to the Freshwater Wetlands Act and the Wetlands Regulations are an unconstitutionally vague regulation of land use in that they fail to clearly identify the areas and/or properties that are actually subject to its restrictions.

176. As set forth above, the new expanded definition of "freshwater wetlands" creates great uncertainty for property owners throughout the state as to the authorized use of their property.

177. Indeed, under the former Freshwater Wetlands Act, property owners could reference DEC's wetlands maps to easily determine whether their properties were subject to DEC's wetlands jurisdiction.

178. That former process provided property owners the constitutional due process that was required to impinge upon their constitutionally protected property rights.

179. By eliminating the wetlands mapping requirement, the 2022 amendments and the Wetlands Regulations have now placed property owners in a situation where they could risk

criminal and civil sanctions for activities that they cannot, on their face, determine whether they are subject to DEC's wetlands jurisdiction.

180. Furthermore, the Wetlands Regulations specifically provide that areas such as vernal pools may have regulated adjacent areas that are only later determined within DEC's discretion. This too forecloses property owners, who may not have any regulated wetlands or vernal pools on their own property, but instead may be regulated because a regulated adjacent area crosses onto their property from a neighbor's land, from knowing whether they are subject to DEC's jurisdiction.

181. In such an example, a property owner would have to ask DEC to make a jurisdictional determination about a wet spot on a neighbor's property to then determine whether their own property falls within a regulated adjacent area, which could expand more than 800 feet outside of a "vernal pool." And then the property owner would have to ask the neighbor for permission to investigate on the neighboring lands, which may or may not be given. That is not the reasonable notice that constitutional due process requires.

182. Thus, because property owners are now faced with potential criminal sanctions for activities within an area that may be regulated under the Wetlands Regulations, to avoid those potential penalties, they are forced to submit every project to a DEC jurisdictional determination, even those which have no overt connection to a wetland on their property or within their control.

183. The process also creates an avenue for great abuse by individuals or entities that may be opposed to a particular project.

184. The Wetlands Regulations allow "any person" to request a parcel jurisdictional determination and, thus, project opponents can file a jurisdictional determination request, even if the property owner does not and even if there is no reasonable chance of DEC exercising wetlands

jurisdiction over the project, thereby nevertheless forcing project reviews into lengthy delays that could threaten financing, approvals, or derail the project entirely.

185. By depriving property owners of reasonable notice of what areas in the state are actually regulated, the 2022 amendments and the Wetlands Regulations are unconstitutionally void for vagueness.

The Wetlands Regulations Standards for Permit Issuance are Unconstitutionally Vague

186. Under the Wetlands Regulations, DEC has granted itself authority to weigh the economic or social need for development, an area in which it has no expertise, against the value of a regulated wetland or adjacent area in order to grant a wetlands permit (*see* 6 NYCRR § 663.5).

187. In particular, to grant a wetlands permit, the Wetlands Regulations allow DEC to first determine whether a proposed development "(i) would be compatible with preservation, protection and conservation of the wetland and its benefits, and (ii) would result in no more than insubstantial degradation to, or loss of, any part of the wetland, and (iii) would be compatible with public health and welfare" (6 NYCRR § 663.5[e][1]).

188. This compatibility test applies, however, only to a limited set of activities. For development, DEC has determined that residences, commercial and industrial buildings, mines, and their associated structures and facilities are "incompatible" or "usually incompatible" with preservation of wetlands, and so must instead satisfy DEC's weighing test under 6 NYCRR 663.5[e][2] (*see* 6 NYCRR 663.4[d], 663.5[e][2]).

189. The weighing test provides for DEC to decide whether a development project is "compatible with the public health and welfare, be the only practicable alternative that could accomplish the applicant's objectives and have no practicable alternative on a site *that is not a freshwater wetland or adjacent area*" (6 NYCRR 663.5[e][2] [emphasis added]).

190. Then for Class I, II, and III wetlands, DEC must also determine that the development proposal "minimize[s] degradation to, or loss of, any part of the wetland or is adjacent area and . . . minimize[s] any adverse impacts on the functions and benefits that the wetland provides (*id.*). And for Class IV wetlands, DEC must determine that "the proposed activity must make a reasonable effort to minimize degradation to, or loss of, any part of the wetland or its adjacent area" (*id.*).

191. As the Wetlands Regulations explain, this weighing analysis is very unlikely ever to be satisfied for development projects that are proposed around Class I, II, and III wetlands and adjacent areas:

- "*Class I wetlands*: Class I wetlands provide the most critical of the State's wetland benefits, reduction of which is acceptable only in the most unusual circumstances. A permit shall be issued only if it is determined that the proposed activity satisfies a ***compelling economic or social need*** that clearly and substantially outweighs the loss of or detriment to the benefit(s) of the Class I wetland."
- "*Class II wetlands*: Class II wetlands provide important wetland benefits, the loss of which is acceptable only in very limited circumstances. A permit shall be issued only if it is determined that the proposed activity satisfies a ***pressing economic or social need*** that clearly outweighs the loss of or detriment to the benefit(s) of the Class II wetland."
- "*Class III wetlands*: Class III wetlands supply wetland benefits, the loss of which is acceptable only after the exercise of caution and discernment. A permit shall be issued only if it is determined that the proposed activity satisfies an ***economic or***

social need that outweighs the loss of or detriment to the benefit(s) of the Class III wetland."

- "*Class IV Wetlands*: Class IV wetlands provide some wildlife and open space benefits and may provide other benefits cited in the act. Therefore, wanton or uncontrolled degradation or loss of Class IV wetlands is unacceptable. A permit shall be issued for a proposed activity in a Class IV wetland only if it is determined that the activity would be the only practicable alternative which could accomplish the applicant's objectives."

(6 NYCRR § 663.5[e][2] [emphasis added]).

192. The Wetlands Regulations then explain that for Class I wetlands, a "compelling" need is one that "carries with it not merely a sense of desirability or urgency, but of actual necessity; that the proposed activity must be done; that it is unavoidable" (6 NYCRR § 663.5[f][4][ii]).

193. For Class II wetlands, which include all wetlands of unusual importance, including those found within an "urban" area, a "pressing" need is one that "must be urgent and intense, though it does not have to be necessary or unavoidable" (6 NYCRR § 663.5[f][5][ii]).

194. These permitting standards vests DEC with virtually unbridled discretion to sit as a super-land use board to determine the relative priority of a proposed development project, be it affordable housing, multi-family development, retail or commercial space, or an aggregate mine, among many others, when compared to the effects on lands that could extend at least 100 feet, if not much farther, outside of a regulated wetland.

195. Indeed, that discretion, which invites arbitrary and discriminatory application that varies between each of DEC's regional offices, vests the power within DEC to kill a project based

only on its own view of the state's economic and social needs, an area in which DEC has no administrative expertise, as demonstrated by their utter failure to even try to assess the overwhelming impact of taking jurisdiction over millions of acres more of wetlands and upland adjacent areas, which renders the Wetlands Regulations unconstitutionally void for vagueness.

196. Because the Wetlands Regulations are unconstitutionally vague with respect to what activities and/or what properties are regulated, and grant DEC unlimited discretion to enforce them in a manner that allows DEC to sit as a super-land use board, an area in which it lacks any administrative expertise, the Wetlands Regulations are null and void, and Respondent should be enjoined from enforcing them.

AS AND FOR A FOURTH CAUSE OF ACTION
(CPLR Article 78 Claim Alleging that Certain Provisions of the Wetlands Regulations are Arbitrary and Capricious)

197. Petitioner repeats and realleges all of the foregoing allegations set forth in this Petition and Complaint with the same force and effect as though set forth at length herein.

The Wetlands Regulations Extension of 100-Foot Regulated Adjacent Areas Surrounding All Wetlands was Arbitrary and Capricious

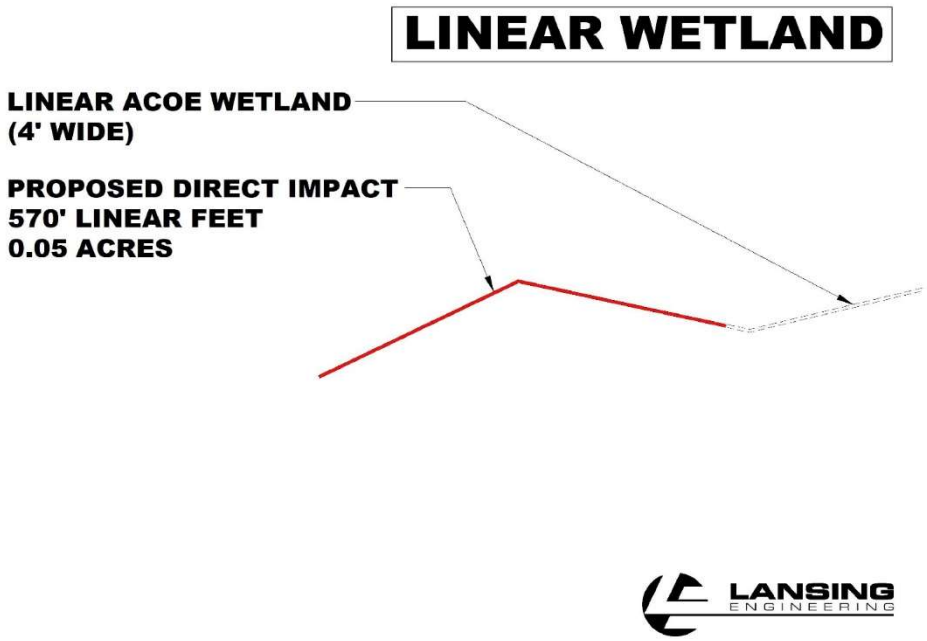
198. Although DEC certainly has an interest in regulating to protect the state's wetlands, as the Legislature provided in the 2022 amendments to the Freshwater Wetlands Act, the blanket setting of 100-foot regulated adjacent areas surrounding all wetlands, regardless of their relative environmental significance, is arbitrary and capricious.

199. Indeed, the Wetlands Regulations merely provide that each regulated wetland, regardless of its classification, must have a 100-foot regulated adjacent area surrounding it (*see* 6 NYCRR § 664.2[ac]).

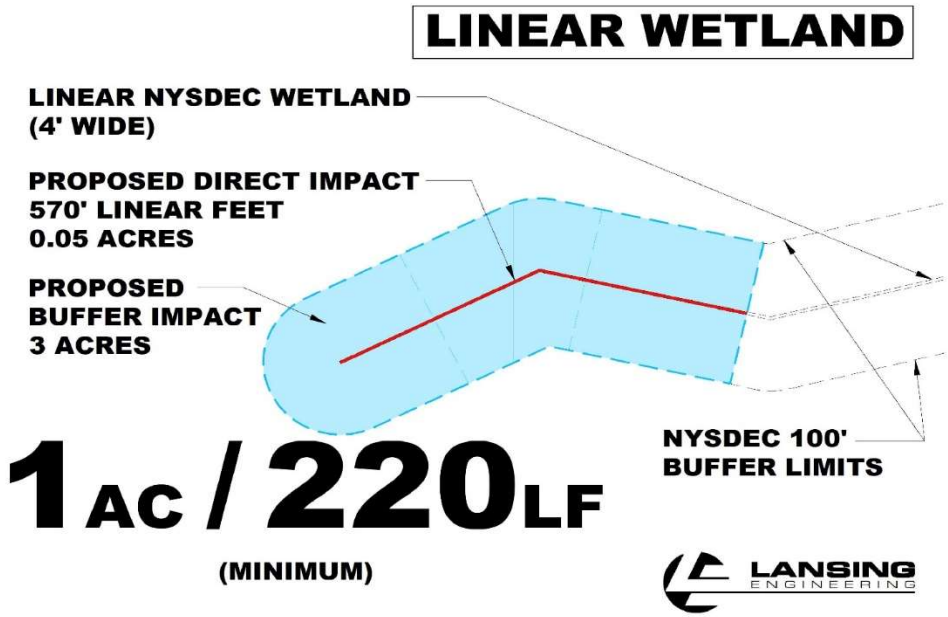
200. Upon information and belief, DEC failed to support the blanket 100-foot regulated adjacent area upon any scientific basis to demonstrate that 100 feet of land outside a regulated wetland must be protected in every instance to ensure protection of the wetland itself.

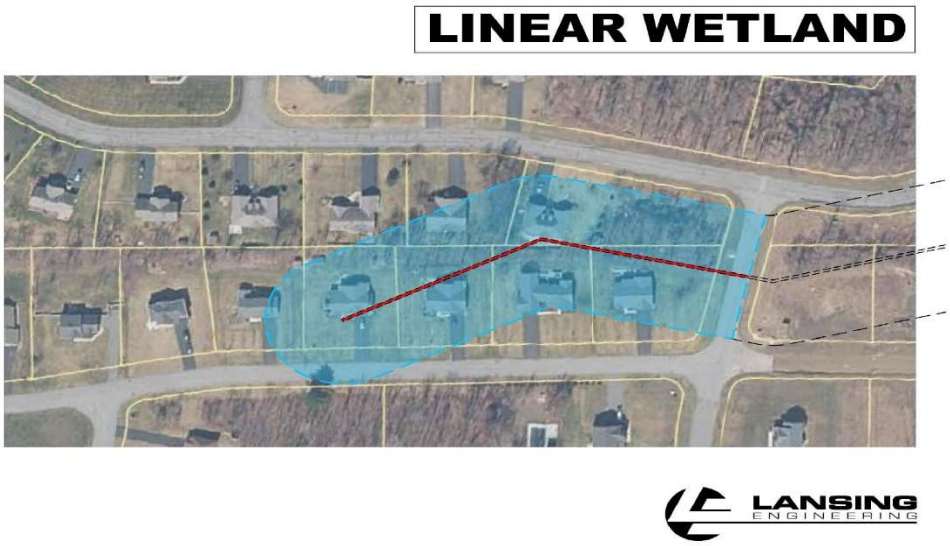
201. The impact of that arbitrary imposition is drastic in practice.

202. For example, a 4-foot wide linear regulated wetland that runs 570 feet long would remove 0.05 acres from the developable area of a site.

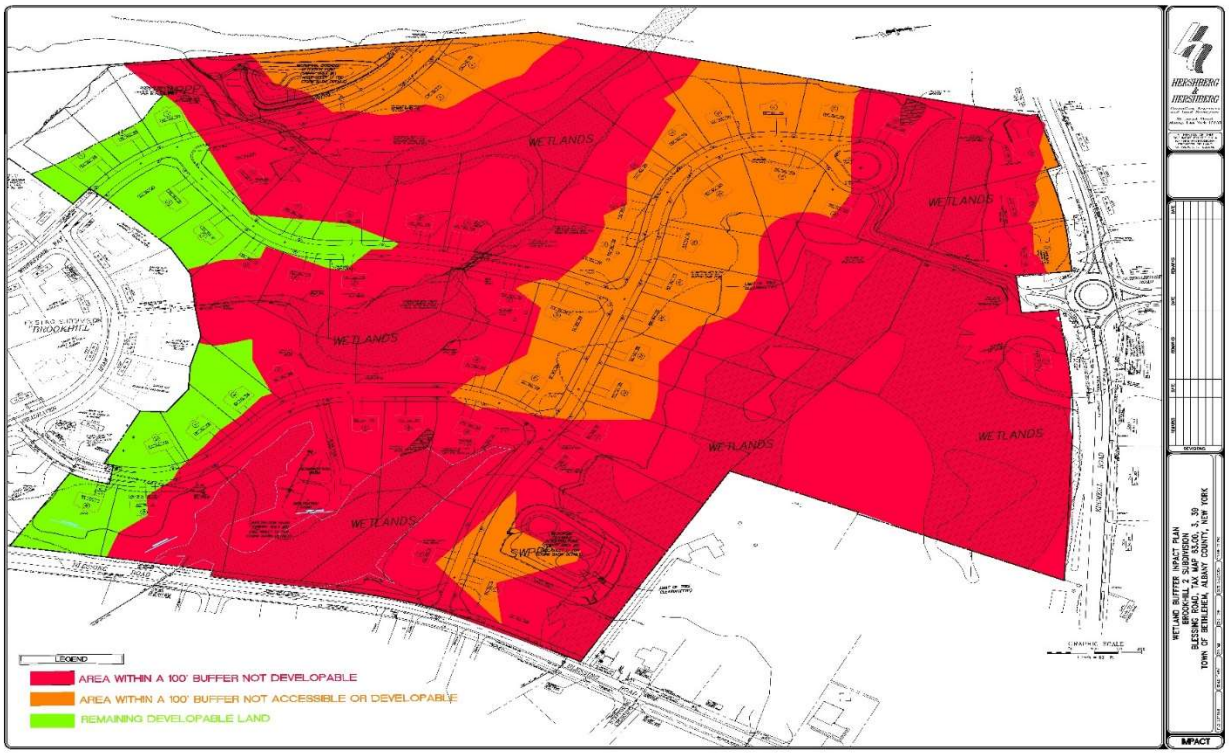


203. When the 100-foot regulated adjacent area is mandatorily imposed, without regard to the particular environmental significance of the regulated wetland, however, approximately 3-acres is undevelopable.





204. The impact on entire projects is even more drastic when there are developable lands that lay between regulated wetlands:



205. Because DEC has failed to support its blanket imposition of 100-foot regulated adjacent areas surrounding each and every wetland across the state, regardless of the individual characteristics or environmental significance of each, the Wetlands Regulations are arbitrary and capricious.

The Wetlands Regulations Extension of Regulated Adjacent Areas Beyond 100 Feet for All Nutrient Poor Wetlands and Vernal Pools was Arbitrary and Capricious

206. The extension of the regulated adjacent area beyond 100 feet for nutrient poor wetlands and vernal pools, contained in 6 NYCRR § 664.7(a), is also arbitrary and capricious and unsupported by substantial evidence in the record.

207. Although DEC is required to develop a "freshwater wetlands map," those maps only "depict the approximate location of wetlands and are not necessarily determinative as to whether a permit is required pursuant to" ECL 24-0701 (ECL 24-0107[2]).

208. These jurisdictional qualifiers leave property owners guessing when it comes to relying on DEC's maps. Worse yet, even an unmapped wetland is subject to DEC's jurisdictional requirements.

209. This uncertainty is particularly troublesome when it comes to identifying a vernal pool on a property owner's land.

210. Under DEC's classification system, a "vernal pool" is a Class II wetland (6 NYCRR 664.5[b][5]).

211. The Wetlands Regulations define a "vernal pool" as follows:

> Vernal pool means a naturally occurring, or purposefully created, depression wetland containing hydrophytic vegetation that is geographically isolated from, and lacking a connection to, permanent surface waters. Vernal pools, temporarily hold water during the spring, summer, and/or fall, and typically dry up for a period of time during the year. Vernal pools do not support permanent adult fish populations, yet they provide essential habitat for amphibian, invertebrate, and other species

6 NYCRR 664.2(ag).

212. Of particular note, vernal pools are temporary, actually dry up each year, and are not connected to any permanent surface waters. This definition reveals how difficult it is for property owners to account for vernal pools that are unmapped by DEC.

213. A freshwater wetland, regardless of size, is of "unusual importance" if "it is a vernal pool that is known to be productive for amphibian breeding" (ECL § 24-0107[9][g]).

214. The Wetlands Regulations, however, drastically expand that definition to include areas not only known for breeding, but also areas that might be considered "essential habitat" even if it is not known for breeding.

215. The Wetlands Regulations do not resolve the dilemma that property owners face. To the contrary, the Wetlands Regulations specify that "a vernal pool is known to be productive

for amphibian breeding… where the department has determined" that specified conditions exist (6 NYCRR 664.6[g]) and further reference a map available on DEC's website.

216. In other words, DEC must first determine whether a vernal pool exists under the Wetlands Regulations, but a property owner is subject to liability for interfering with a vernal pool on his or her property even when this area is unmapped.

217. The Wetlands Regulations further provide DEC with authority to extend the regulated adjacent area of nutrient poor wetlands and vernal pools identified by the department beyond the already arbitrary 100-foot buffer (6 NYCRR 664.7[a]).

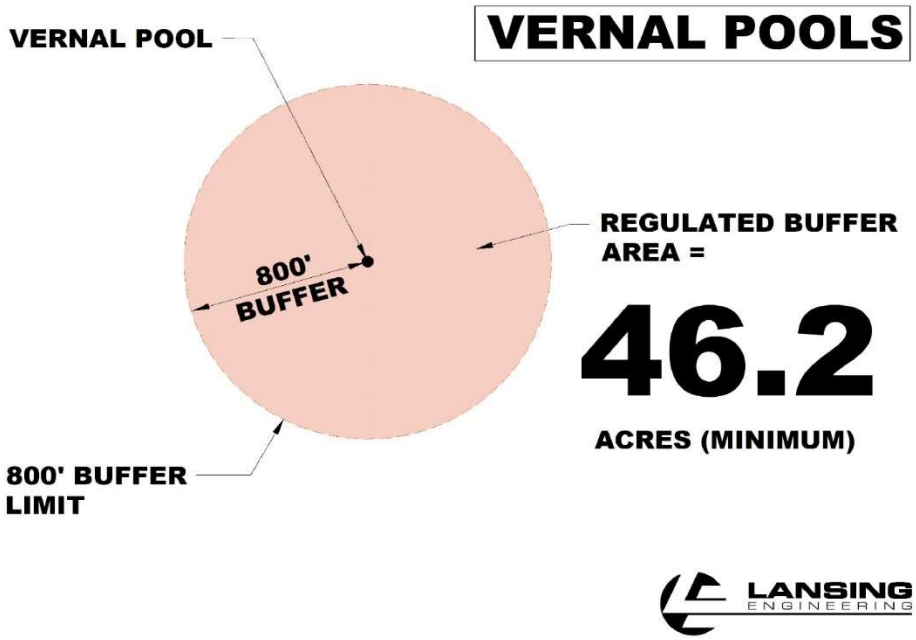
218. "The distance and the arrangement of the extended adjacent area shall be determined by the department using an individual analysis of environmental conditions of each … productive vernal pool" (*id.*).

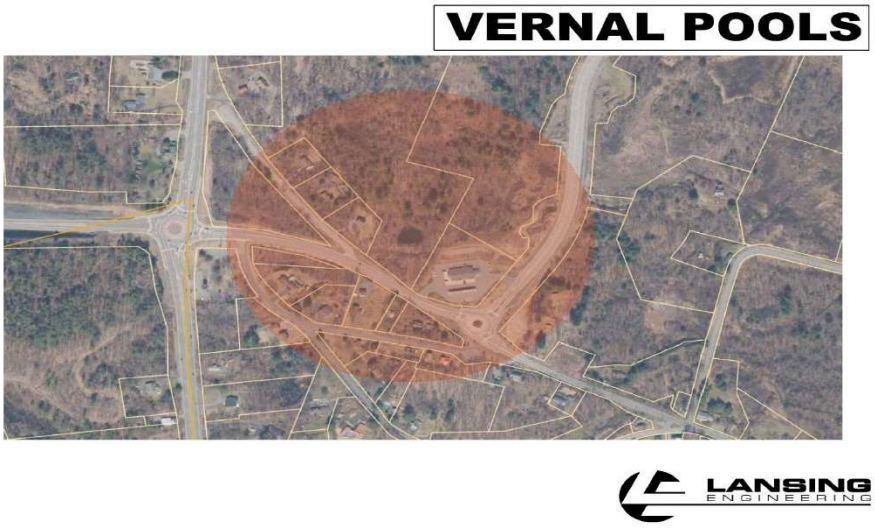
219. By definition, the contours of a regulated vernal pool are not limited by an express distance, but only by the discretion of DEC. Such unbridled discretion is not a rational standard and renders the Wetlands Regulations arbitrary and capricious. DEC regulates a 100-foot buffer around any regulated wetland. But for vernal pools known to be productive for amphibian breeding, DEC may extend this adjacent area to protect and preserve the vernal pool.

220. Although the draft regulations had simply set an 800-foot buffer around productive vernal pools, the final rule imposed no limits on the size or shape of regulated adjacent areas for vernal pools; those parameters will be determined on a case-by-case basis based on the specific environmental conditions of the vernal pool. 6 NYCRR § 664.7(a).

221. The impact of such unknown regulated adjacent areas is similarly drastic. For example, if DEC chose to impose an 800-foot buffer around a small vernal pool, it would eliminate

a minimum of 46.2 acres of developable land from a site. For most sites, that would eliminate all economically viable use.





222. DEC has proffered no rationale or scientific basis for this extension to the regulated adjacent area for nutrient poor wetlands or vernal pools that drastically impair property owners' constitutionally protected property rights.

223. Since DEC rendered no findings whatsoever to support this extension to the regulated adjacent area for nutrient poor wetlands and vernal pools, the corresponding regulations are arbitrary and capricious, and should be annulled.

WHEREFORE, Petitioners-Plaintiffs respectfully request that this Court enter an order and judgment pursuant to New York Civil Practice Law and Rules Article 78 and § 3001: (1) annulling the new Wetlands Regulations promulgated by Respondents New York State Department of Environmental Conservation and Amanda Lefton, as Acting Commissioner of the New York State Department of Environmental Conservation, that became effective on January 1, 2025, in their entirety; (2) declaring that the Wetlands Regulations are null and void; (3) enjoining Respondents from enforcing the Wetlands Regulations; (4) awarding Petitioners the costs and attorneys' fees incurred in prosecuting this proceeding; and (5) granting Petitioners such other and further relief as the Court deems just, proper or equitable.

Dated: Albany, New York
April 30, 2025

WHITEMAN OSTERMAN & HANNA LLP

By: _____

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Conor Lynch
Attorneys for Petitioners-Plaintiffs
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Albany, New York 12260
(518) 487-7600
rrosborough@woh.com

VERIFICATION

STATE OF NEW YORK)
)ss.
COUNTY OF ALBANY)

ROBERT S. ROSBOROUGH IV, ESQ., being duly sworn, deposes and says as follows:

1. I am a member of Whiteman Osterman & Hanna LLP, attorneys for Petitioners-Plaintiffs in this matter.

2. I have read the foregoing Verified Petition and Complaint and the same is true to my own knowledge, except those matters stated to be upon information and belief, and as to those matters, I believe them to be true. The source of my knowledge is conversations with my clients and my review of the proceedings at issue here.

3. The reason why this verification is made by me and not by Petitioners-Plaintiffs Barbera Homes & Development, Inc., New York Development Group/Rowland Acres LLC, New Hampton Lumber Co., Inc., and Windsor Ridge Partners LLC is that Petitioners-Plaintiffs do not have offices located in the County of Albany, which is the county in which the offices of Whiteman Osterman & Hanna LLP are located.

ROBERT S. ROSBOROUGH IV, ESQ.

VERIFICATION

STATE OF NEW YORK)
)ss.
COUNTY OF ALBANY)

LEWIS DUBUQUE, hereby affirms under the penalties of perjury pursuant to CPLR 2106, that the following is true:

1. I am the Vice President of Chapter Management for National Waste & Recycling Association, Petitioner-Plaintiff in this action.

2. I have read the annexed Verified Petition and Complaint and know the contents thereof and the same is true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters, I believe them to be true. My belief as to those matters is based upon personal knowledge and the review of pertinent documents and public information.

Lewis Dubuque
LEWIS DUBUQUE

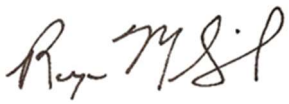
VERIFICATION

STATE OF NEW YORK)
)ss.
COUNTY OF ALBANY)

RYAN SILVA, hereby affirms under the penalties of perjury pursuant to CPLR 2106, that the following is true:

1. I am the Executive Director of New York State Economic Development Council, Petitioner-Plaintiff in this action.

2. I have read the annexed Verified Petition and Complaint and know the contents thereof and the same is true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters, I believe them to be true. My belief as to those matters is based upon personal knowledge and the review of pertinent documents and public information.



RYAN SILVA

VERIFICATION

STATE OF NEW YORK :
: ss.:
COUNTY OF ALBANY :

MICHAEL FAZIO, hereby affirms under the penalties of perjury pursuant to CPLR 2106, that the following is true:

1. I am the Executive Vice President of New York State Builders Association Inc., Petitioner-Plaintiff in this action.

2. I have read the annexed Verified Petition and Complaint and know the contents thereof and the same is true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters, I believe them to be true. My belief as to those matters is based upon personal knowledge and the review of pertinent documents and public information.

MICHAEL FAZIO

VERIFICATION

STATE OF NEW YORK :
: ss.:
COUNTY OF ALBANY :

MICHAEL KELLY, hereby affirms under the penalties of perjury pursuant to CPLR 2106, that the following is true:

1. I am the Vice President and Chief Lobbyist of New York State Association of REALTORS® Inc., Petitioner-Plaintiff in this action.

2. I have read the annexed Verified Petition and Complaint and know the contents thereof and the same is true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters, I believe them to be true. My belief as to those matters is based upon personal knowledge and the review of pertinent documents and public information.

MICHAEL KELLY

VERIFICATION

STATE OF NEW YORK :
: ss.:
COUNTY OF ALBANY :

MICHAEL J. ELMENDORF II, hereby affirms under the penalties of perjury pursuant to CPLR 2106, that the following is true:

1. I am the President and CEO of Associated General Contractors of New York State, LLC, Petitioner-Plaintiff in this action.

2. I have read the annexed Verified Petition and Complaint and know the contents thereof and the same is true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters, I believe them to be true. My belief as to those matters is based upon personal knowledge and the review of pertinent documents and public information.

MICHAEL J. ELMENDORF II