

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CAYUGA

In the Matter of the Application of

CITY OF AUBURN, TOWN OF OWASCO, OWASCO
WATERSHED LAKE ASSOCIATION, INC.,

Petitioners-Plaintiffs,

For a Judgment Under Article 78 of the Civil Practice
Law and Rules,

-against-

JAMES V. MCDONALD, in his capacity as the
Commissioner of the New York State Department of
Health, NEW YORK STATE DEPARTMENT OF
HEALTH, RICHARD A. BALL, in his capacity as the
Commissioner of the New York State Department of
Agriculture and Markets, and NEW YORK STATE
DEPARTMENT OF AGRICULTURE AND
MARKETS,

Respondents-Defendants.

Index No. _____

**VERIFIED PETITION AND
COMPLAINT**

Oral Argument Requested

Petitioners-Plaintiffs City of Auburn, Town of Owasco, and Owasco Watershed Lake Association, Inc. (collectively, "Petitioners"), for their verified petition for judgment pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") and their complaint seeking a declaratory judgment pursuant to section 3001 of the CPLR, by their attorneys, Earthjustice, allege as follows:

PRELIMINARY STATEMENT

1. Cayuga County has 45,000 residents who rely on Owasco Lake for drinking water. For years they have faced a public health crisis caused by proliferating harmful algal

blooms (“HABs”) that contaminate the lake with toxins.

2. In response, starting in 2017, the municipal suppliers of water, the City of Auburn and the Town of Owasco, banded together with an array of local stakeholders, including Petitioner-Plaintiff Owasco Watershed Lake Association, to address this drinking water crisis.

3. These stakeholders asked the New York State Department of Health (“DOH”) to begin the regulatory process or of updating outdated 1985 Owasco Lake Watershed Rules and Regulations (“WRRs”) because that agency is charged by the State Legislature with the authority and duty to protect the drinking water of New Yorkers.

4. The stakeholders then spent years diligently drafting new regulations to address rising contamination in the lake, the first step in DOH’s regulatory process for enacting new WRRs. Local stakeholders met and communicated with state agencies throughout the drafting process, and kept state agencies, including DOH, well apprised of the substance of the draft regulations.

5. Several years into the process, however, DOH began to suggest, and then recently made a final determination, that the passage of Agriculture and Markets Law (“AML”) Article 11-a deprived DOH of the legal authority to promulgate regulations to protect Owasco Lake from HABs, the main source of its current toxic contamination.

6. DOH also made that legal determination without considering its impact on the constitutionally protected environmental rights of residents throughout Cayuga County and the state.

7. As a result of this erroneous determination, the Department denied the City of Auburn and the Town of Owasco’s request to propose new regulations that would protect Owasco Lake from nutrient pollution contributing to harmful algal blooms and decided to repeal

the lake's existing nutrient management regulations and began preparing documents for that purpose.

8. If left standing, DOH's legal determination and the actions flowing from it will not only weaken drinking water regulations in Owasco Lake, but also compel nullification of similar nutrient management regulations previously adopted by DOH to protect watersheds throughout the state.

9. Finally, DOH also violated its own procedures by deciding to publish new proposed Owasco Lake WRRs in the State Register without first obtaining agreement from the suppliers of water. Thereafter, DOH took further actions, including at least the preparation of necessary documents for the State Administrative Procedures Act ("SAPA") process, to implement this decision.

10. This petition challenges DOH's decisions, determinations, and/or actions set forth herein as arbitrary and capricious or affected by errors of law.

PARTIES

11. Petitioner City of Auburn is a municipality organized and existing under the Constitution and laws of the State of New York. *See* Affirmation of Michael Youhana ("Youhana Aff.") ¶ 2 and Exhibit A. The City of Auburn is one of two suppliers of water sourcing and distributing public water from Owasco Lake to 45,000 residents of Cayuga County.

12. Petitioner Town of Owasco is a municipality organized and existing under the Constitution and laws of the State of New York. Youhana Aff. ¶ 3 and Exhibit B. The Town of Owasco is one of two suppliers of water sourcing and distributing public water supply from Owasco Lake to 5,000 residents of Cayuga County.

13. Petitioner Owasco Watershed Lake Association ("OWLA") is a non-profit

founded in 1988 and dedicated to the protection and restoration of Owasco Lake. Youhana Aff. ¶ 4 and Exhibit C. OWLA has committed itself to protecting Owasco Lake's use as both a source of drinking water and recreation. To this end, OWLA has conducted harmful algal research every year since the New York State Department of Environmental Conservation ("DEC") began a 2015 pilot shoreline surveillance program designed to better understand the severity and duration of HABs for Owasco Lake. OWLA assists with the management of this program by identifying blooms and providing pictures verifying their reports to DEC. OWLA's members live throughout Cayuga County and many get their drinking water from Owasco Lake. Members of the organization participated in the public engagement process that led to the development of draft Watershed Rules and Regulations that were transmitted to DOH for review.

14. Ms. Julie Lockhart is a member of OWLA who lives in the Town of Owasco and near Owasco Lake. Youhana Aff. ¶ 5 and Exhibit D. Ms. Lockhart is a retiree who assists OWLA with harmful algal bloom surveillance. She also participated in the public engagement process to develop new Watershed Rules and Regulations for Owasco Lake. She is concerned that the Department of Health's determination that it lacks legal authority to regulate nutrient pollution will contribute to the incidence and severity of harmful algal blooms in Owasco Lake. Ms. Lockhart feels that her health and safety have been threatened by this determination, as she relies on Owasco Lake for her drinking water and for recreation such as kayaking. She feels that the Department's refusal to regulate nutrients in the lake will raise her chance of suffering health related harms from HABs, or, at the very least, interfere with her use of Owasco Lake.

15. Respondent Department of Public Health is an executive agency of the State of New York. Its powers and duties are set forth in the New York Public Health Law.

16. Respondent James V. McDonald is the Commissioner of DOH.

17. Respondent Department of Agriculture and Markets (“DAM”) is an executive agency of the State of New York. Its powers and duties are set forth in the New York Agriculture and Markets Law.

18. Respondent Richard A. Ball is the Commissioner of DAM. His principal office is in Albany County.

JURISDICTION AND VENUE

19. This Court has jurisdiction pursuant to CPLR sections 3001, 7801, and 7803(3).

20. Petitioners timely initiated this special proceeding by properly filing their Notice of Petition, Verified Petition and Complaint, memorandum of law, and all supporting affirmations and exhibits thereto on January 5, 2024.

21. Venue lies in Supreme Court, Cayuga County because Cayuga County is a “county within the judicial district . . . where the material events otherwise took place. . . .” CPLR § 506(b).

LEGAL BACKGROUND

I. ADOPTION OF WATERSHED RULES AND REGULATIONS

22. The New York State Legislature assigned DOH the power and duty to “supervise and regulate the sanitary aspects of water supplies . . . and control the pollution of waters of the state.” N.Y. Pub. Health Law § 201(1)(l).

23. To fulfill this duty, the Legislature provided DOH with authority to “make rules and regulations for the protection from contamination of any or all public supplies of potable waters and water supplies of the state or United States, institutions, parks, reservations or posts and their sources within the state.” N.Y. Pub. Health Law § 1100(1).

24. Regulations promulgated in accordance with that authority are called Watershed Rules and Regulations (“WRRs”). Title 10, Chapter 3 of the New York Codes, Rules and Regulations sets forth Watershed Rules and Regulations. 10 NYCRR §§ 100–157.

25. DOH has promulgated a step-by-step procedure for adopting WRRs, set forth in the Department’s Environmental Health Manual, titled “Adoption of Rules and Regulations for the Protection of Water Supplies,” (“WRR Procedure”). *See* Youhana Aff. ¶ 6 and Exhibit E.

26. Echoing the legislative mandate, the WRR Procedure states that DOH “shall promote the protection of sources of public water systems through the adoption and enforcement of watershed rules and regulations.” Youhana Aff., Exhibit E ¶ A.

27. The Procedure clarifies that the water supplier initiates the process for promulgating WRRs. The supplier notifies the “Local Health Unit” (i.e. the county health department) that it wants new rules and regulations and drafts proposed rules and regulations that DOH then reviews. Youhana Aff., Exhibit E ¶¶ 1–6.

28. DOH may propose revisions of the draft to the water suppliers. DOH, however, must first “obtain[] the Supplier of Water’s agreement” on any revisions before it can formally propose the rules by publishing them in the State Register. Youhana Aff., Exhibit E ¶ 6–11.

II. OWASCO LAKE’S WATERSHED RULES AND REGULATIONS

29. The current 1985 WRRs “apply to Owasco Lake and its tributaries, which is a source of the public water supply for both the City of Auburn and the Town of Owasco, Cayuga County, New York, and to all watercourses tributary thereto or which may ultimately discharge into said lake.” 10 NYCRR § 104.1(a) *et seq.*

30. These Owasco Lake WRRs include a section with several specific prohibitions on the conduct of persons engaged in agricultural activities. 10 NYCRR § 104.1(d), (f); N.Y. Pub.

Health Law § 1103.

31. One prohibition states “[n]o agricultural-associated animal waste area shall be located within a 250-foot linear distance of the lake or watercourse. Beyond that distance such area shall be maintained in such manner that surface runoff will not carry agricultural-associated animal waste directly into the lake or watercourse.” 10 NYCRR § 104.1(d)(1).

32. “Agricultural-associated animal waste” and “[a]gricultural-associated animal waste area” are respectively defined to “mean manure obtained from agricultural industries” and “land used for the deposition of agricultural-associated animal waste on the surface of the ground for fertilization purposes.” 10 NYCRR § 104.1(b)(1)–(2).

33. A second agricultural prohibition states “[n]o chloride salt shall be stored within a 500-foot linear distance of the lake or watercourse, except in weatherproof buildings or watertight vessels.” 10 NYCRR § 104.1(d)(3).

34. “Chloride salt” is defined to include “solid compounds or solutions of potassium chloride (commonly used as fertilizer).” 10 NYCRR § 104.1(b)(4).

35. A third specific prohibition regulating agricultural practices states “[m]anure shall not be field-spread within 75 feet of the lake or watercourse unless it is plowed underground on the same day it is spread.” 10 NYCRR § 104.1(d)(7).

III. AGRICULTURE AND MARKETS LAW ARTICLE 11-A

36. Agriculture and Markets Law (“AML”) Article 11-a was created in 2000 and establishes an agricultural environmental management (“AEM”) program. AML § 151.

37. The State Legislature created the AEM program to “assist farmers in maintaining the economic viability of their farm operations while addressing environmental impacts from those operations.” *Id.* § 151.

38. AML Article 11-a allows, but does not require, farmers to adopt “AEM Plans,” which set forth “a course of action for the environmental management of a farm operation” and are developed by certified planners. *See generally id.* § 150.

39. These voluntary plans may, but are not required to, include “measures to abate and control agricultural nonpoint source water pollution, air pollution and other adverse environmental impacts from farm operations through the implementation of best management practices, in a way which maintains the viability of the farm operation.” *Id.*

40. AML Article 11-a contains a discrete, express prohibition on the authority of local governments.

41. Local governments are prohibited from exercising their powers “to enact, administer or enforce local laws or ordinances... in a manner... which unreasonably restricts planning, practices, structures, projects or other measures conducted or implemented in relation to the participation of a farm owner or operator in the AEM program.” *Id.* § 151-d.

42. They are also prohibited from enacting, administering or enforcing local laws in a manner that is inconsistent with the Article. *Id.* § 151-d.

43. By contrast, AML Article 11-a contains no section or subsection that prohibits or restricts the rulemaking authority of state agencies.

IV. NEW YORK CONSTITUTIONAL RIGHT TO A HEALTHFUL ENVIRONMENT

44. The Constitution of the State of New York guarantees that “[e]ach person shall have a right to clean air and water, and a healthful environment.” N.Y. Const. art. I, § 19.

FACTUAL BACKGROUND

I. OWASCO LAKE

45. Owasco Lake is one of New York State’s Finger Lakes, located in Cayuga County

on the south edge of the city of Auburn.

46. Owasco Lake is a source of drinking water for 45,000 residents of Cayuga County.

47. People also use Owasco Lake for recreational activities such as boating, fishing, and swimming.

48. The Town of Owasco and the City of Auburn are the suppliers of water that draw and treat water from Owasco Lake and purvey it to residents throughout the county.

II. HARMFUL ALGAL BLOOMS

49. Harmful algal blooms (“HAB”) are overgrowths of algae in water.

50. Some HABs produce dangerous toxins in fresh water called microcystins.

51. Microcystins can cause serious liver damage and may be carcinogenic.

52. Human exposure to microcystins can occur in a variety of ways, including: the drinking of contaminated water; recreational contact with contaminated water such as by swimming; and, the consumption of fish in which the toxins accumulate.

53. Filtration of HAB-contaminated waters also produces disinfection byproducts, which can be harmful to human health.

54. Empirical science has shown that nutrient pollution to lakes is an important driver of lake eutrophication and HABs.

55. Because manure and fertilizer contain nutrients, farming runoff sometimes causes nutrient pollution.

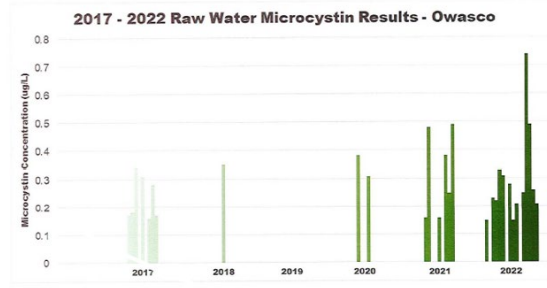
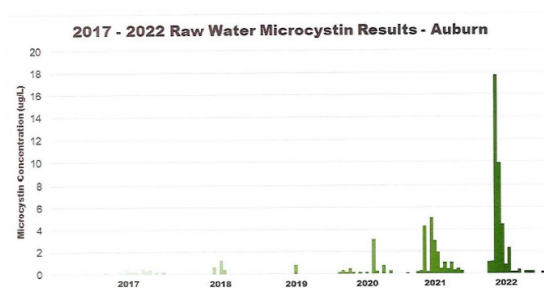
III. OWASCO LAKE DRINKING WATER CRISIS

56. In September and October of 2016, HABs engulfed Owasco Lake and produced detectable, unsafe levels of toxins in raw and finished (treated) water drawn from Owasco Lake.

Youhana Aff. ¶ 7 and Exhibit F; Youhana Aff. ¶ 8 and Exhibit G.

57. Massive HABs have repeatedly polluted Owasco Lake in each succeeding year up through 2023. Youhana Aff., Exhibit G.

58. That HAB pollution corresponded with a dramatic rise in the level of toxins in the raw water entering both the City of Auburn and the Town of Owasco's water treatment plants between 2017 and 2022. Youhana Aff. ¶ 9 and Exhibit H.



59. This HAB-contamination has also forced local health authorities to close beaches and impaired residents' use and enjoyment of Owasco Lake. Youhana Aff., Exhibit G.

60. The Owasco Lake drinking water crisis has greatly alarmed officials and residents in the Town of Owasco, the City of Auburn, and communities throughout Cayuga County, including members of OWLA.

61. The Town of Owasco and the City of Auburn have spent millions of dollars to upgrade their water treatment plants to safeguard Cayuga County residents' health amidst this persistent crisis. Youhana Aff. ¶ 10 and Exhibit I.

62. Nevertheless, local health officials' fears have not been allayed. They are concerned that the contamination of the drinking water soon will become so severe that even the upgraded water treatment systems will be insufficient to keep drinking water safe. Youhana Aff. ¶ 11 Exhibit J.

63. Accordingly, the Cayuga County Health Department has updated its plans for issuing a “do not drink order” in case the drinking water crisis reaches an acute point at which filtration of HAB-derived toxins fails. *Id.*

IV. OWASCO AND AUBURN DRAFT NEW WATERSHED RULES AND REGULATIONS

64. In response to the drinking water crisis, Cayuga County’s suppliers of water, the City of Auburn and the Town of Owasco, initiated the process for drafting and submitting updated draft WRRs to DOH. Youhana Aff., Exhibit E ¶ 1. They came to understand that newer, science-based rules were necessary to tackle their watershed’s growing HAB crisis. Youhana Aff. Exhibits A and B.

65. Specifically, in the Spring of 2017, the City of Auburn, the Town of Owasco, and Cayuga County all passed resolutions supporting the initiation of a “Public Participation Process” to update Owasco Lake’s WRRs, which had not been revised since 1985. Youhana Aff. ¶ 12 and Exhibit K; Youhana Aff., Exhibit H.

66. Soon thereafter, stakeholders and officials from the Cayuga County Legislature, the Auburn City Council, the Owasco Town Board, the Owasco Lake Watershed Management Council, the Cayuga County Board of Health, agricultural stakeholders, and OWLA formed a Steering Committee to draft new WRRs for Owasco Lake with public consultation and input. Youhana Aff., Exhibit K.

67. During the two yearlong Public Participation Process, the Steering Committee and its staff held a series of meetings and presentations through which they solicited input from a diverse array of stakeholders on what new draft WRRs should include. *Id.*

68. Through the Public Participation Process, the Steering Committee and its staff made efforts to respond to a wide variety of distinct constituencies throughout Cayuga County,

as well as State agencies, including agricultural and business communities, lake shore owners, lake advocacy groups, the Cayuga County Soil and Water Conservation District, DOH, DEC, and DAM. *Id.*; Youhana Aff. ¶ 13 and Exhibit L.

69. The Steering Committee held a Public Notice and Comment Period on a draft of the Watershed Rules and Regulations that extended from March to June 2019. Youhana Aff., Exhibit K.

70. In March 2020, the Steering Committee responded to public comments, and then approved a final draft of the Watershed Rules and Regulations. *Id.*

71. The provisions contained in the final draft of the Watershed Rules and Regulations was the product of years of stakeholder engagement and compromise.

72. Those provisions included a detailed “Nutrient Management” section with eight subsections. Youhana Aff. ¶ 14 and Exhibit M at 16–19.

73. While Owasco Lake’s 1985 Watershed Rules and Regulations also contained binding requirements designed to prevent nutrient pollution, this newly drafted Nutrient Management section contained more detailed nutrient pollution regulations tailored to address the burgeoning HAB crisis. Youhana Aff., Exhibit M at 16–19

74. Like many other WRRs—including extensive WRRs adopted for Skaneateles Lake in 2005—the new Nutrient Management section was designed to guard against agricultural nutrient pollution. More specifically, the regulations required the adoption of environmentally sound nutrient management practices. The regulations have as their goal reduction of total nutrient levels in Owasco Lake, as existing regulations have only managed to hold those levels steady.

75. For example, the Nutrient Management section requires operators of farms seven

acres or larger to comply with a farm management plan “that specifies appropriate rates and volumes of application of manure and/ or commercial fertilizer,” to maintain records of manure and fertilizer use, and to refrain from disposing of manure and commercial fertilizer in Owasco Lake. *Id.* at 16–17.

76. The draft regulations also require vegetative buffers to mitigate nutrient runoff into Owasco Lake and also create setbacks on the application of manure and commercial fertilizer to prevent manure and commercial fertilizers from being applied too close to water supplies. *Id.* at 17.

77. And the draft regulations: prohibit the application of manure and fertilizer to impervious areas, such as parking lots; require milking center wastewater and silage leachate to be discharged to an appropriate treatment or collection system; regulate the storage of agricultural waste, manure, and feed; and control the access of livestock to Owasco Lake as well as the watershed’s watercourses. *Id.* at 18–19.

78. Finally, the Nutrient Management section requires operators of farms to make farm management plans available for inspection by regulators upon request. *Id.* at 19.

79. DOH was informed in advance of the Steering Committee’s final approval that the draft would likely include provisions designed to manage the flow of nutrient pollution from agricultural activities into Owasco Lake.

80. On information and belief, DOH stated that such nutrient management regulations may raise the hackles of some members of the agricultural community who prefer voluntary programs (like the AEM program) but did not state or otherwise indicate that it lacked legal authority to promulgate such rules.

V. INITIAL STATE REVIEW OF LOCAL DRAFT NUTRIENT MANAGEMENT SECTION LEADS TO DISAGREEMENT.

81. After some delay related to the COVID-19 pandemic, the Steering Committee transmitted the final draft of the WRRs to the Auburn City Council and the Owasco Town Board in October of 2020 for a vote. Youhana Aff., Exhibit K. At the end of October, both the Auburn City Council and the Owasco Town Board passed resolutions endorsing the final draft regulations (“Local Draft”). Youhana Aff. ¶ 15 and Exhibit N; Youhana Aff. ¶ 16 and Exhibit O.

82. In November 2020, the Cayuga County Board of Health issued a resolution endorsing the Local Draft. Youhana Aff., Exhibit L.

83. In accordance with DOH WRR Procedure, it then transmitted the Local Draft to DOH for review in December 2020. Youhana Aff. ¶ 17 and Exhibit P.

84. In June 2023, the Town of Owasco and the City of Auburn formed a state-local technical workgroup with DOH, the Owasco Lake Watershed Management Council, Cayuga County, and various state agencies to collectively review and discuss the language of the Local Draft. Youhana Aff. ¶ 18 and Exhibit Q.

85. During the first state-local technical workgroup meeting held in June 2022, DOH expressed concern about the Nutrient Management section of the draft. State representatives recommended revising the draft “to ensure regulations do not conflict with other State laws and regulations,” and tabled discussion of potential revisions to the Nutrient Management section for later in the year. *Id.*

86. In state-local technical workgroup meetings held in October and November of 2022, DOH finally gave voice to some of its reservations regarding the Nutrient Management section after admitting to limitations in the AEM program. Youhana Aff. ¶ 19 and Exhibit R; Youhana Aff. ¶ 20 and Exhibit S.

87. During these meetings the “[t]he group discussed the need to increase participation” of farmers in the AEM program, and agreed that there had been inadequate funding from the state to incentivize farmers to participate in the AEM best management practices voluntarily. Youhana Aff. Exhibit S.

88. Despite the acknowledged insufficient participation in the voluntary AEM program, the State agencies present at the workgroup meeting did not endorse the solution to the State’s failure to manage nutrient pollution in Owasco Lake contained in the Local Draft: mandating better nutrient management practices through enforceable rules and regulations.

89. Rather, State agencies raised several possible legal and policy concerns about the Nutrient Management section of the Local Draft and indicated that DOH might need to revise it. *Id.*; Youhana Aff. ¶ 21 and Exhibit T.

90. For example, the State agencies stated that that the Nutrient Management section *might* “overextend the intended reach of NYSDOH watershed rules and regulations to touch on another agency’s express jurisdiction”—mentioning the Environmental Conservation Law and the AEM program in particular. Youhana Aff., Exhibit T.

91. State officials also expressed some policy concerns with the Nutrient Management section, noting that “[n]o other State watershed rules and regulations address topics” found in the Local Draft, and adding that “[t]hese provisions would be precedent setting and would exceed State resources.” *Id.*

92. In response, the local workgroup members requested a more detailed explanation of the State agencies’ legal concerns regarding the Nutrient Management section, including legal citations as well as line-by-line explanations of revisions—as had been the State’s practice for revisions to other portions of the Local Draft. Youhana Aff., Exhibit S; Youhana Aff. ¶ 22 and

Exhibit U.

93. The State agencies responded that DOH would need to complete a “legal review before coming back together to do the line-by-line review of nutrient management section.”

Youhana Aff., Exhibit U.

94. In closing, the group acknowledged that it had arrived at “an impasse” over what to do about the Nutrient Management section. Further discussion was postponed until after completion of the legal review. Youhana Aff., Exhibits S, T.

VI. DOH’S LEGAL REVIEW

95. DOH conducted a legal review of the Local Draft’s Nutrient Management section over the next seven months. During this time, DOH conveyed concerns about the scope of the Department’s rulemaking authority to local members of the workgroup including the water suppliers, the Town of Owasco and the City of Auburn.

96. Local members of the workgroup continued to try to get clarity from DOH about potential legal barriers. For example, on December 14, 2022, Seth Jensen, Director of Municipal Utilities for the City of Auburn, reiterated via email the city’s request for a more detailed explanation of DOH’s legal concerns regarding the Nutrient Management section of the Local Draft to Ashley Inzerillo, a DOH Bureau of Water Supply Protection official. Ms. Inzerillo responded by saying that DOH needed “more definitive answers” from its legal team regarding what sorts of provisions the Department could include in WRRs. Youhana Aff. ¶ 23 and Exhibit V.

97. On January 12, 2023, Mr. Jensen once again asked via email for specific legislation and laws that DOH intended to examine as a part of the agency’s legal review. Ms. Inzerillo responded with an initial list of laws, including N.Y. Pub. Health Law § 1100 and AML

Article 11-a § 151-d. Youhana Aff., Exhibit V.

98. On March 30, 2023, Mr. Jensen sent another email to Ms. Inzerillo requesting that DOH provide a written outline of its views of the legal obstacles to promulgating the Local Draft, and the specific laws DOH believes conflict with the Local Draft. Youhana Aff. ¶¶ 24 and Exhibit W.

99. DOH did not respond or provide the requested information.

100. At a state-local technical workgroup meeting convened on June 29, 2023, counsel for DOH orally provided various inconsistent explanations of the Department's legal concerns regarding the Local Draft. Youhana Aff. ¶¶ 35, 36.

101. Counsel for DOH first stated that the State Legislature did not give DOH express authority to adopt agricultural regulatory provisions, like some of those present in the Local Draft, in Watershed Rules and Regulations. Youhana Aff. ¶ 37.

102. Local stakeholders raised the counterpoint that DOH had in fact adopted such agricultural regulatory provisions in the past. Youhana Aff. ¶ 38.

103. DOH Counsel then stated that—to the extent that DOH once had authority to promulgate such provisions—that authority had been stripped from DOH by the more recently enacted provisions of the AML Article 11-a. Youhana Aff. ¶ 39.

104. Local stakeholders also rebutted this argument, pointing out that AML Article 11-a was passed prior to the promulgation of WRRs for Syracuse that contain agricultural requirements. DOH provided no clear rebuttal to this point. Youhana Aff. ¶ 40.

105. Officials from other State agencies then suggested that another statute, AML § 305-a, may have stripped DOH of its legal authority to promulgate agricultural WRRs. Youhana Aff. ¶ 41.

106. The Department also once again did not present proposed revisions to the Local Draft at the workgroup meeting, and the local attendees remained unsure of how DOH Counsel's oral legal positions would result in revisions of the Nutrient Management section of the Local Draft.

107. The day after the inexact and shifting legal positions presented at that meeting, Mr. Jensen again emailed Ms. Inerillo stating that he "appreciated the Department of Health's explanation of its legal authority to issue Watershed Rules and Regulations," while asking the Department for "written materials explaining . . . how and why the Department of Health is limited in what it can include in the Owasco Lake watershed rules and regulations." Youhana Aff. ¶ 26 and Exhibit Y.

108. Mr. Jensen noted that "oral presentations can sometimes be a bit difficult to follow" and therefore a written explanation of the Department's legal concerns would help the City of Auburn "understand the conclusions and the reasoning of the Department." Youhana Aff., Exhibit Y.

109. Neither Ms. Inerillo nor any DOH official responded to that request.

110. Mr. Jensen followed up on the City of Auburn's request for DOH's written legal rationale via email almost two weeks later. *Id.*

111. Ms. Inerillo responded, but once again did not provide the requested written explanation of the Department's legal position. Rather, she stated that DOH, DEC, and DAM would go over the conclusions and reasoning at the next state-local technical workgroup meeting. *Id.*

112. Earthjustice, on behalf of the Town of Owasco and the City of Auburn, then sent a letter via email to both Ms. Inerillo and DOH Legal Counsel William Gerald Sacks "to request

a written statement or explanation of what DOH believes it lacks authority to include in watershed rules and regulations.” *See* Youhana Aff. ¶¶ 27, 42 and Exhibit Z.

113. DOH never responded to that letter. Youhana Aff. ¶ 43.

VII. DOH STRIPS NUTRIENT MANAGEMENT SECTION FROM THE LOCAL DRAFT

114. DOH presented a revised draft of the Owasco Lake Watershed Rules and Regulations during the next state-local workgroup meeting held on July 31, 2023. DOH walked the City of Auburn and the Town of Owasco through the draft, which contained the Department’s recommended revisions to the Nutrient Management section. Youhana Aff. ¶¶ 28, 44–45 & Exhibit AA.

115. DOH’s revised version stripped the entire Nutrient Management section from the Local Draft. And it also removed the binding (yet insufficient) agricultural nutrient management regulations currently in place in the Owasco Lake WRRs (that have been in force since 1985). The revised version consisted of only three paragraphs, none of which contained binding regulations on persons responsible for nutrient pollution. Youhana Aff., Exhibit AA at 9.

116. Instead, DOH’s revised version replaces binding regulations with a mere recommendation to participate in the AEM program and requires local authorities to cease reporting violations of the 1985 Nutrient Management regulations to DOH and to begin referring concerns about nutrient pollution to other agencies. *Id.*; *Id.* ¶ 46.

117. More specifically, the first paragraph “actively encourage[s]” non-CAFO farms “to participate in the AEM program (AML 11-A),” and describes the AEM program. Youhana Aff., Exhibit AA.

118. The second paragraph requires the Owasco Lake Watershed Inspection and Protection Division personnel to refer 6 NYCRR §§ 700–705 water quality standard violations

and CAFO General Permit violations to DEC. *Id.* The third paragraph requires the Owasco Lake Watershed Inspection and Protection Division personnel to refer “[o]ther observations of concern . . . to the local Soil and Water Conservation District to assess and address through participation in AEM” *Id.*

119. Thus, the revised draft, rather than increasing the lake’s protection against nutrient pollution, would deregulate the lake and leave it more vulnerable to contamination than it is today.

120. The local stakeholders at the meeting, including the water suppliers Town of Owasco and City of Auburn, expressed deep dismay at the Department’s decision to strip the draft of binding nutrient management regulations. *Youhana Aff.* ¶ 47.

121. Local stakeholders also requested that DOH remove the recommendations to comply with other state laws from the Nutrient Management section of the Second Draft, noting that such references were superfluous and that it did not make sense to include them in Watershed Rules and Regulations. *Youhana Aff.* ¶ 48.

122. Counsel for the City of Auburn and the Town of Owasco asked whether the Notice of Proposed Rulemaking for DOH’s version of the Owasco Lake Watershed Rules and Regulations would include DOH’s legal rationale for declining to adopt the Local Draft. *Youhana Aff.* ¶ 49.

123. Counsel for DOH replied that the Notice of Proposed Rulemaking would not. *Youhana Aff.* ¶ 50.

VIII. DOH ISSUES WRITTEN DETERMINATION THAT THE DEPARTMENT LACKS AUTHORITY TO PROMULGATE NUTRIENT MANAGEMENT REGULATIONS

124. After learning of DOH’s gutting of the Local Draft’s nutrient management

provisions, the office of Senator Rachel May, the State Senate representative for both the City of Auburn and the Town of Owasco, sent a letter to DOH and other State agencies asking questions related to the protection of Owasco Lake's water quality.

125. Question #3 in Senator May's letter asked:

During public meetings, the NYSDOH indicated that regulations couldn't address pollution sources already covered by other laws. For instance, they argued that since the Agricultural Environmental Management Agency is mentioned in Ag and Markets Law, the Owasco Rules and Regulations cannot include farming requirements. . . . The Skaneateles Rules and Regulations contain substantial farming and sediment erosion/stormwater requirements. Why can regulations address these aspects in one context but not another, and how does the law prohibit the inclusion of certain pollution sources in Owasco's regulations?

Youhana Aff. ¶ 29 and Exhibit AB.

126. Senator May's office provided the City of Auburn with the State's written response on September 8, 2023. The answer to Question #3 was DOH's first definitive legal determination that it lacks the authority to promulgate the Nutrient Management and other agricultural sections of the Local Draft. Youhana Aff. ¶ 51 & Exhibit AB.

127. The State agencies replied in relevant part:

The Syracuse watershed regulations were first adopted six years before any of the agricultural planning provisions of AML Article 11-a existed and, therefore, there was no clear statutory preclusion on [WRR] agricultural management provisions at that time. DOH has reviewed AML Article 11-a in detail and determined DOH lacks delegated legislative authority to promulgate regulations of the kind proposed by the City and Town that would attempt to effectively amend the statutory requirements of AML 11-a.

Youhana Aff., Exhibit AB.

128. Thus, for the first time, the City of Auburn and the Town of Owasco had a definitive, written legal determination from DOH clarifying what the Department understands to be the scope of its rulemaking authority—and a portent of its final denial of the municipalities' request to adopt the Nutrient Management section of the Local Draft.

IX. DOH'S FINAL DENIAL OF NUTRIENT MANAGEMENT SECTION OF LOCAL DRAFT AND REMOVAL OF EXISTING NUTRIENT MANAGEMENT PROVISIONS

129. In mid-September 2023, DOH circulated another draft of the Watershed Rules and Regulations (“DOH-Endorsed Draft”) via email to local stakeholders in the technical workgroup. Youhana Aff. ¶ 30 and Exhibit AC; Youhana Aff. ¶ 31 and Exhibit AD.

130. Although DOH’s email stated that the draft would undergo further review before promulgation, DOH stated that it “plans to keep the Nutrient Management provision in the proposed regulations as written and presented during the 7/31 meeting”—declining once and for all the request of the municipalities to include the Local Draft’s Nutrient Management section in the proposed WRRs for Owasco Lake. Youhana Aff., Exhibit AC.

131. The denial forecloses the possibility that the detailed and binding Nutrient Management section of the Local Draft could be adopted through the rulemaking process.

132. The DOH-Endorsed Draft further deregulates nutrient pollution in the watershed by stripping away the few nutrient management regulations contained in the existing 1985 regulations. DOH’s determination that it lacks legal authority to promulgate watershed rules to control nutrient pollution necessitates this deregulation.

133. Ms. Inzerillo also stated that DOH would proceed with the SAPA rulemaking process, notwithstanding the City of Auburn and the Town of Owasco’s objections to the Nutrient Management section of the DOH-Endorsed Draft. *Id.*

134. On information and belief, DOH is taking action to publish the proposal in the State Register, including, “prepar[ing] the documents” for the SAPA process—notwithstanding that DOH has failed to obtain the agreement of the City of Auburn and the Town of Owasco on revisions reflected in the DOH-Endorsed Draft. Youhana Aff. ¶ 32 and Exhibit AE.

135. Indeed, on October 17, 2023, the City of Auburn and the Town of Owasco submitted a joint letter to the Office of the Governor broadly outlining their objections to DOH's revisions to the Local Draft. Youhana Aff., Exhibit I.

136. On December 8, 2023, City and Town officials filed a petition for declaratory ruling with DOH asking the agency for further elaboration of the legal reasoning underlying the September 8, 2023, determination that the AML stripped DOH of its legal authority to promulgate rules and regulations to control agricultural nutrient pollution. Youhana Aff. ¶ 33 and Exhibit AF.

137. On December 22, 2023, DOH declined the petition for declaratory ruling, reasoning that the request did "not fall within either of the permitted categories contained within SAPA § 204 for which a declaratory ruling may be requested, in so far as it asks the Department to opine on legal requirements and limitations imposed by a statute whose enforcement authority rests entirely with a different executive agency." Youhana Aff. ¶ 34 and Exhibit AG.

FIRST CAUSE OF ACTION

(Erroneous Determination and Actions Regarding DOH's Authority to Regulate Nutrients)

138. Petitioners repeat and re-allege the allegations contained in paragraphs 1–137 above and incorporate such allegations by reference as if set forth herein.

139. DOH has the duty and authority to protect the state's water supplies from contamination through regulations. N.Y. Pub. Health Law §§ 201(l), 1100.

140. AML Article 11-a does not restrict the authority of DOH to promulgate rules and regulations to control nutrient pollution in sources of drinking water.

141. The City of Auburn and the Town of Owasco, in accordance with applicable procedure, made a request for DOH to propose the Local Draft of the WRRs, which included

regulations to control nutrient pollution.

142. DOH subsequently issued a written legal determination that AML Article 11-a strips the Department of authority to do so.

143. DOH's legal determination was affected by an error of law and was arbitrary and capricious.

144. DOH's denial of the City of Auburn and the Town of Owasco's request to propose the agricultural nutrient management regulations contained in the Local Draft and the Department's actions to repeal Owasco Lake's 1985 WRRs' nutrient management provisions were affected by DOH's erroneous and arbitrary legal determination.

145. Accordingly, these agency actions were also affected by an error of law and are arbitrary and capricious.

146. DOH's actions injure Petitioners' residents and members by leading to environmental harms they will suffer from nutrient pollution in Owasco Lake, including the contamination of drinking water as a result of HABs as described above.

147. DOH's definitive position on the scope of its N.Y. Pub. Health Law § 1100 authority—as expressed in a written determination—also injures Petitioners by foreclosing the possibility that the agency will promulgate binding regulations to control nutrient pollution in WRRs for Owasco Lake.

SECOND CAUSE OF ACTION

(Failure to follow Public Health Law § 1100 Procedure)

148. Petitioner repeats and re-alleges the allegations contained in paragraphs 1–147 above and incorporates such allegations by reference as if set forth herein.

149. DOH's WRR Procedure lays out the procedure for implementing Public Health

Law § 1100.

150. The WRR Procedure requires the Department to obtain agreement on revisions to WRR drafts from suppliers of water before submitting WRRs to the State Register. Exhibit E ¶¶ 6–11.

151. The City of Auburn and the Town of Owasco are the suppliers of water for the Owasco Lake Watershed.

152. The City of Auburn and the Town of Owasco transmitted the Local Draft to DOH for review, and DOH subsequently proposed revisions to the draft, including the stripping of the entire Nutrient Management section from the draft. The new DOH-Endorsed Draft also removes nutrient management regulations present in the existing 1985 Owasco Lake WRRs.

153. The City of Auburn and the Town of Owasco did not assent to these revisions of the Local Draft. Indeed, they objected to them. Youhana Aff., Exhibit I.

154. DOH has decided to publish its revised Nutrient Management section in the State Register without first obtaining agreement from the suppliers of water. DOH has taken further actions, including at least the preparation of necessary documents for the SAPA process, to implement this decision.

155. DOH's decision and actions are contrary to its own procedure as set forth in the WRR Procedure Document and are therefore arbitrary and capricious.

156. DOH's actions injure Petitioners because the revised Nutrient Management section is less protective of Owasco Lake's drinking water than Owasco Lake's current Watershed Rules and Regulations that include binding nutrient management provisions.

157. DOH's actions also injure Petitioners the City of Auburn and the Town of Owasco by denying these Petitioners procedural protections they reasonably expected would

govern the rulemaking process they agreed to invest time and resources in.

THIRD CAUSE OF ACTION

(Failure to Consider Petitioners' Members and Residents Rights Under N.Y. Const. Art. I, § 19)

158. Petitioner repeats and re-alleges the allegations contained in paragraphs 1–157 above and incorporates such allegations by reference as if set forth herein.

159. N.Y. Const. art. I, § 19 guarantees every person the right to clean water and a healthful environment.

160. DOH has made a determination that it cannot regulate agricultural nutrient pollution in Owasco Lake, and thus cannot promulgate any new Watershed Rules and Regulations regulating such pollution and must remove any existing provisions regulating such pollution.

161. In making this determination, DOH failed to consider the impact it would have on Petitioners' residents' and members' constitutional right to clean water and a healthful environment. N.Y. Const. art. I, § 19.

162. DOH's failure to consider the impacts of its determination violates the constitutional rights of these members.

163. Petitioner's members and residents are harmed by this constitutional violation because they drink, recreate in, and otherwise use Owasco Lake's water and will be harmed by these decisions.

WHEREFORE, Petitioner respectfully requests that this Court enter judgment against Respondent pursuant to CPLR sections 3001, 7803(1), 7803(3), and 7806 as follows:

164. Adjudging and declaring that DOH's determination that it lacks legal authority to

promulgate watershed rules and regulations to control agricultural nutrient pollution was affected by errors of law, arbitrary and capricious, and/or an abuse of discretion.

165. Adjudging and declaring that DOH's denial of the supplier of waters' request to include the Local Draft's Nutrient Management section in proposed Owasco Lake WRRs and decision to repeal the 1985 agricultural nutrient management regulations was affected by errors of law, arbitrary and capricious, and/or an abuse of discretion;

166. Annuling, voiding, and vacating the denial of the supplier of waters' request to include the Local Draft's Nutrient Management section in the proposed rules and deciding to repeal the 1985 nutrient management regulations on the basis that the Department lacks the legal authority to regulate agricultural nutrient pollution;

167. Adjudging and declaring that DOH's decision to and actions in furtherance of its decision to publish the DOH-Endorsed WRRs in the State register without first obtaining agreement on revisions to the Local Draft from the suppliers of water were a violation of lawful procedure, arbitrary and capricious, and an abuse of discretion;

168. Enjoining DOH from moving forward with the SAPA process for the DOH-Endorsed WRRs unless and until the Department obtains agreement from the suppliers of water on DOH's revisions to the Local Draft;

169. Enjoining DOH from moving forward with the SAPA process for the DOH-Endorsed WRRs until it considers the impacts of their deregulatory provisions on the environmental rights of Petitioners;

170. Granting Petitioners the costs and disbursements of this action; and

171. Granting such other and further relief as the Court deems just and proper.

Dated: January 5, 2024
New York, NY

Respectfully submitted,

EARTHJUSTICE

By /s/ Michael Youhana
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*Counsel for Petitioners-Plaintiffs City of
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Watershed Lake Association*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CAYUGA

-----X
In the Matter of the Application of

CITY OF AUBURN, TOWN OF OWASCO, OWASCO
WATERSHED LAKE ASSOCIATION, INC.,

Plaintiff-Petitioner,

-against-

JAMES V. MCDONALD, in his capacity as the Commissioner of
the New York State Department of Health, NEW YORK STATE
DEPARTMENT OF HEALTH, RICHARD A. BALL, in his
capacity as the Commissioner of the New York State Department of
Agriculture and Markets, and NEW YORK STATE
DEPARTMENT OF AGRICULTURE AND MARKETS,

Defendants-Respondents.
-----X

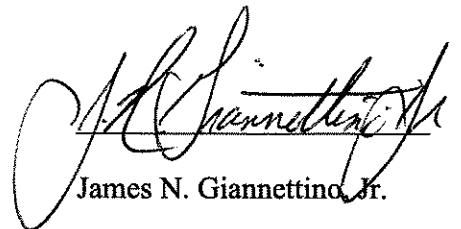
**VERIFICATION OF
PETITION AND
COMPLAINT**

Index No. _____

1. I am the Mayor of the City of Auburn, one of the Petitioners-Plaintiffs in this hybrid Article 78 and declaratory judgment action.

2. I have reviewed the foregoing petition and complaint and know its contents. The petition is true to my knowledge, except as to matters alleged upon information and belief, and as to those matters, I believe them to be true.

I, JAMES N. GIANNETTINO, Jr., affirm this 5th day of January, 2024, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law:


James N. Giannettino, Jr.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CAYUGA

-----X
In the Matter of the Application of

CITY OF AUBURN, TOWN OF OWASCO, OWASCO
WATERSHED LAKE ASSOCIATION, INC.,

Plaintiff-Petitioner,

-against-

JAMES V. MCDONALD, in his capacity as the Commissioner of
the New York State Department of Health, NEW YORK STATE
DEPARTMENT OF HEALTH, RICHARD A. BALL, in his
capacity as the Commissioner of the New York State Department of
Agriculture and Markets, and NEW YORK STATE
DEPARTMENT OF AGRICULTURE AND MARKETS,

Defendants-Respondents.
-----X

**VERIFICATION OF
PETITION AND
COMPLAINT**

Index No. _____

1. I am the Town Supervisor of the Town of Owasco, one of the Petitioners-
Plaintiffs in this hybrid Article 78 and declaratory judgment action.

2. I have reviewed the foregoing petition and complaint and know its contents. The
petition is true to my knowledge, except as to matters alleged upon information and belief, and as
to those matters, I believe them to be true.

I, ED WAGNER, affirm this 5 day of January, 2024, under the penalties of perjury under the
laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I
understand that this document may be filed in an action or proceeding in a court of law:


Ed Wagner