

STATE OF NEW YORK  
SUPREME COURT: COUNTY OF ALBANY

---

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.

---

(Supreme Court, Ulster County, Special Term)

APPEARANCES:

EARTHJUSTICE  
Michael Youhanna  
Suzanne Novak  
48 Wall St., 15<sup>th</sup> Floor  
New York, New York 10005  
Counsel for Petitioners-Plaintiffs

Letitia A. James  
Attorney General of the State of New York  
(Mihir A. Desaid, Assistant Attorney General, Of Counsel)  
28 Liberty Street, 19<sup>th</sup> Floor  
New York, New York 10005  
Counsel for Respondents-Defendants

Savona, J.:

Petitioners-Plaintiffs filed a petition on or about January 5, 2024, asserting three separate causes of action. Many months of mutual adjournment requests followed the initial filing and,

ultimately, two of the three causes of action were withdrawn. The only relief sought by the remaining cause of action is a judgment: “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.” The Respondents-Defendants filed a motion to dismiss, pursuant to CPLR §§3211(a)(2) and (7), “for lack of subject matter jurisdiction in that the petitioners-plaintiffs lack of standing, and for failure to state a cause of action.”

The following facts are not in dispute:

- 1) Petitioner, 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.” (Petition at paragraph 11). Petitioner, 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.” (Petition at paragraph 12). Petitioner, Owasco Watershed Lake Association (“OWLA”) is a “non-profit founded in 1988 and dedicated to the protection and restoration of Owasco Lake.” (Petition at paragraph 13).
- 2) The State is possessed with the authority, pursuant to PHL §§ 201(1)(l) to “supervise and regulate the sanitary aspects of water supplies...and control the pollution of waters of the state.” In order to fulfill this duty, the New York State Department of Health (“DOH”) is authorized, pursuant to PHL § 1100 to “make rules and regulations for the protection from contamination of any or all public supplies of potable waters...and their sources within the state.”
- 3) The regulations promulgated by the DOH in order to protect the State’s water supplies from contamination are known as Watershed Rules and Regulations.

(WRRs). The WRRs that “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” were developed in 1984 and are set forth at 10 NYCRR §104.1. These regulations address both pollution from a single, identifiable source such as a drain pipe, and pollution originating from a diffuse and widespread area, such as fertilizer runoff from farms.

- 4) The 1984 WRRs contain language regulating “agricultural-associated animal waste” and the runoff of same, as well as language regulating the spread of manure and the storage of chloride salt within a certain distance from the lake or watercourse.
- 5) The 1984 WRRs empowered the Mayor and council of the City of Auburn and the town board of the Town of Owasco to ascertain compliance with the WRRs, to notify any persons deemed to be in violation of said WRRs, and to “promptly notify the State Commissioner of Health” of any uncorrected violations. The WRRs also required the local governments to “report to the State Commissioner of Health in writing annually, prior to the 30<sup>th</sup> of January, the results of the regular inspections made during the preceding year. The report shall state the number of inspections which were made, the number of violations found, the number of notices served, the number of violations abated and the general condition of the watershed at the time of the last inspection.”
- 6) Pursuant to PHL §§1101-1103, the DOH has the power to conduct investigations to ascertain compliance with the Owasco Watershed Regulations and to pursue injunctions, abatements and/or penalties for violations.

- 7) In 2000, the “Agricultural Environmental Management Act” was passed (Agriculture and Markets Law, Article 11-a) (hereinafter “the Act”). The Legislative findings and declarations set forth within the Act discuss concerns over water quality, and the impact that agricultural production has on water quality. The Act specifically mentions the manure management practices of farms, and the impact of same on water quality. The Legislative findings and declarations state that: “[i]n order to accomplish environmental protection and improvement while maintaining viable agricultural operations in New York State, it is declared to be in the best interest of the state to establish a voluntary, incentive-based program of agricultural and environmental management...The goals and objectives of this voluntary program are to: document farmers’ stewardship of the land; enhance environmental stewardship through the adoption of best management practices that are consistent with individual farm resources; provide assistance to *enable farmers to comply with federal, state and local environmental regulations*; and reduce farmers’ exposure to environmental liability.” (Agr. & M., Art. 11-A)(emphasis added).
- 8) The Act created an Agricultural Environmental Management Program (hereinafter “AEM”) designed to allow farmers to voluntarily follow a plan developed by a “certified AEM planner”, designed 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.” (Agr. & M. §150(3)).

- 9) In 2017, the City of Auburn, the Town of Owasco and Cayuga County each passed resolutions to commence a public process through which to examine and update the 1984 WRRs.
- 10) The 1984 WRRs contain language requiring a minimum distance of 250 linear feet between “agricultural-associated animal waste” and the lake or watercourse. Those WRRs also specify that the area beyond 250 linear feet “shall be maintained in such manner that surface runoff will not carry agricultural-associated animal waste directly into the lake or watercourse.” The 1984 WRRs mandated that “manure 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.”
- 11) In December of 2020 the Town and the City made a formal request to the DOH to propose new WRRs pertaining to Owasco Lake. This request was made pursuant to procedures set forth in the DOH’s Environmental Health Manual. In connection with this request, the Town and City submitted to the DOH a draft of proposed new WRRs (the “local WRRs”). This draft contained a lengthy and comprehensive “nutrient management” section. The nutrient management section obligated operators of certain farms with seven or more acres of land to “have and comply with a current *farm management plan...*” (emphasis in original). The local WRRs also required the installation and maintenance of “vegetated buffers” and established rules about manure stacking, waste storage, feed storage areas, wastewater, manure application, and livestock access to the lake and watercourses.

- 12) The parties participated jointly in a number of workshops/workgroups. The parties were ultimately unable to reach an agreement with respect to the issue of language designed to address nutrient management.
- 13) In June of 2023, counsel for the DOH opined at a state-local meeting that “any authority held by DOH to promulgate agricultural management regulations such as those being proposed by the Owasco Parties had been stripped by the more recently enacted provisions of Article 11-a in the Agriculture and Markets Law, which enacted the Agricultural Environmental Management Program.” (Memorandum of Law in Support of the State’s Motion to Dismiss at pg. 6).
- 14) During a workgroup in July of 2023, the DOH presented their proposed WRRs. The “Nutrient Management” section in the State’s “Proposed Revisions to the 1984 Owasco Lake Watershed Rules and Regulations” says simply that “Non-CAFO farms are actively encouraged to participate in the AEM program (AML 11-A), locally led by the Soil and /Water Conservation District and further guided by state approved clean water plans as applicable....Other observations of concern by Owasco Lake Watershed Inspection and Protection Division personnel shall be referred to the local Soil and Water Conservation District to assess and address through participation in AEM.” (A CAFO is a Concentrated Animal Feeding Operation, where agricultural meat, dairy or egg producing animals are kept and raised in confinement rather than being permitted to graze or eat in pastures or fields.)
- 15) The DOH’s draft WRRs do not contain the language from the 1984 WRRs mandating a specific distance between the lake or watercourse and agricultural-associated animal waste, nor do they contain the 1984 language pertaining to the spread of manure. The

DOH's draft WRRs do not contain the language from the 1984 WRRs mandating the maintenance of land in a manner designed to prevent surface runoff that would carry agricultural-associated animal waste directly into the lake or watercourse.

- 16) In response to the DOH's position that Article 11-a had stripped the DOH of their authority to promulgate certain agricultural management regulations, Senator Rachel May sent a letter to the State, asking questions concerning the DOH's position with respect to the WRRs. One of the questions asked was: "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. Similarly, they stated that regulations on sediment and stormwater are unnecessary due to existing Environmental Conservation Law. 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?"
- 17) The DOH's response to Senator May's "Question 3" opined that: AML Article 11-a created a "clear statutory preclusion on Title 10 agricultural management provisions..." The response also stated that: "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."

- 18) By email dated September 15, 2023, the State transmitted a revised set of draft WRRs, and indicated in the email that “The State plans to keep the Nutrient Management provision in the proposed regulations as written and presented during the 7/31 meeting.”
- 19) The September 15, 2023 email from Ashley Inzerillo at the DOH also stated that: “DOH will update the group once the package is ready to submit for Department of State for public comment.” Pursuant to the State Administrative Procedure Act (SAPA), the DOH is required to publish the proposed new WRRs in the New York State Register for a period of public comment. After publication in the Register and the exhaustion of the public comment period, the DOH has the ability to adopt the new WRRs.
- 20) In December of 2023, the Petitioner-Plaintiffs filed a petition seeking a declaratory ruling from the DOH, asking the DOH to further elaborate their legal reasoning. The DOH denied this request.
- 21) Following a protracted settlement negotiation process, the Owasco Parties withdrew all causes of action except for one seeking: “that this Court enter judgment against Respondent...[a]djudging 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.”

### **Standing**

“A party challenging governmental action must meet the threshold burden of establishing that an injury-in-fact has been suffered and that the injury asserted ‘fall[s] within the zone of

interests or concerns sought to be promoted or protected by the statutory provision under which the [government] has acted.” Matter of Stevens v. New York State Div. of Criminal Justice Servs., (206 A.D.3d 88, 97 (1<sup>st</sup> Dept., 2022))(quoting Matter of Mental Hygiene Legal Serv. v. Daniels, 33 NY3d 44, 50[2019]). Additionally, in order to have standing, a party must have an injury distinct from that of the general public.

The Respondents-Defendants assert that the Petitioners-Plaintiffs lack standing in that the “legal determination” (contained in the DOH’s response to Senator May’s inquiry) complained of “was a non-binding statement that did not affect the Owasco Parties’ legal rights or commit DOH to a definitive position on whether it would or would not proceed with the proposed rulemaking.” (Memorandum of Law in Support of the State’s Motion to Dismiss at page 12). The Court disagrees. The DOH averred, in writing, that the DOH lacked delegative legislative authority to issue WRRs that contain agricultural management provisions. Accordingly, the DOH informed the Owasco parties that its hands were forever tied by the enactment of AML Article 11-a. This written response was provided as clarification and support for the DOH’s verbal statements in public meetings that WRRs were no longer permitted to include farming requirements, as a result of the enactment of AML Article 11-a.

The DOH’s interpretation of Article 11-a and the DOH’s verbal and written assertion that they were precluded from drafting and passing WRRs containing agricultural management provisions was, therefore, a binding legal determination. The Court is hard-pressed to imagine a situation where the DOH would suddenly change its mind, declare that they were incorrect, and acknowledge that WRRs can contain agricultural management provisions. The City of Auburn and the Town of Owasco have therefore suffered an injury in fact. The ability of the City and the

Town to fight to protect their residents' drinking water from nutrient pollution has now been reduced to a hope that farmers will engage in voluntary programs.

A lack of standing is also claimed in the DOH's assertion that "it is wholly speculative whether any judgment or declaration by the Court regarding the DOH statement would provide them with practical relief." (Memorandum of Law in Support of the State's Motion to Dismiss at page 13). The Court disagrees. There is no question, in the Court's mind, that the DOH's determination renders the Plaintiff-Petitioners powerless to regulate the amount of harmful agricultural nutrient contamination entering and impacting the waterway. There is nothing speculative about the fact, acknowledged by both sides, that agricultural nutrient contamination contributes to HABs.

There is no dispute that Owasco Lake is bordered by farmland and that those farms raise animals that produce waste. There is no dispute that animal waste discharging into a body of water contributes to the incidences of HABs. There is no dispute that HABs negatively impact the potability of water as well as the ability of individuals to safely recreate on or in a body of water. There is no dispute that the City of Auburn and the Town of Owasco are tasked with the sourcing and distributing of drinking water to tens of thousands of residents and that HABs negatively impact their ability to do so. There is no dispute that Owasco Lake is used for recreational purposes and that such use results in economic benefit to the City and the Town. There is no dispute that the 1984 WRRs contained regulations mandating certain nutrient contamination regulation language and that the DOH now asserts an inability to mandate compliance with any sort of nutrient pollution management plans.

Finally, there is no dispute that the DOH has made a legal determination that they no longer have the ability to mandate any sort of nutrient management by farmers and that the

DOH's proposed WRRs removed all mandatory language. The DOH argues that this was not a "final determination" because the proposed WRRs have not yet undergone the SAPA process. This is a game of semantics. The DOH has been abundantly clear in their position that Article 11-a has rendered them powerless to mandate any sort of nutrient waste management. While it is true that the SAPA process has not yet played out, public comment will not convince the DOH that their interpretation of the law is incorrect.

The City of Auburn and the Town of Owasco have suffered an injury-in-fact as a result of the DOH's legal determination. The Court finds, therefore, that they have standing. The Owasco Watershed Lake Association, Inc., did not establish such an injury-in-fact, and the petition is dismissed as to that party.

#### **Review of Agency Determination**

"In a CPLR article 78 proceeding to review a determination of an administrative agency, the standard of judicial review is 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. An agency's action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." Matter of Richmond Children's Ctr., Inc. v. Delaney, 233 A.D.3d 1328, 1329-30 (3<sup>rd</sup> Dept., 2024) (internal quotes and citations intentionally omitted).

The DOH's analysis and application of AML Article 11-a is an error of law and is arbitrary and capricious. AML Article 11-a was intended to *supplement* existing laws, not replace them. It is clear that the Legislature recognizes that nutrient pollution caused by runoff from farms is harming the State's potable and recreational water supplies. It is also clear that Article 11-a was passed in an effort to incentivize farmers to voluntarily ask for assistance in managing pollutants stemming from their farms.

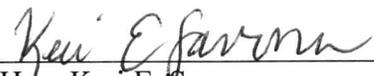
It makes no sense that, in response to a known agricultural and health crisis, the Legislature would determine to abolish the ability of the State to mandate rules and regulations designed to address this area of serious concern, and replace it with a program that is voluntary in nature and for which the failure to participate in the program and/or the failure to manage pollutants has no consequences. As noted in the Legislative findings and declarations accompanying AML 11-a, the Act was passed “to enable farmers to comply with federal, state and local environmental regulations...”

Accordingly, the motion to dismiss is DENIED as it pertains to the City of Auburn and the Town of Owasco. The motion to dismiss as it pertains to Owasco Watershed Lake Association, Inc. is GRANTED.

The Court hereby finds that DOH’s determination that it lacks legal authority to promulgate watershed rules and regulations to control agricultural nutrient pollution as a result of the enactment of AML Article 11-a is an error of law, and was made arbitrarily and capriciously.

SO ORDERED AND ADJUDGED  
ENTER.

Dated: May 6, 2025  
Albany, New York

  
\_\_\_\_\_  
Hon. Keri E. Savona  
Acting Supreme Court Justice

Papers Considered:

1. Petition dated January 5, 2024
2. Memorandum of Law dated January 5, 2024
3. Affirmation of Michael Yohana, Esq. dated January 5, 2024 with accompanying exhibits A through AG
4. Affirmation of Timothy P. Mulvey, Esq. dated January 23, 2024
5. Notice of Motion to Dismiss dated October 18, 2024
6. Memorandum of Law in Support of Motion to Dismiss dated October 18, 2024
7. Affirmation dated November 22, 2024 with accompanying exhibits A through G
8. Memorandum of Law in Opposition dated November 22, 2024
9. Memorandum of Law in Reply dated January 15, 2025