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Roy Jacobson, Jr.
NYSDEC, Attn: 5th Floor, 625 Broadway
Albany NY 12233-4756
WetlandRegulatoryComments@dec.ny.gov

RE: Wetlands Part 664 Comments

Dear Mr. Jacobson,

September 17, 2024

Buffalo Niagara Waterkeeper ("BNW") is a community based non-profit organization based in Buffalo, NY. BNW's mission is to protect and restore our waters and surrounding ecosystems for the benefit of current and future generations. For 35 years, BNW has been the guardian of Western New York's fresh water, protecting clean water, restoring the health of ecosystems, connecting people to the water and inspiring economic growth and community engagement. As residents and representatives of the Great Lakes basin, BNW provides the following comments. The preproposal letter submitted by the Save NYS Wetlands Coalition, of which BNW is a member, provided specific suggestions regarding the special nature of the Great Lakes which we reiterate and expand upon here.

I. The regulations as drafted are not protective enough of coastal freshwater wetlands.

The language in the regulation describing the benefit of wetlands for storm and floodwater control states, "(1) Flood and stormwater control. Wetlands may slow water runoff and temporarily store water, thus helping to protect downstream areas from flooding, particularly storms related flooding due to climate change. Public health and private property may be harmed in one portion of a watershed if wetlands are destroyed in a different part of that watershed."

Here, however, Lake Erie itself is often the source of the flooding so wetlands along and near the coast protect the upstream areas with equal importance. It is immediately apparent that wetlands within the Great Lakes coastal plain do not fit easily into the definitions and goals of the freshwater wetland law. Since the lakes are not tidal but instead subject to a seiche, the damage caused by storm flooding is often characterized as "wind damage" and uninsurable. Thus, protecting the nearshore wetlands and wetlands along tributaries is of the utmost importance. New York's Great Lakes coastal wetlands provide critical buffers to absorb and mitigate the high energy of the lake's seiche-driven wind and waves, protecting coastal residents and lessening flooding along tributaries upstream.

The Lakes are historic channels of commerce with a heavily industrialized past, meaning most of the coastline and nearshore areas have been developed leaving only smaller wetlands remaining. In fact, over 50% of the shoreline of Lake Erie, Niagara and Buffalo Rivers is hardened. Due to this, most of the remaining wetlands are too small to meet the size criteria under the rule. Therefore, they need to be protected under the unusual local importance criteria ("ULI"). The draft regulations define wetlands that may be subject to significant flooding as wetlands located in a 12-digit Hydrologic Unit Code ("HUC12") that meets all of the following three criteria: (i) has 2% or more impervious surface, (ii) less than 5% of its surface area is comprised of floodwater storage zones in the form of lakes, ponds, reservoirs, or wetlands; and (iii) is located within 4 kilometers of an urban area. The significant flooding criteria as drafted is problematic when applied to the Great Lakes Basin.

BNW encourages the Department to find a way to highlight the importance of and protect Great Lakes wetlands just as draft regulations focus on added protections for wetlands adjacent to tidal freshwater wetlands along the Hudson River and wetlands that straddle the "blue line" of the Adirondack Park. We suggest adding a third criterion to locally or regionally significant wetlands that can include unique attributes of the Great Lakes. One example of additional, more protective language is provided below.

> 3) the wetland is contiguous to or within 1,000 feet of the mean high-water line of a Great Lakes shoreline, embayment, or tributary.

To support this suggestion, we provide the following examples.

II. Western New York experiences significant flooding beyond the DFIRM Mapping

There are two sections of the Unusual Local Importance criteria that pertain to flooding. First, floodways:

> "(h) Floodways. It is located in an area designated as a floodway on the most current Digital Flood Insurance Rate Map (DFIRM) 'National Flood Hazard Layer', produced by the Federal Emergency Management Agency."

The maps included are a great addition, but WNY is already experiencing significant flooding beyond what is suggested by the maps and climate change is expected to drastically increase the risk. The Lake level has reached 100-year historic high levels twice in the last 15 years. Further, recent coastal resilience analysis undertaken by BNW found, that "extensive flooding in 2019 and 2020, which occurred throughout the Great Lakes basin, as well as the recent Winter Storm Elliott, underscore the need for a comprehensive evaluation of current coastal flooding risks and potential future conditions driven by climate change." As the climate

changes, the storms are intensifying. In December 2022, Winter Storm Elliot arrived with 72mph winds, akin to a Category 1 hurricane, and 8 feet of water level rise. Based on the predicted winds, another foot of water level rise was anticipated, along with widespread coastal flooding. Storms of this nature are not new to the Great Lakes region. The earliest record of storm damage from coastal conditions was in 1844 when a seiche breached a 14-foot seawall, killing 78 people. Today, the City of Buffalo experiences 2-3 seiche events per year. This number is likely to increase if warmer water temperatures continue to keep the lakes from freezing during the winter.

To further support this point, researchers at the Michigan Technological University suggest that Lake Erie average levels could increase 11 to 21 inches by 2050. While flooding can be influenced by stormwater, the coastal resilience analysis found that regional scale flooding was dominated by coastal storm surge and contributions from primary tributaries such as the Buffalo River, and that secondary effects were experienced locally from the contributing factors such as Lake Erie water levels.

In addition, the Niagara River, a critical connecting channel between Lakes Erie and Ontario, is subject to the same fluctuations in water level and intense seiche driven flooding as the lakes proper. As an extension of protecting the shorelines of the Great Lakes the Department should consider the wetlands within the Niagara River Corridor, which as an ecological complex is a named "wetland of international importance," under the Ramsar convention. The Convention on Wetlands ("Ramsar Convention") is the intergovernmental treaty that provides the framework for the conservation and wise use of wetlands and their resources. As one of only forty sites nationwide and the only wetland with this designation in New York, it is critical to protect this corridor. https://www.ramsar.org/document/list-wetlands-international-importance-ramsar-list
Ultimately, for the regulation to be applicable, it requires criteria that are tailored to the unique regional conditions of the Lake Erie/Ontario coastal plain.

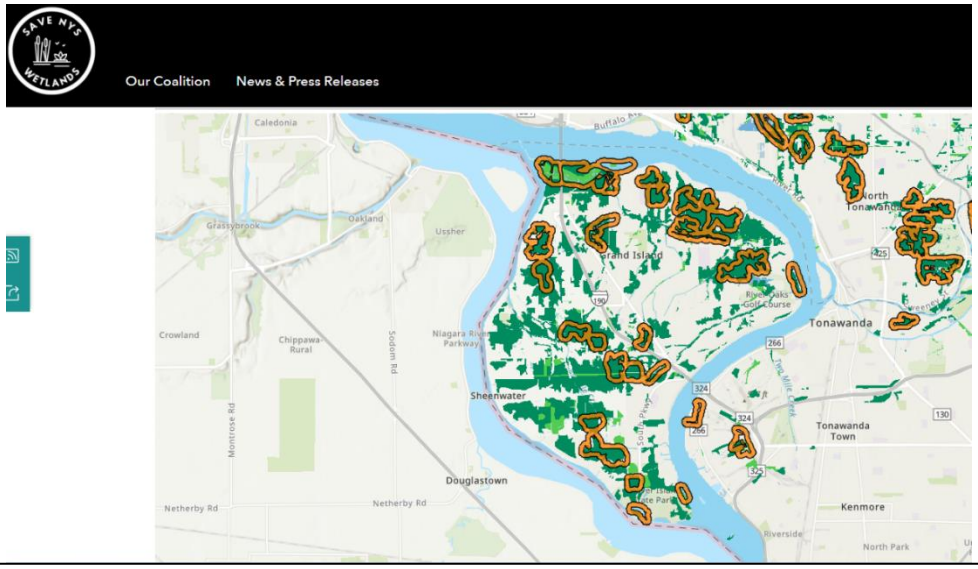
III. **The ULI Criteria leaves critically important wetlands unprotected in Western New York**

As stated in the coalition letter, through analysis by the coalition, it became apparent that under the ULI criteria virtually no part of the Great Lakes shoreline and associated wetlands meet the 'less than 5% of its surface area is comprised of floodwater storage zones in the form of lakes, ponds, reservoirs, or wetlands' criterion.

The operation of wetlands in a marine environment is wholly different than the law implies. Not only, is the lake acting as the source of the flooding, but the coastal environment makes the criterion that less than 5% of its surface area is comprised of floodwater storage zones in the

form of lakes, ponds, reservoirs, or wetlands in a single HUC code difficult to meet. See Grand Island, for example.

The island lies in the Niagara River between the U.S. and Canada. As shown in the map below, almost the entirety of Grand Island is a wetland. Roughly 39.82% or 7,240 acres of the island is wetland so it cannot meet the less than 5% requirement under ULI criteria. Further independent mapping completed by BNW using LIDAR data verified that there is an additional 300 acres of wetlands on Grand Island that are not captured by NWI Maps. The LIDAR effort resulted in 15.40% difference in emergent wetlands, 63.28% difference in forested wetlands and a .90% difference in shrub wetlands compared to NWI. Despite the abundance of critically important wetlands that function as green infrastructure in the face of increasing coastal stressors, places like Grand Island will fall through the cracks of the new regulation and risk being unprotected. As currently written, many important wetlands in the WNY region cannot meet the wetland size requirements nor the ULI criteria and are not located in a floodway.



Current mapped v. unmapped wetlands on Grand Island, NWI maps in green, state mapped wetlands in orange

We acknowledge the difficulty of a statewide policy for a bicoastal state, but the uniform application of a single rule statewide does not provide adequate protections for the state's varying ecology and landscape. As the benefactor of two Great Lakes, with 47% of New York's land in the Great Lakes Basin and over 700 miles of shoreline, the State has a duty to protect this resource

For these reasons, we reiterate the need to critically assess the specific needs of the Great Lakes as a freshwater coastal environment, to add the entire Niagara River Corridor as a

protected area under the new rule and, critically, to add specific criteria for protection of wetlands along and within at least 1,000 feet of a mean high-water mark of a Great Lake, connecting channel, or tributary.

Respectfully submitted,

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Legal Director
Buffalo Niagara Waterkeeper