

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

CONSOLIDATED DECISION, ORDER & JUDGMENT

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

Petitioners-Plaintiffs,

Case 1

Index No. 903982-25

-against-

THE STATE OF NEW YORK and the NEW
YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Respondents-Defendants.

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

Petitioners-Plaintiffs,

Case 2

Index No. 904423-25

-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.

VILLAGE OF KIRYAS JOEL and
TOWN OF PALM TREE,

Petitioners-Plaintiffs,

Case 3

Index No. 904424-25

-against-

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

Respondents-Defendants.

CHAUTAUQUA LAKE PARTNERSHIP, INC.,
et al.,

Petitioners-Plaintiffs,

Case 4

Index No. 905313-25

-against-

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

Respondents-Defendants.

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Hon. Richard M. Platkin, A.J.S.C.

Pending before the Court are four combined CPLR article 78 proceedings/declaratory judgment actions challenging (i) the 2022 legislative amendments (“2022 Amendments”) to the Freshwater Wetlands Act (*see* Environmental Conservation Law [“ECL”] art 24), and (ii) the new Part 664 regulations promulgated by respondent New York State Department of Environmental Conservation (“DEC”) to implement the 2022 Amendments.

I. BACKGROUND

A. The Original Wetlands Act

The Legislature enacted the Freshwater Wetlands Act (“Act”) in 1975 “to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, . . . consistent with the general welfare and beneficial economic, social and agricultural development of the state” (ECL § 24-0103; *see Spears v Berle*, 48 NY2d 254, 260 [1979]).

The Act principally defined “freshwater wetlands” as “lands and submerged lands commonly called marshes, swamps, sloughs, bogs, and flats supporting aquatic or semi-aquatic vegetation” of eight specified types (*see* former ECL § 24-017 [1] [a] [1-8]). The definition also encompassed certain “lands and submerged lands containing [vegetation] remnants” (*id.* [b]), as well as “lands and waters substantially enclosed” by vegetation or remnants falling into the preceding two categories (*see id.* [c]).

The Act “assign[ed] the Commissioner of DEC the formidable task . . . to study and to map parcels of wetlands throughout the State having an area of at least 12.4 acres or areas measuring less than 12.4 acres deemed of ‘unusual local importance’” (*Matter of Wedinger v Goldberger*, 71 NY2d 428, 436 [1988], quoting former ECL § 24-0301 [1]).

As DEC’s identification of wetlands progressed, the agency was “directed to prepare tentative maps, detailing the boundaries of the areas determined up to that point in time to be freshwater wetlands” (*id.*). “Prior to promulgation of a final map, DEC [was] required to give the community and affected landowners specific notice and opportunity to be heard” (*id.*).

Although the Legislature supplied DEC with a definition of “freshwater wetlands,” the Act provided that “only those lands and waters ‘shown on [DEC’s final] freshwater wetlands map’” were treated as wetlands (*Matter of Drexler v Town of New Castle*, 62 NY2d 413, 417 [1984], quoting former ECL § 24-0107 [1]). Mapped wetlands became “subject to rigorous regulation” by DEC, “with certain uses permitted as of right and others permissible only by permit” (*Spears*, 48 NY2d at 260). For “lands or waters [not] satisfying either the size or importance criterion, . . . the [Act] reserve[d] entire and exclusive jurisdiction in the local governments” (*Drexler*, 62 NY2d at 417-418).

To implement the Act, DEC promulgated two sets of regulations. Under 6 NYCRR part 663 (“Part 663”), DEC established the procedural requirements and substantive standards for the use of regulated wetlands and the issuance of permits therefor. The standards and procedures for classifying wetlands were established in 6 NYCRR part 664 (“Part 664”).

B. The 2022 Amendments

Enacted as part of the 2022-23 State budget, Part QQ of Chapter 58 of the Laws of 2022 amended the Act to remove the requirement that freshwater wetlands be mapped for them to be subject to State regulation. Following enactment of the 2022 Amendments, DEC’s wetland maps are merely informational and not necessarily determinative of regulatory jurisdiction (*see* ECL § 24-0107 [2]).

The 2022 Amendments establish “a rebuttable presumption that mapped and unmapped areas meeting the definition of a freshwater wetland . . . are regulated and subject to permit requirements” (*id.* § 24-0301 [4]). “This presumption may be rebutted by presenting information to [DEC] that the area does not meet the [statutory] definition. A wetland delineation by [DEC], or a verification by [DEC] of a wetland delineation by another party, is required to identify the regulated freshwater wetland boundary in a particular location” (*id.*).

The 2022 Amendments also defined 11 categories of wetlands deemed to be of “unusual importance” (ECL § 24-0107 [9]). Wetlands falling into any of these categories are subject to regulation, regardless of size (*see id.*).

But no changes were made to the Act’s definition of “freshwater wetlands” or its authorization for a buffer zone in areas adjacent to wetlands: “[A]ctivities are subject to regulation . . . if they impinge upon or otherwise substantially affect the wetlands and are located not more than one hundred feet from the boundary of such wetland. Provided, that a greater distance from any such wetland may be regulated . . . where necessary to protect and preserve the wetland” (*id.* § 24-0701 [2]).

C. The New Part 664 Regulations

“In response to the Act’s 2022 amendments, DEC immediately developed and implemented a multi-phased plan to inform stakeholders of the landmark changes to the Act, conducted general and targeted outreach, and collected feedback on informal proposals. DEC used this feedback to repeal and replace the former 6 NYCRR part 664” (Case 2, NYSCEF Doc No. 25 [“Jacobson Aff.”], ¶ 14). “DEC’s outreach involved multiple in-person and remote meetings and webinars with more than 30 stakeholder groups representing development interests,

agriculture, environmental advocacy, energy generation and transmission, environmental consultants, municipalities, land trusts, and state agencies” (*id.*, ¶ 15).

DEC then released “a written draft of regulatory text to which stakeholders could respond and give informal feedback, prior to beginning the formal rule making process” (*id.*, ¶ 16).

Seeking “specific feedback on how to best clarify” the 2022 Amendments in relation to “the 11 new unusual importance criteria, the extent to which DEC would extend the ‘adjacent area’ now that its jurisdiction was not limited to mapped wetlands, a new jurisdictional determination procedure, and a process for property owners to appeal positive jurisdictional determinations,” DEC published an advance notice of proposed rulemaking on January 3, 2024 (*id.*, ¶¶ 17-18).

“DEC received and carefully reviewed 2,600 written responses,” many of which “expressed concerns regarding potential regulatory delay during the jurisdictional determination process, confusion over the new unusual importance criteria, the extension of the regulated wetland adjacent area, and new jurisdictional determination and appeals procedures” (*id.*, ¶ 20). “DEC used this critical feedback to address these concerns in the formal notice of proposed rule making and through other regulatory tools . . . , like the development of standard operating procedures for wetland mapping and several proposed general permits” (*id.*).

DEC filed a notice of proposed rulemaking on July 10, 2024, which received over 4,900 public comments (*see id.*, ¶¶ 21-22). After review, “DEC decided to further clarify the proposed rule and regulatory impact statement, adding clearer definitions, a more precise description of the jurisdictional determination process and the extension of regulated adjacent areas, and a clearer description of how DEC would identify endangered species habitat” (*id.*, ¶ 25).

“On December 20, 2024, DEC filed the final rule making package (final rule) with the Department of State including the revised text, a summary of the revised text, a certificate of

adoption, a summary of the revised regulatory impact statement, an assessment of public comment, [an] Environmental Assessment Form including the negative declaration under the State Environmental Quality Review Act . . . , as well as a statement . . . why the non-substantive changes to the final rule did not necessitate changes to, and resubmission of, the regulatory flexibility analysis, rural area flexibility analysis, or the job impact statement” (*id.*, ¶ 32).

The final rule was published in the State Register on December 31, 2024 (*see id.*, ¶ 33), and the new Part 664 took effect on January 1, 2025.

D. This Litigation

Pending before the Court are four hybrid actions/proceedings challenging the Part 664 regulations and certain aspects of the 2022 Amendments.

In Case 1, the Chautauqua Lake Property Owners Association (“Chautauqua POA”), together with a municipality, landowner and two business associations, filed a combined petition/complaint raising five challenges: (i) the Part 664 regulations were adopted in violation of the State Administrative Procedure Act (“SAPA”); (ii) the 2022 Amendments and Part 664 regulations violate the due process rights of landowners; (iii) the Part 664 regulations are arbitrary and capricious; (iv) Part 664 improperly delegates regulatory authority to private actors; and (v) the 2022 Amendments and Part 664 violate Home Rule principles (*see* Case 1, NYSCEF Doc No. 1 [“Case 1 Petition”]).

In Case 2, brought by the Business Council of New York State Inc. (“Business Council”) and other development-oriented associations, along with several companies involved in real-estate development and home construction, petitioners allege that: (i) the Part 664 regulations were not adopted in compliance with the State Environmental Quality Review Act (“SEQRA”); (ii) the Part 664 regulations were not adopted in compliance with SAPA; (iii) the 2022

Amendments and Part 664 regulations are unconstitutionally vague; and (iv) the Part 664 regulations are arbitrary and capricious (*see* Case 2, NYSCEF Doc No. 1 [“Case 2 Petition”]).¹

The petitioners in Case 3, the Village of Kiryas Joel and Town of Palm Tree, are represented by the same counsel as the Case 2 petitioners and allege the same four claims (*see* Case 3, NYSCEF Doc No. 1 [“Case 3 Petition”]).

Finally, Case 4 is brought by Chautauqua Lake Partnership and three local landowners who allege: (i) the Part 664 regulations are arbitrary and capricious; (ii) the regulations were adopted in violation of SAPA; (iii) the 2022 Amendments and Part 664 are void for vagueness; (iv) certain aspects of the 2022 Amendments and Part 664 regulations constitute an improper delegation of authority to DEC; and (v) the Part 664 regulations were adopted in violation of SEQRA (*see* Case 4, Doc No. 16 [“Case 4 Petition”]).

DEC and the other named respondents answered the petitions through a combined memorandum of law (*see* NYSCEF Doc No. 29 [“Opp Mem”]), affidavits from three DEC employees (*see* NYSCEF Doc Nos. 25-27) and the 14-volume administrative record, consisting of more than 3,000 pages.

In addition to submissions from the parties, the Court received an amicus brief from members of the Save the Wetlands Coalition in opposition to the petitions (*see* NYSCEF Doc No. 46) and amicus submissions in support of the petitions from certain Republican members of the Legislature (*see* NYSCEF Doc No. 55), the Village of Lakewood (*see* Case 4, NYSCEF Doc No. 60) and the Bemus Point Business Association (*see* Case 1, NYSCEF Doc No. 54).

Given the substantial commonality of issues presented by the cases and DEC’s combined opposition, the Court informally consolidated the four challenges for oral argument and

¹ Unless otherwise specified, citations to the NYSCEF docket shall refer to the docket in Case 2.

disposition. Argument was held on January 30, 2026 (*see* NYSCEF Doc No. 66), copies of the transcript were filed on or around March 10, 2026 (*see* NYSCEF Doc No. 67 [“Transcript”]), and this Consolidated Decision, Order & Judgment follows.

II. DUE PROCESS

A. The Elimination of Jurisdictional Mapping

The Chautauqua POA petitioners allege that the 2022 Amendments and Part 664 violate the due process rights of property owners by eliminating the procedural safeguards associated with the prior system of jurisdictional maps (*see* Case 1 Petition, ¶¶ 97-103; NYSCEF Doc No. 10 [“Case 1 MOL”] at 18). Petitioners complain that “[t]he replacement of individualized notice, public hearings, and formal mapping orders” with “an amorphous presumption of jurisdiction – rebuttable only through a costly and burdensome process” does not accord landowners with procedural due process (Case 1 MOL at 19).

1. Legal Standard

“The standard for determining whether notice is adequate under the Due Process Clauses of the Fourteenth Amendment to the United States Constitution and article I, § 6 of the New York Constitution is well settled” (*Hetelekides v County of Ontario*, 39 NY3d 222, 236 [2023]). “Due process does not require personal notice in every circumstance where a property interest may be affected by government action; instead, a balancing process is employed to determine what constitutes ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to [be heard]’” (*Matter of North Dock Tin Boat Assn., Inc. v New York State Off. of Gen. Servs.*, 96 AD3d 1186, 1189-1190 [3d Dept 2012], quoting *Matter of Zaccaro v Cahill*, 100 NY2d 884, 890 [2003]).

The Case 1 Petition and memorandum of law raise a purely facial challenge to the constitutionality of the 2022 Amendments and Part 664. “Generally, a party making a facial 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], quoting *Brightonian Nursing Home v Daines*, 21 NY3d 570, 577 [2013]). “Thus, 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. v Urbach*, 99 NY2d 443, 445 [2003]).

Additionally, “[l]egislative 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, 125 [3d Dept 2022], quoting *White v Cuomo*, 38 NY3d 209, 216 [2022]). “Thus, while the presumption of constitutionality is not irrefutable,” petitioners “face the initial burden of demonstrating [the] invalidity of [the 2022 Amendments and Part 664] beyond a reasonable doubt” (*id.* [internal quotation marks and citation omitted]).

Accordingly, to prevail on their facial challenge, petitioners “bear the substantial burden of demonstrating that in any degree and in every conceivable application, the [2022 Amendments and Part 664 regulations] suffer[] from wholesale constitutional impairment” (*id.*).

2. Analysis

In alleging that the 2022 Amendments and Part 664 deprive them of procedural due process, the Chautauqua POA petitioners focus on ECL § 24-0301 (4), which establishes a

“rebuttable presumption that mapped and unmapped areas meeting the definition of a freshwater wetland in [Article 24] are regulated and subject to permit requirements.” “This presumption may be rebutted by presenting information to [DEC] that the area does not meet the definition contained in [Article 24]” (*id.*). A “wetland delineation” by DEC or its verification of a wetland delineation by another party “is required to identify the regulated freshwater wetland boundary” (*id.*).

Under the prior map-based system, freshwater wetlands were “only those lands and waters ‘shown on [DEC’s final] freshwater wetlands map’” (*Drexler*, 62 NY2d at 417, quoting former ECL § 24-0107 [1]). Petitioners complain that “DEC’s new reliance on informal ‘jurisdictional determinations’ rather than formally promulgated wetlands maps . . . allow[s] the DEC to assert jurisdiction over properties without individualized notice of any kind, much less adjudicatory hearings. All lands are now presumptively Regulated Wetlands” (Case 1 MOL at 19), which “substantially affects the landowner’s rights by restricting the property’s use” (*Zaccaro*, 100 NY2d at 891).

Contrary to petitioners’ contention, however, ECL § 24-0301 (4) does not presume that all lands in New York State are regulated wetlands. The presumption applies only to lands “meeting the definition of a freshwater wetland in [Article 24]” (ECL § 24-0301 [4]). Thus, the presumption created by the 2022 Amendments presumes only that lands falling within Article 24’s definition of “freshwater wetlands” (*id.* § 24-0107 [1]) are, in fact, regulated as freshwater wetlands.

Moreover, as respondents observe, a rebuttable presumption is constitutionally valid if there is “‘a rational connection between the facts proven and the fact presumed, and . . . a fair opportunity’” for the party challenging the presumption “‘to make [a] defense’” (*Overstock.com*,

Inc. v New York State Dept. of Taxation & Fin., 20 NY3d 586, 596 [2013], quoting *Matter of Casse v New York State Racing & Wagering Bd.*, 70 NY2d 589, 595 [1987]; see *Matter of Sanford v Rockefeller*, 35 NY2d 547, 555 [1974]).

Here, there is a clear and rational connection between lands meeting the statutory definition of freshwater wetlands and the presumption that such lands are subject to regulation as freshwater wetlands.² And landowners have a fair opportunity to challenge the presumption through the jurisdictional determination process, a no-cost review that DEC must complete within ninety (90) days or potentially lose jurisdiction over the subject lands (*see* ECL § 24-0703 [5]; 6 NYCRR 664.8 [e]-[g]).

To be sure, petitioners raise legitimate concerns about burdens and uncertainties associated with the new jurisdictional determination process. They observe that “any person” can request a jurisdictional determination (*see* ECL § 24-0703 [5]), thereby enabling opponents of a development project to “file a jurisdictional determination request, . . . even if there is no reasonable chance of DEC exercising wetlands jurisdiction over the project” (Case 2, NYSCEF Doc No. 13 [“BC MOL”] at 25). Petitioners also posit practical difficulties where “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” (*id.*).

But these concerns as to how Article 24 may be applied in particular circumstances, however legitimate and foreseeable, are insufficient to establish facial constitutional infirmities. The possibilities that the jurisdictional determination process may be abused by third parties or adjacent area determinations may prove difficult where potential wetlands span parcel

² Indeed, the presumption is almost tautological in nature.

boundaries are insufficient to establish that the 2022 Amendments and Part 664 “suffer[] wholesale constitutional impairment” in *all* of their possible applications (*Owner Operator*, 40 NY3d at 61 [internal quotation marks and citation omitted]).

Although framed largely as a due process challenge to the rebuttable presumption, it is apparent that petitioners’ complaints about the loss of individualized notice, the lack of public hearings, and the uncertainty and expense associated with the new jurisdictional-determination process flow from the Legislature’s decision to move away from jurisdictional mapping to the new definition-based system, with individualized assessments “whether or not a given parcel of land includes a freshwater wetland subject to regulation or a regulated freshwater wetland adjacent area” (ECL § 24-0703 [5]).

But the fact that the prior map-based system accorded landowners with procedural due process does not mean that a map-based system is constitutionally required or that the new definition-based approach is inherently unconstitutional. The critical inquiry is whether the new regimen provides constitutionally adequate notice to landowners, not whether it provides the same procedural protections or the same degree of certainty and predictability as a map-based system.

In this connection, the Court observes that the State’s new definition-based approach to jurisdiction over wetlands is substantially similar to the federal government’s implementation of the Clean Water Act (“CWA”) and its prohibition on the unpermitted “discharge of any pollutant” into “navigable waters,” which are defined as “the waters of the United States” (33 USC §§ 1311 [a]; 1362 [7], [12]). “It is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does,” including “substantial criminal and civil penalties” for unauthorized activities (*United States*

Army Corps of Eng'rs v Hawkes Co., 578 US 590, 594 [2016]). For this reason, the CWA established a process for the Army Corps of Engineers to render individualized jurisdictional determinations (*see id.*).

To be sure, the jurisdictional scope of the CWA has been the subject of extensive controversy and litigation, and the U.S. Supreme Court recently narrowed that jurisdiction in *Sackett v EPA* (598 US 651 [2023]), based in part on concerns about regulatory uncertainty. Yet, despite decades of debate and criticism over the CWA's reach and the burdens attendant to jurisdictional uncertainty and a host of legal challenges (*see Hawkes*, 578 US at 602 [Kennedy, J., concurring] [reach of CWA is “notoriously unclear” and “the consequences to landowners even for inadvertent violations can be crushing” (citation omitted)]), no cases have held the CWA's jurisdictional determination process to be violative of procedural due process.

Like the CWA, the 2022 Act establishes a definition-based approach to jurisdiction that may require professional consultation in some cases, provides for no-cost agency jurisdictional determinations within specified timeframes, and imposes civil and criminal penalties for violations. While *Sackett* teaches that the Legislature and DEC must ensure that the classification of freshwater wetlands remains tethered to ascertainable standards (*see Part II [B], infra*), it does not stand for the proposition that a definition-based approach to wetlands jurisdiction is inherently unconstitutional. And the prospect that future applications of the 2022 Amendments and Part 664 may give rise to as-applied challenges, and perhaps limiting constructions, is insufficient to demonstrate facial unconstitutionality.

Based on the foregoing, the Court concludes that petitioners have not demonstrated that the Legislature's decision to replace jurisdictional mapping with a definition-based system violates the procedural due process rights of petitioners in every conceivable application.

B. Vagueness

Relatedly, petitioners contend that the 2022 Amendments and Part 664 regulations are unconstitutionally vague, arguing that they fail to identify and give property owners reasonable notice of regulated freshwater wetlands (*see* BC MOL at 22-23). Petitioners take particular issue with Part 664’s definition of “wetlands of unusual importance” (*see* Case 4, NYSCEF Doc No. 24 [“Partnership MOL”] at 16; *see also* 6 NYCRR 664.6).

The following principles govern a void-for-vagueness challenge:

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. It has long been settled that civil as well as penal statutes can be tested for vagueness under the due process clause. 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.

Courts use a two-part test to determine whether a statute or regulation is unconstitutionally vague. First, to ensure that no person is punished for conduct not reasonably understood to be prohibited, the court must determine whether the statute in question is sufficiently definite to give a person of ordinary intelligence fair notice that the person’s contemplated conduct is forbidden. Second, the court must determine whether the enactment provides officials with clear standards for enforcement so as to avoid resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. The two prongs of the test are closely related – if a statute is so vague that a potential offender cannot tell what conduct is against the law, neither can the person charged with its enforcement (*Matter of Independent Ins. Agents & Brokers of N.Y., Inc. v New York State Dept. of Fin. Servs.*, 39 NY3d 56, 63-64 [2022] [internal quotation marks, citations and alternations omitted]).

Here, violations of Article 24 expose landowners to criminal penalties, with first offenses punishable as violations (with fines of up to \$5,000), and second and subsequent offenses punishable as misdemeanors (*see* ECL § 71-2303 [2]). Inasmuch as the Act’s regulatory scheme

carries criminal sanctions, the Court must apply the stricter vagueness scrutiny applicable to penal statutes (*see People v Stuart*, 100 NY2d 412, 421 [2003]).

Nonetheless, the void-for-vagueness doctrine “‘is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide a fair warning that certain kinds of conduct are prohibited’” (*People v Swartz*, 130 AD2d 288, 290 [3d Dept 1987], quoting *Colten v Kentucky*, 407 US 104, 110 [1972]). Criminal statutes should not be held to standards of impossible precision (*see People v Cruz*, 48 NY2d 419, 424 [1979]).

Beginning with the 2022 Act, the Court observes that Article 24’s definition of “freshwater wetlands” has remained substantively unchanged since first enacted in 1975 (*see Jacobson Aff.*, ¶ 11). The core definitional criteria, focusing on vegetation adapted to aquatic or semi-aquatic conditions, have been in place for more than five decades without any successful vagueness challenge, and the new system of no-cost jurisdictional determinations largely mirrors the CWA, which has consistently survived vagueness challenges (*see e.g. United States v Lucero*, 989 F3d 1098, 1101-1102 [9th Cir 1993] [“Although the (CWA’s) definitions are complex, they nevertheless provide an ascertainable standard for when ‘wetlands’ and ‘tributaries’ constitute jurisdictional waters”]; Paul J. Larkin, *The Clean Water Act and the Void-for-Vagueness Doctrine*, 20 Geo JL & Pub Pol’y 639 [2022] [despite “decades” of “uncertainty” over reach of the “hopelessly vague” scope of the CWA, the Supreme Court has never held the statutory scheme void for vagueness]).

The 2022 Amendments did expand State regulatory jurisdiction over 11 categories of freshwater wetlands of “unusual importance,” regardless of size (*see ECL § 24-0107* [9] [a]-[k]). Many of the new categories are defined through external, objective standards (*see e.g. id.* [b]

[defining urban areas by reference to census data], [d] [endangered species habitats], [h] [FEMA-designated floodways], [i] [previously mapped wetlands]), but other categories are defined in more subjective and potentially problematic ways.

First, petitioners challenge the wetlands designation of “a vernal pool that is known to be productive for amphibian breeding” (*id.* [g]). Petitioners argue that this definition relies on temporary and seasonal features, and they argue persuasively that landowners cannot be expected to determine whether a wet spot on the ground is productive for amphibian breeding.

However, the statute speaks only in terms of vernal pools “known” to be productive for amphibian breeding (*id.*), and the new regulations provide that a “vernal pool is known to be productive for amphibian breeding . . . where [DEC] has determined” that egg mass counts exceed a prescribed threshold (6 NYCRR 664.6 [g]).³ Thus, both the statute and regulations inject an element of knowledge into the definition. And to the extent that the seasonal and temporary nature of vernal pools renders jurisdiction unknowable in a particular case and the property owner is not saved by the knowledge requirement, the concerns raised by petitioners implicate a potential as-applied challenge, not a wholesale constitutional infirmity.

Next, petitioners complain about the regulation of wetlands “determined by the [DEC] commissioner to be of significant importance to protecting the state’s water quality” (ECL § 24-0107 [9] [k]). Although the statutory provision is cast in broad terms, Part 664 implements this provision by requiring a written determination of the Commissioner, supported by substantial evidence, articulating the “underlying reasons why the wetland is of significant importance to

³ As observed by DEC, the use of “minimum egg mass counts” as criteria for determining if a vernal pool is known for productive amphibian breeding is an objective measure that “other Northeastern states” have implemented successfully (Jacobson Aff., ¶ 54).

protecting the State's water quality" (6 NYCRR 664.6 [k]). Thus, for jurisdiction to attach, there must be a formal administrative determination.

Finally, petitioners complain about the category of lands "classified by [DEC] as a Class I wetland" (ECL § 24-0107 [9] [e]). According to petitioners, this category will allow DEC "to designate any geographic feature as a wetland in a potentially arbitrary way" (Partnership MOL at 19). However, Part 664 provides largely objective definitions of a Class I wetland (*see* 6 NYCRR 664.5 [a]), and the statute plainly contemplates a prior classification action prior to wetlands jurisdiction attaching.

Petitioners do express a legitimate concern that landowners of ordinary intelligence may be unable to determine the presence of freshwater wetlands without professional assistance. But they cite no authority for the proposition that the vagueness doctrine requires complex legislation to be fully self-executing by laypersons without the assistance of qualified professionals.

In any event, even assuming that petitioners satisfied the first prong of the vagueness inquiry by showing that the 2022 Amendments and Part 664 are insufficient to give a person of ordinary intelligence fair notice of freshwater wetlands on their property,⁴ petitioners have not shown that the challenged provisions lack clear enforcement standards (*see Independent Ins. Agents*, 39 NY3d at 64). The vernal pool criteria are objective, albeit obscure, and injected with the requirement of knowledge; Class I wetlands are designated by DEC and defined by largely objective criteria (*see* 6 NYCRR 664.5 [a]); and any finding that a wetland is necessary to protect water quality must be embodied in a prior written determination of the DEC

⁴ Petitioners also raise a vagueness challenge to 6 NYCRR 664.7 (a), which authorizes DEC to extend the regulated adjacent area beyond 100 feet for nutrient-poor wetlands and vernal pools based on "an individual analysis of environmental conditions." Given the Court's determination that Part 664 must be annulled for non-compliance with SEQRA (Part IV, *infra*), the Court need not reach this purely regulatory challenge.

Commissioner, supported by substantial evidence, stating the “underlying reasons” for the determination (6 NYCRR 664.6 [k]).

The Court recognizes petitioners’ complaints about the vagueness of the underlying permitting standards for freshwater wetlands established in Part 663, which use terms like “compelling,” “pressing,” and “clearly outweighs,” and which are said to leave DEC with “unbridled discretion to sit as a super-land use board to determine the relative priority of a proposed development project” (BC MOL at 27). Petitioners take particular issue with Part 664’s blanket classification of urban wetlands as Class II, arguing that this effectively forecloses development under the stringent and ill-defined standards of Part 663 (*see* 6 NYCRR 663.5 [e] [2] [requiring proof of “a pressing economic or social need that clearly outweighs the loss of or detriment to the benefit(s) of the Class II wetland”])).

The problem for petitioners, however, is that the constitutionality of Part 663 is not before the Court. Part 663, including the flexible permitting standards to which petitioners object, has been in effect since at least 1995 (*see* Opp Mem at 45; *see also* 6 NYCRR 663.11; NYSCEF Doc No. 26, ¶ 6). Neither the 2022 Amendments nor the new Part 664 regulations amended or otherwise modified Part 663 or its permitting standards. Thus, any facial challenge to Part 663’s permitting standards is decades too late and cannot be revived through a collateral attack on Part 664’s classification criteria.

Additionally, none of the petitions before the Court seek invalidation of the Part 663 regulations, and petitioners cannot bootstrap their challenge to Part 664 into a facial challenge to the Part 663 permitting standards merely because the 2022 Amendments and new Part 664 subject additional lands to those standards. The vagueness inquiry focuses on whether the 2022 Amendments and Part 664 allow property owners to determine if their land is regulated as

freshwater wetlands, but the land-use consequences that flow from that jurisdictional determination under Part 663 are analytically distinct.

Based on the foregoing, the Court concludes that petitioners have not carried their heavy burden of showing that the 2022 Amendments and Part 664 regulations are impermissibly vague in all applications. At most, petitioners have shown that certain applications of Article 24 and Part 664 may prove problematic, but that is not enough to sustain a facial challenge (*see Independent Ins. Agents*, 39 NY3d at 65 [“that a statute or regulation would be unclear in hypothetical situations at its periphery does not render it facially, unconstitutionally vague”]).

III. OTHER CHALLENGES TO THE 2022 AMENDMENTS

A. Improper Delegation

Petitioners in Case 1 argue that the 2022 Amendments improperly delegate regulatory decisions to nongovernmental actors by “permit[ing] any private party – including project opponents, advocacy groups, or uninterested third parties – to initiate a binding Jurisdictional Determination request” (Case 1 MOL at 23; *see* ECL § 24-0703 [5] [“Any person may inquire of (DEC) as to whether or not a given parcel of land includes a freshwater wetland”]).

The Court does not find petitioners’ argument to be persuasive. While a private party may *initiate* the jurisdictional determination process, only DEC is authorized to *render* jurisdictional determinations. The 2022 Amendments do not allow a private party to exercise regulatory jurisdiction over other landowners. There has been no proof of an impermissible delegation of governmental powers to private parties.

B. Home Rule

Petitioners in Case 1 further argue that the 2022 Amendments’ elimination of “the statutory provision allowing local governments to designate freshwater wetlands of ‘Unusual

Local Importance’ (ULI) under former ECL § 24-0301 (1) constitutes an unconstitutional intrusion on local self-governance in violation of the New York State Constitution and the Municipal Home Rule Law” (Case 1 MOL at 23).

As DEC observes, however, the 2022 Amendments do preserve a substantial degree of local regulatory control (*see* ECL art 24, title 5), and, in any event, the 2022 Amendments constitute general laws to protect the environment, “a matter of substantial state concern” (*Empire State Ch. of Associated Bldrs. & Contrs., Inc. v Smith*, 21 NY3d 309, 317 [2013]).

The Court therefore concludes that petitioners have failed to establish a violation of the Home Rule protections of the New York State Constitution.

IV. SEQRA

Petitioners in Cases 2, 3 and 4 seek annulment of the Part 664 regulations for non-compliance with SEQRA.

A. Standing

As a threshold matter, DEC challenges the standing of petitioners in Cases 2 and 3 to maintain claims under SEQRA, arguing that their alleged injuries are purely economic and, therefore, fall outside the zone of interests protected by SEQRA.

1. Environmental Injury

“Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria” (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991] [citations omitted]). Petitioners have “the burden of establishing both an injury-in-fact and that the asserted injury is within the zone of interests sought to be protected by

[SEQRA]” (*Matter of Association for a Better Long Is., Inc. v New York State Dept. of Env’tl. Conservation*, 23 NY3d 1, 6 [2014]; *see Society of Plastics*, 77 NY2d at 772-773).

Because SEQRA’s core purpose is to ensure that environmental considerations are incorporated into governmental decision-making, “[e]conomic injury is not by itself within SEQRA’s zone of interests” (*Society of Plastics*, 77 NY2d at 777). But an environmental injury giving rise to SEQRA standing may be established through proof that petitioners have been harmed in “their use and enjoyment of the affected natural resources” (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 304 [2009], quoting *Society of Plastics*, 77 NY2d at 775).

Here, one of the petitioners in Case 4, Mary Hutchings, owns property on Chautauqua Lake, and she alleges that the new Part 664 regulations have had a “direct and chilling effect on [her] ability to enjoy [her] property” (Case 4, NYSCEF Doc No. 26, ¶¶ 4-5, 11). She avers that Part 664 heavily regulates, or outright prohibits, “activities that are essential to maintaining lake useability and water quality, such as removing floating weeds, harvesting aquatic vegetation, dredging sediment from boating areas, and controlling nutrient runoff” (*id.*, ¶ 10). As a result, the new regulations “cast doubt on whether [she] can continue to swim, fish, or use [her] boat freely” (*id.*, ¶ 12). The alleged proliferation of aquatic weeds, degradation of water quality, and impairment of Chautauqua Lake’s ecosystem fall squarely within the types of environmental harms that SEQRA was designed to address.

Notably, while DEC’s combined opposition challenged the SEQRA standing of petitioners in Cases 2 and 3, no similar objection was made to the standing of petitioners in Case 4, who raise the same SEQRA challenge (*see Opp Mem*, Point I [B] at 16 [“The Business Council and Kiryas Joel petitioners lack standing to raise SEQRA challenges to DEC’s

promulgation of the regulations.”]; Transcript at 34 [(DEC) objected specifically to just the Business Council and Kiryas Joel Petitioners . . . because those Petitioners are the ones who only raised . . . specific economic harms.”]).

The Court therefore concludes that petitioner Hutchings in Case 4 has alleged an environmental injury allowing her to challenge DEC’s alleged noncompliance with SEQRA under traditional standing principles (*see Save the Pine Bush*, 13 NY3d at 303-304).

2. Affected Landowners

Although SEQRA standing generally requires petitioners to allege an environmental injury, the Court of Appeals has recognized an exception for property owners whose land is directly subject to the challenged action. In *Matter of Har Enters. v Town of Brookhaven* (74 NY2d 524 [1989]), it was “evident” to the Court of Appeals “that if any party should be held to have a sufficient interest to object – without having to allege some specific harm – it is an owner of property which is the subject of [governmental regulation]” (*id.* at 529; *see also Gernatt Asphalt Prods. v Town of Sardinia*, 87 NY2d 668, 687 [1996] [“the owner of property that is the subject of (governmental action) need not allege the likelihood of environmental harm”]).

The Court of Appeals reaffirmed this principle recently in *Matter of Seneca Meadows, Inc. v Town of Seneca Falls* (2025 NY Slip Op 06961 [2025]), holding that a landfill operator had SEQRA standing as an “affected property owner” to challenge a local law requiring the closure of its facility based “solely on its ownership of the land subject to the [challenged enactment]” (*id.*, *1-2). “[A]s in *Har*, [the landowner] ‘has a legally cognizable interest in being assured that the [government] satisfied SEQRA before’ taking action to restrict the activities that can be conducted on the land (*id.*, quoting *Har*, 74 NY2d at 527-528).

Here, certain of the petitioners in Cases 2 and 3 have demonstrated ownership of property subject to Part 664.

Petitioner New York Development Group/Rowland, LLC (“Rowland”) received a positive jurisdictional determination from DEC on April 15, 2025, confirming that its parcels in the Town of Milton contain Class I and Class II wetlands under new Part 664 (*see* NYSCEF Doc No. 10, ¶¶ 13-15). As a result, development is restricted to approximately 55% of Rowland’s project area, and the permissible number of residential units is reduced from 54 to zero (*see id.*, ¶¶ 19-20).

Similarly, petitioner Barbera Homes & Development, Inc. is the contract vendee of a 63.87-acre parcel in the Town of Bethlehem (*see* NYSCEF Doc No. 50, ¶ 2). The land contains less than five acres of wetlands identified by the Army Corps of Engineers (*see id.*, ¶ 16), but the addition of a 100-foot buffer zone would result in about 27 acres of regulated wetlands, a 41% increase (*see id.*, ¶ 14).⁵

Petitioner New Hampton Lumber Co., Inc. owns property containing wetlands within two miles of Middletown, New York, which is identified as an urban area by the Census Bureau (*see* NYSCEF Doc No. 12, ¶¶ 2, 5, 11-12).

And in Case 3, the Village of Kiryas Joel purchased property for the construction of a municipal water treatment facility that allegedly would be adversely impacted by the new Part 664 regulations (*see* Case 3, NYCSEF Doc No. 8, ¶¶ 15-17; NYCSEF Doc No. 50, ¶¶ 4-13).

⁵ ECL § 24-0701, unchanged by the 2022 Amendments, provides that “activities are subject to regulation whether or not they occur upon the wetland itself, if they impinge upon or otherwise substantially affect the wetlands and are located not more than one hundred feet from the boundary of such wetland.” Notably, Part 664 adopts a blanket 100-foot buffer zone without individualized consideration of impingement or effect on actual wetlands (*see* Part IV [C], *infra*).

DEC urges the Court to limit the *Har/Gernatt/Seneca Meadows* line of authorities to site-specific governmental actions, citing the familiar principle that standing will not lie where petitioners fail to allege injuries “different in kind or degree from the public at large” (*Society of Plastics*, 77 NY2d at 777-778).

Although DEC’s argument has some superficial appeal – the *Har* line of cases focuses on regulations targeting activities occurring on specific properties, and Part 664 applies broadly across the State – the rationale underlying *Har*, *Gernatt* and *Seneca Meadows* does not depend on the number of other property owners affected by a challenged action. The cases instead rest on the principle that persons whose land is subject to governmental regulation have a cognizable interest in ensuring that the government complied with the applicable legal requirements before imposing that regulation. Simply stated, a property owner “has a legally cognizable interest in being assured that the [government] satisfied SEQRA before taking action” to restrict the use of their property (*Seneca Meadows*, 2025 NY Slip Op 06961, *2 [internal quotation marks and citation omitted]). This same interest is present regardless of the number of other landowners or parcels affected by a particular action.

It also bears emphasis that the landowner-petitioners in Cases 2 and 3 are not asserting generalized grievances about environmental policy. Each petitioner owns land subject to Part 664 and claims that the new regulations will adversely affect the use and enjoyment of their particular lands. Under *Seneca Meadows*, these petitioners have standing based “solely on [their] ownership of the land subject to [Part 664]” (*id.*).

Nor is the Court persuaded by DEC’s argument that petitioners’ injuries are speculative because they have not exhausted their administrative remedies or received final agency determinations. Petitioners are not challenging individual permit denials or jurisdictional

determinations; they are seeking to vindicate their “legally cognizable interest in being assured that [DEC] satisfied SEQRA” (*id.* [internal quotation marks and citation omitted]).⁶

Finally, an organization may establish standing on behalf of its members, “provided that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members” (*Matter of Mental Hygiene Legal Serv. v Daniels*, 33 NY3d 44, 51 [2019] [internal quotation marks and citation omitted]).

The Court is satisfied that the organization petitioners in Case 2 have individual members with standing as landowners; the purposes of the organizations include representing the interests of landowners and developers affected by environmental regulations; and the SEQRA claim presents largely legal questions that do not require the participation of individual members.

B. SEQRA Requirements

Article 8 of the ECL establishes “the procedural and substantive requirements for governmental entities to follow when reviewing the environmental consequences of proposed projects or ‘actions’” (*Matter of City Council of City of Watervliet v Town Bd. of Town of Colonie*, 3 NY3d 508, 516-517 [2004]). The goal is to ensure “that agency decision-makers – enlightened by public comment where appropriate – will identify and focus attention on any environmental impact of proposed action, that they will balance those consequences against other relevant social and economic considerations, minimize adverse environmental effects to the

⁶ Notably, the four-month statute of limitations for challenging the adoption of Part 664 has expired, so a property owner who exhausts their administrative remedies in the context of a jurisdictional determination or permitting proceeding would be limited to challenging the specific *application* of the new regulations, not their *adoption*. As the Court of Appeals has recognized, standing rules should not be applied “in an overly restrictive manner where the result would be to completely shield a particular action from judicial review” (*Association for a Better Long Is.*, 23 NY3d at 6, citing *Har*, 74 NY2d at 529).

maximum extent practicable, and then articulate the bases for their choices” (*Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 414-415 [1986]).

Under ECL § 8-0109, “[a]ll agencies . . . shall prepare, or cause to be prepared . . . an environmental impact statement [‘EIS’] on any action they propose or approve which may have a significant effect on the environment.” The term “action” includes “policy, regulations, and procedure-making” (ECL § 8-0105 [4] [ii]; *see also* 6 NYCRR 617.2 [b] [2] [“agency planning and policy making activities that may affect the environment and commit the agency to a definite course of future decisions”]).

Actions under SEQRA are classified as either Type I, Type II or Unlisted (*see* 6 NYCRR 617.2 [b], [aj], [ak], [al]). DEC regulations provide an illustrative, but “not exhaustive,” list of Type I actions (6 NYCRR 617.4 [a] [1], [b]), with the critical inquiry being whether the action may “have a significant adverse impact on the environment and requires the preparation of an EIS” (*id.* [a] [1]). Type II actions are exempt from further review because they “have been determined not to have a significant impact” (6 NYCRR 617.5), and Unlisted actions are those “not identified as a Type I or Type II” action (6 NYCRR 617.2 [al]).

“As early as possible in [the] formulation of an action,” an agency must “[d]etermine whether the action is subject to SEQR[A]” (6 NYCRR 617.6 [a] [1] [i]). If the preliminary classification is Type II, “the agency has no further responsibilities” (*id.*); otherwise, the lead agency must determine the significance of the contemplated action. “For Type I actions, a full [Environmental Assessment Form (‘EAF’)] . . . must be used to determine significance” (*id.* [a] [2]), whereas a “short EAF” is used to assess an Unlisted action (*id.* [a] [3]).

To determine significance, the lead agency must: (i) “review the EAF, the criteria [established for determining significance] and any other supporting information to identify the

relevant areas of environmental concern”; (ii) “thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment”; and (iii) “set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation” (6 NYCRR 617.7 [b] [2]-[4]).

“To determine whether a proposed Type I or Unlisted action may have a significant adverse impact on the environment, the impacts that may be reasonably expected to result from the proposed action must be compared against” an “illustrative, not exhaustive,” list of “criteria [] considered indicators of significant adverse impacts” (*id.* [c] [1]). One such indicator is whether the action is expected to work “a substantial change in the use, or intensity of use, of land . . . , or in [the land’s] capacity to support existing uses” (*id.* [c] [1] [viii]).

An EIS is required where the lead agency determines that the action “may include the potential for at least one significant adverse environmental impact” (*id.* [a] [1]; *see Matter of Clean Air Action Network of Glens Falls, Inc. v Town of Moreau Planning Bd.*, 235 AD3d 1124, 1126-1127 [3d Dept 2025]). In other words, “[t]o determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant” (6 NYCRR 617.7 [a] [2]).

“Judicial review of SEQRA determinations is ‘guided by standards applicable to administrative proceedings generally: ‘whether [the] determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion’” (*Clean Air Action Network*, 235 AD3d at 1126, quoting *Jackson*, 67 NY2d at 416).

“An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*id.* [internal quotation marks and citation omitted]).

C. Legislative Mandates versus Regulatory Discretion

Under ECL § 8-0105 (4) (ii), the promulgation of regulations is an action subject to SEQRA (*see Matter of Town of Copake v New York State Off. of Renewable Energy Siting*, 216 AD3d 93, 98 [3d Dept 2023], *appeal dismissed* 41 NY3d 990 [2024]).

However, an agency is not obliged to review under SEQRA the potential impacts of actions of the Legislature. “[O]fficial acts of a ministerial nature, involving no exercise of discretion,” are not agency action under SEQRA (ECL § 8-0105 [5] [ii]; *see* 6 NYCRR 617.5 [c] [46]). Accordingly, an agency is under no obligation to consider the “inherent environment consequences” of “legislatively mandated” decisions (*Matter of Citizens For An Orderly Energy Policy v Cuomo*, 78 NY2d 398, 415 [1991]).

The Legislature’s decisions in the 2022 Amendments to move from a system of jurisdictional mapping to a definition-based system, the reduction in acreage threshold, and the establishment of “unusual importance” criteria are all policy decisions made by the Legislature, and DEC was under no obligation to review those policy choices under SEQRA.

However, the record shows that DEC exercised substantial judgment and discretion in implementing significant aspects of the 2022 Amendments through the new Part 664 regulations, and those discretionary policy judgments and choices are subject to SEQRA review.

For example, DEC classified all wetlands in urban areas as Class II (*see* 6 NYCRR 664.5 [b] [13]), for which permits may issue only “in very limited circumstances” (6 NYCRR 663.5 [e] [2]). “A permit shall be issued [for Class II wetlands] 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]; *see* Jacobson Aff., ¶¶ 51-53). To be sure, the 2022 Amendments required DEC to regulate wetlands “located within or adjacent to an urban area” (ECL § 24-0107 [9] [b]), but the Legislature did not require DEC to impose a blanket Class II designation on all urban wetlands without regard to individual characteristics.

The same is true of DEC’s decision to authorize extended adjacent areas of up to 300 feet for nutrient-poor wetlands and up to 800 feet for vernal pools (*see* Jacobson Aff., ¶ 27). DEC initially proposed extensions of fixed distances but modified its approach to require site-specific analyses (*see id.*), a process demonstrating regulatory judgment and discretion.

Relatedly, DEC chose to mandate a fixed 100-foot buffer zone around all regulated wetlands (*see* 6 NYCRR 664.2 [ac]). But the statute itself, unchanged by the 2022 Amendments, provides that activities within 100 feet of wetlands are subject to regulation if they “impinge upon or otherwise substantially affect the wetlands” (ECL § 24-0701 [2]). Rather than requiring an individualized assessment of whether adjacent activities would impinge upon or otherwise adversely affect the wetlands, as contemplated by the statute, DEC made the policy choice of establishing a categorical 100-foot buffer around *all* freshwater wetlands.⁷

DEC also developed specific numeric criteria for implementing the 2022 Act’s “unusual importance” categories, including proximity thresholds and egg-mass counts (*see* Jacobson Aff., ¶¶ 52-54). Again, these numeric criteria represent regulatory judgments subject to SEQRA review.

⁷ Given that the 2022 Amendments contemplate more than one million additional acres of freshwater wetlands, the treatment of buffer zones is a highly consequential regulatory judgment.

D. DEC's SEQRA Review

DEC maintains that it “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” (Opp Mem at 13 [boldface omitted]).

DEC completed a short EAF “to evaluate whether [Part 664] would have any significant adverse impacts on the environment” (Jacobson Aff., ¶ 43; *see* NYSCEF Doc No. 6 [“Short EAF”]). After analyzing 11 separate categories of potential impacts, including whether the proposed rulemaking would “result in a change in the use or intensity of land,” DEC determined that the new Part 664 regulations would have either no impact or only a small impact (Short EAF, Part 2 at 1).

In Part 3 of the Short EAF, DEC checked the box to indicate that the promulgation of Part 664 “will not result in any significant adverse environmental impacts” (*id.*, Part 3 at 2). DEC offered the following narrative explanation for the determination of non-significance:

The purpose of the Freshwater Wetlands Act is to preserve, protect, and conserve freshwater wetlands across the state and [Part 664] will substantially increase the amount of wetlands 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 [under Part 663] (*id.*).

E. Classification of Action

At the outset, petitioners complain that DEC’s promulgation of Part 664 should have been classified as a Type I action, which “would carry the presumption of requiring preparation of an EIS” (*Copake*, 216 AD3d at 93). Petitioners argue principally that the promulgation of Part 664 constitutes “the adoption . . . of a comprehensive resource management plan,” which is identified as a Type I action under SEQRA (6 NYCRR 617.4 [b] [1]).

DEC responds that Part 664 “is nothing like a comprehensive resource management plan, because [it] 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” (Opp Mem at 23).⁸

In arguing for a Type I classification, petitioners emphasize the scope and scale of Part 664. Together with the 2022 Amendments, Part 664 will “safeguard an estimated one million additional acres of wetland habitat” (NYSCEF Doc No. 24, ¶ 66), and the adjacent area restrictions extend that reach even further. Under DEC’s SEQRA regulations, even “the physical alteration of 10 acres” (6 NYCRR 617.4 [b] [6] [i]) or “changes in the allowable uses . . . affecting 25 or more acres” (*id.* [b] [2]) are Type I actions. The scale of Part 664 dwarfs these thresholds, even without regard to incorporated legislative mandates.

Ultimately, however, the Court need not resolve the parties’ classification dispute. *Copake* teaches that “a misclassification does not always lead to the annulment of the negative declaration if the lead agency conducts the equivalent of a type I review notwithstanding the misclassification” (216 AD3d at 99 [internal quotation marks and citation omitted]). Conversely, “even where the action [properly] is classified as a type I action, the lead agency can issue a negative declaration where it determines that there will be no adverse environmental impacts” (*id.*).

Even assuming that DEC properly treated the promulgation of Part 664 as an Unlisted action, despite the scope and scale of the new regulations, the Court concludes, for the reasons that follow, that the SEQRA review was deficient.

⁸ As discussed previously, the discretionary policy decisions embodied in Part 664 do affect which lands in New York State are subject to regulation as wetlands (*e.g.* adjacent areas) and the permitting standards to be applied (*e.g.* subjecting all urban wetlands to Class II review under Part 663) (*see* Part IV [C], *supra*).

F. Identification of Concerns/Hard Look/Reasoned Elaboration

To evaluate SEQRA compliance, the Court must examine “whether [DEC] identified the relevant areas of environmental concern, took a ‘hard look’ at them, and made a ‘reasoned elaboration’ of the basis for its determination” (*Jackson*, 67 NY2d at 417 [citation omitted]).

1. Identification of Relevant Areas of Concern/Hard Look

A lead agency under SEQRA has a threshold obligation “to identify the relevant areas of environmental concern” (6 NYCRR 617.7 [b] [2]).

In completing the Short EAF, DEC checked boxes indicating that there would be no impact, or only a small impact, across 11 different dimensions, including whether the new regulations would “result in a change in the use or intensity of use of land” (Short EAF, Part 2 at 1). The only contemporaneous explanation for the absence of potential adverse impacts was that Part 664 “will substantially increase the amount of [regulated] wetlands,” which, in turn, “will lead to a reduction in adverse impacts on these wetlands as more projects will be required to avoid, minimize, or mitigate impacts through [Part 663]” (*id.*, Part 3 at 2).

But the administrative record shows that DEC received public comments identifying specific areas of potential environmental concern with new Part 664, including: (i) the prospect of urban sprawl and other growth-inducing impacts (*see* NYSCEF Doc No. 38 at 2087-2092); (ii) impact to aquatic ecosystems, algae blooms and invasive species (*see id.* at 2144-2146); (iii) effect on urban communities, including sprawl (*see* NYSCEF Doc No. 39 at 2215-2216); and (iv) growth-inducing impacts (*see* NYSCEF Doc No. 40 at 2598-2599).

The areas of concern identified by the public correspond closely with DEC’s own regulatory criteria for determining significance. Under 6 NYCRR 617.7 (c) (1) (viii), “a substantial change in the use, or intensity of use, of land . . . or in its capacity to support existing

uses” is an indicator of a potentially significant adverse impact. Part 664 affects millions of acres of freshwater wetlands, and DEC’s discretionary regulatory choices – including the blanket Class II designation for urban wetlands, the categorical 100-foot buffer zone and extended adjacent areas of variable size – have the potential to work significant changes through alteration in development patterns, land-use intensity and/or the capacity of affected lands to support existing uses.

Nothing in the Short EAF indicates that DEC identified any of these potential environmental concerns as relevant areas warranting a hard look. The Short EAF’s analysis rests entirely on the narrow premise that expanded wetland protection is inherently beneficial to wetlands, and there is no indication that DEC considered anything other than that objective when it determined that Part 664 had no potential for adverse impacts.⁹

SEQRA does not permit an agency to confine its review only to the intended benefits of a contemplated action. To the contrary, the lead agency must examine whether the proposed action “may have a significant adverse impact on the environment” (6 NYCRR 617.7 [b] [3]), a standard that encompasses all reasonably foreseeable consequences to the environment, including the consequences to non-regulated lands.

In opposition, DEC argues that “speculative environmental consequences are not sufficient to establish a SEQRA violation” (*Matter of Heights of Lansing, LLC v Village of Lansing*, 160 AD3d 1165, 1167 [3d Dept 2018] [internal quotation marks and citation omitted]). “An agency complying with SEQRA need not investigate every conceivable environmental problem; it may, within reasonable limits, use its discretion in selecting which ones are relevant”

⁹ This underscores the importance of the “reasoned elaboration” requirement, as the Court has no way to know what concerns DEC may or may not have considered beyond those memorialized in the Short EAF and any other contemporaneous documentation (*see* Part IV [F] [2], *infra*).

(*Save the Pine Bush*, 13 NY3d at 307 [citation omitted]). While correct statements of the law, these principles do not relieve DEC of the obligation to identify and examine the foreseeable consequences of its discretionary regulatory choices in relation to millions of acres of land.

Moreover, the cases relied upon by DEC involved actions of vastly narrower scope. In *Heights of Lansing*, the action involved a zoning change affecting a single district (*see* 160 AD3d at 1166-1167). Similarly, in *Matter of 61 Crown St., LLC v City of Kingston Common Council* (217 AD3d 1144, 1147 [3d Dept 2023]), the zoning code amendment at issue governed the development of affordable housing in just portions of a small city.

The Court also is mindful that the SEQRA threshold is not whether adverse impacts *will* occur, but whether the action “*may include the potential* for at least one significant adverse environmental impact” (6 NYCRR 617.7 [a] [1] [emphasis added]). As the Third Department recently observed, “the threshold for a positive declaration and a subsequent EIS is relatively low,” whereas “the standard for a negative declaration . . . 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*, 235 AD3d at 1126-1127 [internal quotation marks, citations and emphasis omitted]).

DEC’s failure to identify and examine the reasonably foreseeable environmental consequences of Part 664, including the consequences for non-wetlands, is well-illustrated by the Fourth Department’s recent decision in *Matter of Seneca Meadows, Inc. v Town of Seneca Falls* (2026 NY Slip Op 01687 [4th Dept, Mar. 20, 2026]).¹⁰

¹⁰ The decision was issued on remittal after the Court of Appeals determined that petitioner had standing to maintain a SEQRA challenge as an affected landowner (*see* Part IV [A] [2], *supra*).

In *Seneca Meadows*, the Fourth Department had before it a SEQRA challenge to a local law mandating the closure of the only solid waste management facility in the Town of Seneca Falls (“Town”). On appeal, respondents argued that the Town Board, as the SEQRA lead agency, “was not obligated to identify and consider that closure of the landfill could result in negative environmental impacts,” despite the prospect of needing to reroute “the extensive amount of waste disposed of at [petitioner’s] facility . . . to other locations, thereby increasing greenhouse gas emissions generated by hauling vehicles” (*id.*, *3). Respondents argued that “such a potential environmental consequence was speculative” (*id.*).

The Fourth Department squarely rejected respondents’ argument, concluding that the Town Board “erred in simply assuming that closure of the landfill would have no environmental impacts” (*id.*). “[T]he transportation of waste to other locations and the concomitant increase in greenhouse gas emissions by hauling vehicles constituted a nonspeculative impact that could be reasonably expected to result from the proposed closure of the landfill, particularly considering the size of [petitioner’s] operation” (*id.*; *cf. Matter of Town of Waterford v New York State Dept. of Env’tl. Conservation*, 187 AD3d 1437, 1443 [3d Dept 2020] [“DEC discussed the available alternatives at length in the SEQRA findings statement . . . (and) also explicitly explored what would occur if no action were taken.”]).

DEC further argues that “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” (Opp Mem at 22).

But permit-stage review is limited to assessing whether a *particular project* will have significant impacts on particular wetlands. Review on a project-by-project basis will not, and

cannot, assess the cumulative effects of the new regulatory framework on development patterns, land-use intensity and community character throughout the State.¹¹ And some of the potential adverse impacts may be felt on non-wetlands, which are not subject to Part 663.

Moreover, “[a] principal goal of SEQRA is to incorporate environmental considerations into the decisionmaking process at the earliest opportunity” (*City Council of City of Watervliet*, 3 NY3d at 518 [internal quotation marks and citation omitted]). Deferring analysis of statewide impacts to the permit stage is inconsistent with this objective (*see Copake*, 216 AD3d at 100).

Having concluded that DEC failed to identify the relevant areas of environmental concern, the Court further concludes that DEC did not take a “hard look” at such areas to determine whether the new Part 664 regulations may have a significant adverse impact (*see Seneca Meadows*, 2026 NY Slip Op 01687, *4).

2. Reasoned Elaboration

The record further establishes that DEC did not comply with the separate (but related) SEQRA requirement that the lead agency “set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation” (6 NYCRR 617.7 [b] [4]).

DEC’s contemporaneous explanation for its negative declaration boils down to just a few sentences: the purpose of Part 664 is to protect wetlands, and expanding jurisdiction over wetlands will reduce adverse impacts through the Part 663 permitting regimen (*see Short EAF*, Part 3 at 2).

¹¹ As petitioners observe, this is precisely the gap that SEQRA’s generic EIS provisions are intended to fill. Under 6 NYCRR 617.10 (a), a generic EIS may be used to assess the environmental impacts of “an entire program or plan having wide application or restricting the range of future alternative policies or projects, including new or significant changes to existing land use plans, development plans, zoning regulations or agency comprehensive resource management plans” (*id.* [a] [4]).

But this explanation does not address any potential adverse impacts, reference any supporting documents, acknowledge the concerns raised in public comments or analyze the concerns that were identified. There simply is no reasoned elaboration as to how the imposition of new environmental regulations governing millions of acres of wetlands across the State, viewed in light of “the scale and context of the proposed action” (*id.*), would have *no* potential for significant adverse impacts to the environment.

DEC’s significance analysis, to the extent it is discernable, was confined to a single dimension: the protection of wetlands. And while DEC ultimately may be correct that only positive environmental benefits will accrue from enhanced wetlands protection, the agency has not articulated the reasoning it relied upon to rule out the potential for adverse impacts.

The Court further concludes that the Jacobson affidavit, submitted by DEC in opposition to the petitions, is not a proper substitute for a contemporaneous, reasoned elaboration. The “reasoned elaboration” serves “to focus and facilitate judicial review and, of no lesser importance, to provide affected landowners and residents with a clear, written explanation of the lead agency’s reasoning at the time the negative declaration is made” (*Matter of Dawley v Whitetail 414, LLC*, 130 AD3d 1570, 1571 [4th Dept 2015]). These salutary purposes are not served by after-the-fact affidavits prepared for litigation.

Moreover, allowing an agency to cure SEQRA deficiencies through *post hoc* rationalizations is inconsistent with the longstanding rule that “a lead agency must strictly comply with SEQRA’s procedural mandates, and failure to do so will result in annulment of the . . . determination of significance” (*Matter of Wir Assoc., LLC v Town of Mamakating*, 157 AD3d 1040, 1044 [3d Dept 2018] [internal quotation marks and citation omitted]; see *Matter of Troy Sand & Gravel Co., Inc. v Town of Nassau*, 82 AD3d 1377, 1379 [3d Dept 2011]).

DEC argues that it “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” (Opp Mem at 14, citing *Matter of Village of Ballston Spa v City of Saratoga Springs*, 163 AD3d 1220, 1224 [3d Dept 2018]). However, *Ballston Spa* involved an initial negative declaration that lacked reasoned elaboration, but the municipality subsequently adopted a formal resolution that “reaffirmed its determination” of non-significance and “specifically addressed each question in part 2 of the EAF” (*id.* at 1224-1225). DEC points to no similar action here.

DEC also invokes the “rule of reason” standard, observing that courts review SEQRA determinations to assess whether “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] [internal quotation marks and citation omitted]). But, absent an indication that the agency identified and analyzed the relevant areas of potential environmental concern, there is no reasoned exercise of discretion to which the Court can defer. And, in any event, the rule of reason does not relieve an agency of the duty to provide a written elaboration supporting its exercise of discretion.

And unlike the respondents in *Copake*, DEC does not identify anything in the administrative record showing that it “took a thorough and hard look at the potential negative environmental impacts associated with [Part 664]” (216 AD3d at 99). In *Copake*, “review of the vast record” showed that the lead agency “took a thorough and hard look at the potential negative environmental impacts associated with the proposed regulations” and “then issued an amended short EAF . . . providing a more robust explanation of the proposed action . . . and the determination of significance” (*id.* at 100-101). In contrast, the Short EAF here remained

unchanged despite extensive public comments, and DEC has not identified any contemporaneous amended or supplemented analysis.

G. Remedy

Having concluded that DEC did not adequately identify the relevant areas of environmental concern, did not take a “hard look” at them and did not make a reasoned elaboration of the basis for its determination of non-significance, the Court concludes that the subject action – the promulgation of the new Part 664 regulations – must be annulled for noncompliance with SEQRA (*see Dawley*, 130 AD3d at 1571; *Troy Sand & Gravel*, 82 AD3d at 1379).

CONCLUSION

Based on the foregoing,¹² it is

ORDERED, ADJUDGED and DECLARED that regulations promulgated as 6 NYCRR part 664 are **ANNULLED** in their entirety for non-compliance with SEQRA, and such regulations are null and void; and it is further

ORDERED that the Case 2 Petition is granted to the extent indicated in the first decretal paragraph and is otherwise denied; and it is further

ORDERED that the Case 3 Petition is granted to the extent indicated in the first decretal paragraph and is otherwise denied; and it is further

ORDERED that the Case 4 Petition is granted to the extent indicated in the first decretal paragraph and is otherwise denied; and finally it is

ORDERED that the Case 1 Petition is denied.

¹² Given the disposition ordered herein, the Court need not reach petitioners’ other challenges to Part 664.

This constitutes the Consolidated Decision, Order & Judgment of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, the prevailing parties in each case shall promptly serve notice of entry on all parties entitled thereto.

Dated: Albany, New York
April 8, 2026



RICHARD PLATKIN
A.J.S.C.

Papers Considered:

- Case No. 1:* NYSCEF Doc Nos. 1-10, 20-39, 42, 45-55 and 68.
- Case No. 2:* NYSCEF Doc Nos. 1-13, 24-43, 46, 50-55, 61 and 67.
- Case No. 3:* NYSCEF Doc Nos. 1-14, 24-43, 46-48, 50-52 and 63.
- Case No. 4:* NYSCEF Doc Nos. 16-30, 33-52, 55, 60, 62-85, 87 and 99.