STATE OF NEW YORK
SUPREME COURT : COUNTY OF ESSEX

In the Matter of

SUZANNE CARRILLO KERN, HOWARD KERN, JEFFREY HAIDINGER, JOHN BRENNAN, JEAN BRENNAN, MARY ANN RANDALL, and CHRISTOPHER COHAN,

Petitioners-plaintiffs,

v

ADIRONDACK PARK AGENCY, PAUL LEINWAND, and MARIA CICARELLI,

Respondents-defendants.

Hon. Richard B. Meyer
Index No. CV21-0370

MEMORANDUM OF LAW

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PRELIMINARY STATEMENT

In the late 1980s, the Adirondack Park Agency (the APA or the Agency) permitted the creation of several new lots in a multi-lot subdivision at the northern end of Upper Saranac Lake. In 2020, Paul Leinwand and Maria Cicarelli contracted to purchase the sole remaining undeveloped lot. In a site plan submitted to the Agency, Leinwand and Cicarelli proposed to construct an on-site shallow-trench wastewater treatment system incorporating, among other things, a set of highly efficient peat biofilters. Because the site plan could not satisfy a condition in the original subdivision permit requiring that wastewater treatment systems be set back 200 feet from water resources, Leinwand and Cicarelli applied to the Agency to amend the permit. APA technical staff thoroughly reviewed the application and supporting materials, visited the site, determined that the proposed treatment system would have no adverse impact on nearby wetlands or other water resources, and issued the permit amendment.

Petitioners—several of whom own lots in the same subdivision—now sue the Agency to vacate the permit amendment. Among other things, petitioners claim the APA inappropriately treated the permit amendment application as seeking a non-material change in the original permit; erroneously ignored regulations requiring greater separation between the proposed wastewater treatment system and nearby water resources; and irrationally concluded that the

proposed system would have no adverse environmental impact. But the Agency fully complied with the rules governing permit amendments and, as the record and supporting affidavits make clear, rationally concluded that the proposed treatment system would comply with all relevant standards; represent a significant improvement over the treatment system envisioned in the original subdivision permit; and have no adverse impact on nearby wetlands or waterbodies. For these and other reasons explained more fully below, the Agency requests that the amended petition and complaint be denied and the proceeding dismissed.

STATEMENT OF THE CASE

A. Statutory and regulatory background

The Adirondack Park Agency Act (APA Act) charges the APA with regulating land use and development on private lands in the Adirondack Park (*see* Executive Law § 805; *Matter of New York Blue Line Council, Inc. v Adirondack Park Agency*, 86 AD3d 756, 757 [3d Dept 2011], *lv dismissed* 17 NY3d 947 [2011], *lv denied* 18 NY3d 806 [2012]). As relevant here, the APA has permitting jurisdiction over "all subdivisions of land . . . involving wetlands" in areas classified as low or moderate intensity use on the APA's land use map (Executive Law § 810 [1] [b] [1], [1] [c] [1]; *see id.* § 805 [2]–[3]). APA's subdivision jurisdiction extends to "[a]ll land use[s] or development proposed for lots, parcels[,] or sites in a subdivision" (9 NYCRR 573.4 [c]).

With respect to wastewater treatment systems specifically, "[u]nless otherwise provided in an agency permit," systems designed to treat less than 1,000 gallons of effluent per day "shall be designed, installed[,] and maintained in accordance with the [New York State Department of Health (DOH) standards at 10 NYCRR Appendix 75-A] and with the additional standards set forth in [9 NYCRR Appendix Q-4]" (9 NYCRR 574.4).[1] DOH regulations require a 100-foot minimum separation between wastewater treatment system absorption fields and streams, lakes, watercourses, and wetlands (*see* 10 NYCRR Appendix 75-A.4 [b]; *see also* Executive Law § 806 [1] [b] [requiring that "any on-site sewage drainage field" be set back at least 100 feet from "all lakes, ponds, rivers, and streams"]). DOH regulations also prohibit the installation of absorption fields in soils with a percolation rate faster than one minute per inch "unless the site is modified by blending with a less permeable soil to reduce the infiltration rate" (10 NYCRR Appendix 75-A.4 [a] [3]). Where soil percolation rates are faster than three minutes per inch, APA regulations prohibit the installation of absorption fields "[w]ithin 200 feet of the shoreline of a lake, pond, river[,] or stream" (9 NYCRR Appendix Q-4 [2]). In keeping with DOH standards and as expressed in Agency guidance however, the APA has historically

[1] The APA regulation at 9 NYCRR 574.4 provides what amounts to a default rule for wastewater treatment systems: while systems must typically adhere to the standards set forth in Appendices 75-A and Q-4, the Agency reserves the right to vary or depart from those standards as appropriate in individual permits.

allowed for the amendment of fast-draining soils to slow percolation to a more suitable rate (*see* Purzycki aff ¶ 14, exhibit A at 3).

B. The 1988 subdivision permit

In 1988, the APA granted a permit to Deerwood Associates authorizing the creation of seven additional lots in an existing subdivision on the north shore of Upper Saranac Lake (*see* R1–16). Classified as low intensity and moderate intensity use, the original 55-acre parcel contained, among other things, a 25-acre, value 2 wetland complex; a small bog/pond; and several streams (*see* R1, 6–7). Of the seven new lots, five—lots 6 through 10—were building lots; one—lot 11—was a small, nonbuilding lot; and one—23-acre lot 12, including the bog/pond and surrounding wetlands—was set aside as a nonbuilding communal lot for the benefit of the Deerwood homeowners' association members (*see* R4, 23). The communal lot was to be improved by a network of trails suitable for non-motorized use (*see* R5–6).

As relevant here, the 1988 permit authorized only one principal building on each of lots 1 through 10 and, with certain exceptions, prohibited tree cutting or disturbance in wetlands without prior approval (*see* R10, 12). The permit also required that site plans showing, among other things, "on-site sewage disposal facilities" be submitted to and approved by the APA before construction could occur on any of lots 6 through 10 (R11). Wastewater treatment systems were to be "[s]oils [r]eplacement [t]ype [systems]" incorporating "at least

two [feet] of fill with a percolation rate of 15 to 45 [minutes per inch] below and[/]or around the distribution lines" (R11). The permit required that new absorption fields on any of lots 1 through 10 be "set back a minimum of 200 [feet] from the wetlands on the site[,] from the mean high water mark of Upper Saranac Lake[,] and from any existing water supplies [or] wells located on adjoining properties" (R11). Finally, the permit referenced a "proposed common sewage area" for lots 9 and 10, shown on the subdivision's survey map upslope of the lake approximately 1,000 feet to the east of lot 9 (*see* R6, 23; Purzycki aff ¶ 5).

C. The 1992 path and dock amendment

In 1992, the APA approved an amendment to the Deerwood permit authorizing the construction of paths and limited docking facilities on lots 9 and 10 (*see* R19–22). With respect to lot 9 in particular, the 1992 permit amendment authorized the construction of "a new path located within 50 [feet] of the common line between [lots 9 and 10]" (R20). The new path, including short sections of wooden walkway and/or log corduroys, would traverse approximately 165 feet of wetland and was subject to a series of limitations and requirements including, among other things, that project plans be submitted to the APA for approval (*see* R21).

In 2008, the APA sent a compliance letter to the former common owners of lots 9 and 10 stating that the path through the wetlands on lot 9 had been

constructed in compliance with the terms of the 1992 permit amendment "and therefore [was] acceptable to the Agency" (R24).

D. The 2021 wastewater treatment system amendment

In November 2020, Mr. Leinwand filed a pre-application meeting request with the APA (*see* R25–27). Leinwand told the Agency he intended to purchase lot 9 in the Deerwood subdivision; that lot 9 had never been developed; and that the developer of lot 10 had, at some point in the past, installed a wastewater treatment system solely for lot 10 in the location designated on the original survey map as the common septic area for lots 9 and 10 (*see* R26). Leinwand requested that the 200-foot absorption field setback requirement in the 1988 permit be reduced to 100 feet as applied to lot 9—the practical effect of which change would be to allow construction of a wastewater treatment system on lot 9 itself (*see* R26–27).

In January 2021, Mr. Leinwand submitted a site plan for lot 9 showing a proposed five-bedroom house, a garage with a studio apartment, and an on-site wastewater treatment system (*see* R59–62); the treatment system employed a series of peat biofilters and a shallow-trench absorption field. In March 2021, the APA issued an amended permit information request requiring, in effect, that the treatment system plan be modified to include soil amendment in the vicinity of the proposed absorption field (*see* R188–189). Mr. Leinwand's engineering firm modified the plan to respond to the Agency's request

(*see* R194–197).

In April 2021, APA permitting and natural resources staff visited lot 9 and confirmed that the absorption area for the proposed wastewater treatment system was—as required by APA and DOH standards—at least 100 feet away from all waterbodies, wells, and wetlands (*see* Purzycki aff ¶ 34). Staff subsequently determined that the proposed amendment did not involve a material change in permit conditions, applicable law, environmental conditions, or technology; deemed the application complete and—though it had no legal obligation to do so—notified the public that it would accept comments on the application (*see* Burth aff ¶¶ 46–51; Lore aff ¶ 4; R202–203 [ENB notice]).

In May 2021, while the permit amendment application was pending, the APA sent Mr. Leinwand and Ms. Cicarelli a permit compliance letter stating that the site plan for the proposed house and garage "compl[ied] with the locations shown on the site plan for [the 1988 permit]" and, accordingly, that no review would be required (*see* R595–596). The Agency noted, however, that "any kitchen installed in the 'studio apartment' depicted above the garage on the [s]ite [p]lan must be removed within 30 days of issuance of a certificate of occupancy for the dwelling" (R595). Referencing the 1992 permit amendment and the 2008 compliance letter, the Agency also noted that the existing walkway through the wetlands to the permitted dock location could be maintained, repaired, or replaced in kind without further staff review (*see* R596). Finally,

the Agency reiterated that the 1988 permit otherwise prohibited tree cutting or disturbance in wetlands without prior APA approval (*see* R596).

In June 2021, after carefully reviewing the application materials and all of the public comments received (*see* Burth aff ¶ 60), the APA amended the 1988 permit to effectively allow construction of a wastewater treatment system on lot 9 (*see* R619–624). The permit amendment makes no other change to the 1988 permit and does not authorize construction of a new walkway, dock, or boathouse (*compare* NY St Cts Elec Filing [NYSCEF] Doc No. 40 [Brief] at 3). Petitioners—several of whom are Mr. Leinwand's future neighbors in the Deerwood subdivision—now sue to challenge the amendment.[2]

ARGUMENT

POINT I

THE APA PROVIDED ADEQUATE PROCESS

As an initial matter, petitioners claim the APA violated lawful procedure and/or acted arbitrarily when it elected to treat the permit amendment application as seeking a non-material amendment under Executive Law § 809 (8)

[2] Petitioners' fifth cause of action seeks a declaratory ruling relating to certain petitioners' use of walking trails on lot 9; because this cause of action seeks no relief as against the APA, it fails to state a cause of action against the Agency and should be dismissed to that extent (*see* CPLR 3211 [a] [7]).

Petitioners also seek preliminary injunctive relief (*see* NYSCEF Doc No. 22, order to show cause). For the reasons described below, petitioners cannot show a likelihood of success on the merits and their request for injunctive relief pending the Court's merits decision should be denied (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.,* 4 NY3d 839, 840 [2005]).

(b) (*see* Amended Petition ¶¶ 97–108). Petitioners also claim the APA erroneously treated the permit amendment application as a minor project (*see id.* ¶ 96) and proceeded in excess of its jurisdiction by amending the permit without the participation or consent of all members of the Deerwood homeowners' association (*see id.* ¶ 94). On all counts petitioners are mistaken.

To the extent petitioners claim the wrong APA staff person decided whether to treat the application as seeking a non-material amendment (*see* Amended Petition ¶ 105), the Agency's supporting affidavits belie that claim.[3] The Agency regulation at 9 NYCRR 572.19 (b) empowers the Deputy Director for Regulatory Programs to "determine whether a request to amend a permit involves a material change as defined in [Executive Law §] 809 (8) (b) (1)." Here, APA staff discussed the permit amendment application with the Deputy Director for Regulatory Programs and the Deputy Director determined that the application should be treated as seeking a non-material amendment (*see* Burth aff ¶ 46; Lore affidavit ¶ 4). The Deputy Director's participation in the Agency's permitting process satisfied 9 NYCRR 572.19 (b).

Petitioners' rational-basis argument fares no better. Under the APA Act, permit holders may make a request to the Agency "for the . . . modification of

[3] To the extent petitioners argue that the Agency may not explain its process or elucidate its determination by submitting staff affidavits (*see* Brief at 12), the law is plainly to the contrary (*see e.g. Matter of Kirmayer v New York State Dept. of Civ. Serv.*, 24 AD3d 850, 851 [3d Dept 2005]).

an existing permit" (Executive Law § 809 [8] [b]). Where the APA determines that the request "does not involve a material change in permit conditions, the applicable law, environmental conditions[,] or technology since [the existing permit was issued]," it must grant or deny the request within 15 days (*see id.* § 809 [8] [b] [1]). Where the APA determines that the request *does* involve a material change, it must treat the request as an application for a new permit (*see id.* § 809 [8] [b] [2]) and solicit public comment on the application (*see id.* § 809 [2] [d]). While "material change" has no statutory or regulatory definition, the Agency reasonably understands a material change to be one capable of having an undue adverse impact on the natural, scenic, aesthetic, ecological, wildlife, historic, recreational, or open space resources of the Adirondack Park (*see* Lore aff ¶ 4). The Agency is entitled to deference both in its reasonable interpretation of the statutory term "material change" (*see Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]) and in deciding what constitutes a material change in any particular case (*see Matter of Scenic Hudson v Jorling*, 183 AD2d 258, 262 [3d Dept 1992] [analyzing a functionally identical statutory scheme in the Environmental Conservation Law]).

Here, the APA rationally treated the permit amendment application as seeking a non-material amendment because the changes sought would, if approved, *better* protect wetlands and other water resources on or near lot 9 (*see* Purzycki aff ¶ 36). To reduce the risk of leakage and attendant environmental

harm, current Agency guidelines prohibit the pumping of wastewater more than 250 feet and/or across property lines or rights-of-way (*see* Purzycki aff ¶ 17). The 1988 permit, however, envisioned that lot 9's eventual owners would pump wastewater across multiple property lines and beneath a shared access road to an off-site location some 1,000 feet away (*see* R23; Burth aff ¶ 13). By eliminating the 1,000-foot pumping component of the 1988 plan, the proposed permit amendment would better protect the environment by limiting the amount of piping potentially subject to failure, by reducing the likelihood that system failures go undiscovered, and by ensuring that lot 9's owners have access to and control over the system for purposes of maintenance and repair (*see* Purzycki aff ¶ 21).

And with respect to the treatment technology itself, the system proposed in the permit amendment application was, as the record shows, far superior to the system envisioned in the original permit. The 1988 permit called for the use of what is by modern standards an antiquated nutrient entrapment-type wastewater treatment system and required, somewhat inexplicably, that soils around sealed distribution lines (but *not* the absorption fields) be amended to achieve an inappropriately slow percolation rate of 15 to 45 minutes per inch (*see* R11; Purzycki aff ¶¶ 18–19). The proposed amendment would replace the original permit's nutrient entrapment system with a highly efficient peat biofilter system which, as the record shows, would greatly reduce the amount of

organic matter (including, critically, nitrogen) reaching the absorption field (*see* Purzycki aff. ¶¶ 18, 35–36; R143)—which field would itself be amended to reduce the percolation rate to a far more appropriate 10 to 15 minutes per inch, ensuring optimal effluent dispersion and treatment and preventing migration of contaminants into groundwater or surface water resources (*see* Purzycki aff ¶¶ 19, 32).

In sum, because the proposed on-site wastewater treatment system was both compliant with current APA and DOH standards and would better protect the environment by providing more effective treatment than the system envisioned in the 1988 permit (*see id.* ¶ 30), the APA rationally concluded that the amendment request would not, if approved, constitute a material change in permit conditions.[4]

To the extent petitioners claim the APA erroneously treated the permit amendment request as a minor project under 9 NYCRR 572.5 (*see* Amended Petition ¶ 96), it should suffice to say that the Agency did not treat the application as eligible for expedited review and automatic approval (*see* 9 NYCRR 572.5 [b]). Rather, and as described above, the Agency appropriately treated

[4] And even if the APA erred in treating the permit amendment request as non-material—and it did not—the error would be inconsequential. As the record demonstrates, the APA effectively treated the amendment request as a *material* request by noticing it in the Environmental Notice Bulletin and accepting public comment (*see* R202). In other words, petitioners cannot complain that they lacked either knowledge of or an opportunity to comment on the proposal before the APA made its determination.

the permit amendment application as an application to amend the terms of an existing permit, subject to review under Executive Law § 809 (8) (b) and 9 NYCRR 572.19.

Petitioners' argument notwithstanding (*see* Amended Petition ¶ 94), the APA could—as it has in the past (*see* Burth aff ¶ 31)—lawfully consider the permit amendment request without consent from other members of the Deerwood homeowners' association. The 1988 permit binds the original permittee's "heirs, successors, agents[,] and assigns" (R10). As part of his application, Mr. Leinwand established to the APA that he and Ms. Cicarelli were the owners of lot 9 (*see* R108–112) and, thus, successors in title to the original permittee. Accordingly, Leinwand and Cicarelli were subject to and could seek amendment of the 1988 permit, at least with respect to lot 9 (*see* Executive Law § 809 [8] [b]). Nothing in the 1988 permit or subsequent amendments requires that other homeowners' association members participate in or consent to Leinwand and Cicarelli's amendment request. And while petitioners claim all homeowners' association members are prejudiced by the APA's decision to grant the permit amendment (*see* Brief at 20), the amendment itself makes clear that it applies *only to lot 9* (*see* R621) and, in any event, does nothing to exacerbate impacts already associated with the development of lot 9 as approved in the 1988 permit.

POINT II

THE PERMIT AMENDMENT SATISFIED ALL APPLICABLE REGULATIONS

Petitioners argue that the APA violated regulatory standards and/or the terms of the 1988 permit when it (1) amended the permit to provide for a 100-foot separation between the lot 9 absorption field and nearby water resources, (2) approved an absorption field in an area with insufficient separation from groundwater, and (3) authorized the construction of a second principal building on lot 9 (*see* Amended Petition ¶¶ 70, 130–135). None of these arguments has merit.

A. The proposed treatment system complied with all applicable regulations and guidelines

As noted above (*see supra* at 3–4), the APA Act and DOH regulations prescribe a 100-foot minimum separation between treatment system absorption fields and water resources such as lakes, streams, and wetlands (*see* Executive Law § 806 [1] [b]; 10 NYCRR Appendix 75-A.4 [b]). While 9 NYCRR Appendix Q-4 generally prohibits the installation of absorption fields within 200 feet of water resources where the natural soil percolation rate is three minutes per inch or faster, Agency guidelines allow for soil amendment to slow the percolation rate to more acceptable levels (*see* Purzycki aff ¶ 14).

The proposed wastewater treatment system for lot 9 complies with all applicable setbacks. As the record shows, two deep-hole soil percolation tests

performed at the site of the proposed lot 9 absorption field yielded stabilized percolation rates of 1 minute, 3 seconds per inch and 1 minute, 25 seconds per inch (R51; Purzycki aff ¶ 27). In view of the 200-foot setback provision in 9 NYCRR Appendix Q-4 and to ensure protection of sensitive water resources on and around lot 9, the Agency requested that soils in the area of the proposed absorption field be amended to slow the percolation rate (*see* R189); Leinwand's engineer subsequently modified the system plan to incorporate soil amendment in the area of the absorption field as requested (*see* R194). As modified and consistent with DOH standards, the lot 9 treatment system plan now calls for a stabilized percolation rate of 10 to 15 minutes per inch.

Because the percolation rate of the amended soil in the area of the proposed absorption field will be slower than three minutes per inch, the applicable setback from water resources under all standards and guidelines is 100 feet, not 200 feet (*see* 10 NYCRR Appendix 75-A.4 [b]). As the record indicates and as APA engineering, permitting, and wetland/wildlife biology staff verified during a site visit, there is no stream, wetland, or other water resource within 100 feet of the proposed lot 9 absorption field (*see* R197; Purzycki aff ¶¶ 28, 34). Accordingly, the permit as amended complies with all applicable setbacks.

Nor does the permit violate depth-to-groundwater requirements. Where a typical deep-trench absorption system is specified, APA regulations require that "the natural ground intended for the leaching facility . . . shall have a

minimum depth of four feet of usable soil above bedrock, impervious material, or maximum high seasonal groundwater" (9 NYCRR Appendix Q-4 [1]). However, both DOH regulations and APA guidance contemplate that deep-trench absorption systems may be replaced with a mounded, shallow-trench system "where there is *at least two feet* but less than four feet of . . . separation" to groundwater (10 NYCRR Appendix 75-A.8 [d] [3] [ii] [e] [1] [emphasis added]; *see* Purzycki aff ¶ 30, exhibit A at 6). As petitioners note (*see* Amended Petition ¶ 70; R197), testing on lot 9 indicated a depth to groundwater of 32 inches, or too little to allow for the use of a deep trench system. But because the proposed system is in fact a mounded shallow-trench system, the required separation to groundwater is only two feet and the system is compliant.

B. The APA did not authorize a second principal building on lot 9

The 1988 permit bars construction of more than one principal building on any of lots 1 through 10 (*see* R10). The APA Act defines "principal building" as, among other things, "a single[-]family dwelling" (Executive Law § 802 [50]). The Act defines "single[-]family dwelling" as "any detached building containing one dwelling unit, not including a mobile home" (*id.* § 802 [58]). Borrowing from the New York State Uniform Fire Prevention and Building Code (which in turn incorporates the State's Residential Code [*see* 19 NYCRR 1219.2 (a) (8)]), the APA interprets "dwelling unit" to mean a "single unit providing complete independent living facilities for one or more persons, *including permanent*

provisions for living, sleeping, eating, *cooking* and sanitation" (19 NYCRR 1219.2 [a] [13] [emphases added]; *see* Burth aff ¶ 54, exhibit A at 1 n 1).

Neither the permit amendment nor the May 2021 compliance letter authorized the construction of a second principal building on lot 9. As the permit amendment makes clear, it modifies two conditions of the 1988 permit relating to wastewater treatment systems—and then only as applied to lot 9 (*see* R621); the 1988 permit's single-principal-building condition remains unaltered. The compliance letter for its part simply reminds Mr. Leinwand and Ms. Cicarelli, in conformance with typical Agency practice, that any kitchen facility installed in the studio apartment above the planned garage must be removed "within 30 days of issuance of a certificate of occupancy for the [main] dwelling" (R595).[5] Because a studio apartment without kitchen facilities is not a "dwelling unit" as defined in the building code, neither is it a single-family dwelling or a principal building under the APA Act (*see* Burth aff ¶ 54) and petitioners' contrary argument lacks merit.

POINT III

THE PERMIT AMENDMENT WAS RATIONAL

In proceedings in the nature of mandamus to review, "[the court's] role

[5] The May 2021 compliance letter is also nonfinal with respect to petitioners' principal building argument for the simple reason that it creates no new legal rights or obligations; it merely advises the landowners of their obligations under the existing permit (*see Rhea Lana, Inc. v Dept. of Labor*, 824 F3d 1023, 1028 [D.C. Cir 2016] [agency letter "left the world just as it found it"]).

is to determine whether there is *any basis* in the record for the conclusion reached by the agency" (*Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 34 NY3d 184, 197 [2019] [emphasis added]). "If a determination is rational it must be sustained even if the court concludes that another result would also have been rational" (*id.* at 195 [internal quotation marks and citation omitted]). Here, the record amply supports the APA's permitting determination.

A. The APA rationally concluded that the proposed treatment system would not negatively impact water resources

Petitioners' central argument is that the proposed on-site treatment system for lot 9 poses an acute threat to nearby wetlands and other water resources (*see e.g.* Brief at 17). In reality, and as the record and supporting affidavits make clear, the on-site system—an enhanced treatment system that is both compliant with all applicable design standards and far more effective than the system envisioned in the 1988 permit—will have no negative impact on water resources whatsoever.[6]

Before approving a project or issuing a permit, the APA must determine

[6] To the extent petitioners claim the proposed treatment system will result in a loss of open space (*see* Brief at 17), it should be clear that the APA's permit amendment does not authorize any tree cutting or other vegetation removal. Any vegetation removal currently authorized on lot 9 was authorized either in the 1988 permit or in the 1992 amendment, neither of which is subject to review here (*see* Executive Law § 818 [1] [judicial review of APA determinations subject to a 60-day statute of limitations]).

that the project "would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational[,] or open space resources of the park" (Executive Law § 809 [10] [e]). APA Act § 805 identifies a number of environmental and other considerations that, depending on the specifics of each project, may be relevant to the agency's undue impact review (*see id.* § 805 [4]). These considerations include potential water quality impacts, eutrophication or nutrient-loading, and impacts on freshwater wetlands (*see id.* § 805 [4] [a] [1] [a], [c]; 805 [4] [a] [5] [e]).

The wastewater treatment system proposed here avoids impacts to wetlands and water resources in several important ways. First, because APA and DOH standards are conservatively crafted to prevent contamination of wetlands, waterbodies, or wells (*see* Purzycki aff ¶ 20) and because APA staff field-confirmed that the proposed system would comply with all applicable setbacks before amending the permit (*see id.* ¶ 34), the Agency could rationally conclude that the system would not adversely impact nearby water resources. Second, the amendment of soils in the area of the absorption field to attain a stabilized percolation rate of 10 to 15 minutes per inch will ensure optimal effluent dispersion and treatment and prevent contaminants from migrating into groundwater or nearby surface waters (*see id.* ¶¶ 32–33). And third, the system's peat biofilters will further protect sensitive water resources by significantly reducing nitrogen and other organic contaminants *before* they reach the amended

absorption field (*see id.* ¶ 36). In sum, based on its location and configuration, APA staff rationally concluded that the proposed treatment system would be wholly protective of neighboring wetlands and waterbodies and so would not have an undue adverse impact—or, indeed, any impact—on water resources in the Adirondack Park.[7]

Petitioners' claim that the Agency ignored evidence of impacts to water resources (*see* Brief at 9, 12–14) is both false (*see* Burth aff ¶ 60 [APA staff reviewed all public comments received]) and in any case misapprehends the applicable standard of review. In proceedings in the nature of mandamus to review, the question for the court is whether the record discloses a rational basis for the agency's determination even where conflicting evidence might support a different outcome (*see Matter of Save Our Forest Action Coalition v City of Kingston*, 246 AD2d 217, 221 [3d Dept 1998]). While the reports petitioners reference may disagree with the Agency's project analysis, the Agency is free to reach a divergent conclusion so long as that conclusion finds support

[7] The record belies petitioners' claims that the application materials do not show setbacks from water resources and that the APA's natural resources staff did not participate in the permitting process (*see* Brief at 9, 19). The plans submitted with the application show that the proposed treatment system will comply with applicable setbacks from wetlands, waterbodies, and wells (*see* R51, 197; Purzycki aff ¶¶ 28, 35). With respect to staff involvement, the record and the Agency's supporting affidavits show that natural resources staff both reviewed application materials for compliance with applicable rules and regulations and personally verified on-the-ground conditions (including separation from nearby wetlands and waterbodies) during an April 2021 site visit (*see* R611–615; Purzycki aff ¶ 34).

in the record—which, for the reasons described above, it plainly does.

Petitioners' specific substantive claims are in any case either unsubstantiated or contradicted by other materials in the record. The Curran report identifies three main alleged harms to wetlands on or near lot 9: (1) clearing of trees and other vegetation, (2) shoreline development, and (3) nutrient loading (see R491). But as the APA's May 2021 compliance letter makes clear, other than minor disturbances incident to repair or in-kind replacement of the existing walkway structures, no tree cutting, limbing, or other vegetation removal in wetlands is authorized on lot 9 without prior approval (see R12, 596). To the extent Mr. Curran references tree cutting associated with clearing of the upland building site, that cutting was authorized by the 1988 permit and so is not subject to review here (*see* Executive Law § 818 [1]). And Mr. Curran's odd assertion notwithstanding (*see* R490), no Agency permit or authorization allows for construction of a boathouse along the shoreline of lot 9. Finally, with regard to nutrient loading, the record and supporting affidavits establish not only that compliance with applicable design standards eliminates the risk of environmental harm, but that the proposed system's use of peat biofilters will vastly reduce the introduction of nitrogen and other organic contaminants into the absorption system (which, in any case, will benefit from soil amendment to enhance treatment by slowing percolation in otherwise fast-draining soils) (*see*

Purzycki aff ¶¶ 20, 32, 36).[8]

Petitioners' claim that the APA irrationally changed its position without offering a valid explanation is likewise unavailing (*see* Brief at 11). As the cases petitioners cite make clear, the administrative law rule petitioners rely on—that agencies cannot abandon prior legal interpretations without providing a rational explanation (*see generally Matter of Charles A. Field Delivery Serv. [Roberts]*, 66 NY2d 516, 520 [1985])—does not apply where, as here, an agency determination does not involve a change in the agency's view of the applicable law (*compare Zelanis v New York State Adirondack Park Agency*, 27 Misc 3d 1229[A], 2010 NY Slip Op 50964[U], *6 [Sup Ct, Essex County 2010] [determination irrational where agency failed to explain inconsistent interpretation of the regulatory term "floor space"]). Put otherwise, petitioners' unexplained-change-of-position argument fails because no aspect of the permit amendment required the Agency to reverse its prior interpretation of a statute or regulation.

B. The APA rationally concluded that the proposed treatment system would comply with the Freshwater Wetlands Act

Petitioners also claim the APA inadequately evaluated the project's

[8] To the extent petitioners press the LaBombard report's unsupported suggestion that seasonal use of the proposed treatment system could lead to system failure, the record directly refutes that claim (*compare* Brief at 13–14 *with* R607 [resting period of 6 to 12 months "is positive for the long[-]term functioning of an absorption system"]).

impacts on wetlands by misclassifying affected wetlands and by irrationally concluding that the project met Freshwater Wetlands Act standards (*see* Brief at 15). Neither claim has merit.

To the extent petitioners argue that the APA erroneously failed to treat wetlands on or near lot 9 as value 1 wetlands (*see id.* at 15–16), that argument is a collateral attack on the wetlands valuation in the 1988 permit and is therefore time-barred (*see* Executive Law § 818 [1]). In any event, as the permit amendment makes clear, the Agency concluded that the proposed treatment system would satisfy the Freshwater Wetlands Act whether the wetlands were classified as value 1 or value 2 (*see* R622 [concluding that the proposed on-site wastewater treatment system "w[ould] be compatible with preservation of the entire wetland and w[ould] not result in degradation of loss of any part of the wetland or its associated values]; 9 NYCRR 578.10 [a] [1]).

Petitioners' rationality argument—that the APA arbitrarily granted the permit amendment notwithstanding the threat the on-site treatment system poses to nearby wetlands—fails for the reasons already discussed (*see* Point III.A, *supra*). In sum, both because the system is fully compliant with all applicable design standards and because it incorporates an enhanced treatment mechanism designed specifically to reduce, among other things, nitrogen loading, the APA rationally concluded that the system would satisfy even the most

restrictive Freshwater Wetlands Act standard (*see* 9 NYCRR 578.10 [a] [1]).[9]

C. Petitioners' other arguments are either unreviewable or meritless

Petitioners' remaining claims focus largely on alleged tree cutting and/or wetland disturbance on lot 9 (*see* Brief at 18, 22–24). Petitioners argue that the APA's May 2021 compliance letter impermissibly amended the 1988 permit by authorizing construction of a walkway to the lakeshore (*see id.* at 23–24) and seek a declaration prohibiting Mr. Leinwand and Ms. Cicarelli "from cutting trees within the wetlands, or otherwise disturbing the wetlands, on [lot 9]" (*id.* at 23).

The Agency's May 2021 compliance letter in no way purports to amend the 1988 permit. Rather, the letter simply confirms that the existing path and related infrastructure on lot 9 comply with the 1992 amendment and may be rebuilt or replaced in kind without further Agency review (*see* R596).[10] To the

[9] Petitioners repeatedly claim that the APA failed to require or obtain a wetland vegetation survey originally required as a condition of the 1988 permit (*see* Brief at 5, 6, 16). Petitioners are mistaken (*see* Tallent affirmation, exhibit A). In any event, the argument is irrelevant: Because the permit amendment would not authorize any new disturbance in wetlands and because the on-site wastewater treatment system will have no adverse impact on wetlands or their associated values, the APA rationally concluded that the amendment satisfied all Freshwater Wetlands Act requirements.

[10] Assuming petitioners' arguments can be interpreted as a challenge to this aspect of the compliance letter—that is, its confirmation that the existing walkway structures comply with the 1992 permit amendment—the challenge fails because the letter does not represent a final agency determination on this issue. As the letter makes clear, it merely restates a compliance determination the Agency made in 2008

extent petitioners argue that repair or replacement of these already-approved structures would violate the APA Act's shoreline setback provisions, this argument amounts to an impermissible challenge to the 1992 permit amendment itself (*see* Executive Law § 818 [1]). In any event, because Mr. Leinwand and Ms. Cicarelli may lawfully disturb wetlands on lot 9 to the limited extent necessary to repair or replace the wooden walkways, bridges, and/or log corduroys authorized in the 1992 permit amendment (*see* R596), the Court should deny petitioners' overbroad request for declaratory relief.[11]

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and, consequently, imposes no obligation and determines no right (*see Matter of Essex County v Zagata*, 91 NY2d 447, 453 [1998]).

[11] Apart from its substantive flaws, petitioners' request for declaratory relief is procedurally improper for at least three reasons: First, to the extent the claim is based on alleged defects in the APA's permits (*see* Amended Petition ¶¶ 111–121), that claim can be addressed under CPLR article 78 and should be converted (*see Greystone Mtg. Corp. v Conciliation & Appeals Bd. of City of N.Y.*, 62 NY2d 763, 765 [1984]). Second, to the extent the claim seeks injunctive relief (*see* Brief at 23), injunctive relief is not available in a cause of action seeking a declaratory judgment (*see Matter of Dandomar Co., LLC v Town of Pleasant Val. Town Bd.*, 86 AD3d 83, 89 [2d Dept 2011]). Third, to the extent petitioners' request for declaratory relief in a roundabout way attempts to compel the APA to take enforcement action, mandamus is unavailable either to compel discretionary action (*see Matter of Town of Riverhead v New York State Dept. of Envtl. Conservation*, 50 AD3d 811, 813 [2d Dept 2008]) or to prevent third parties from performing allegedly illegal acts (*see Matter of Walsh v LaGuardia*, 269 NY 437, 441 [1936]).

CONCLUSION

For the foregoing reasons, the verified petition and complaint should be denied in its entirety and the proceeding dismissed.

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