

STATE OF NEW YORK
 SUPREME COURT COUNTY OF WARREN

In the Matter of the Application of

THE LAKE GEORGE ASSOCIATION, THE
 LAKE GEORGE WATERKEEPER, THE
 TOWN OF HAGUE, AND HELENA G. RICE,

Petitioners,

v.

THE NYS ADIRONDACK PARK AGENCY,
 THE LAKE GEORGE PARK COMMISSION,
 AND THE NYS DEPARTMENT OF
 ENVIRONMENTAL CONSERVATION,

Respondents,

for Judgment Pursuant to Article 78 of the New York
 Civil Practice Law and Rules and Injunctive Relief.

Fitzgerald Morris Baker Firth P.C., Glens Falls (*Michael Crowe* and *Thomas A. Ulasewicz* of counsel, for petitioners.

Letitia James, Attorney General, Albany (*Joshua M. Tallent* and *Susan L. Taylor* of counsel), for respondents.¹

ROBERT J. MULLER, J.S.C.

Known as “The Queen of American Lakes,” Lake George is roughly 32 miles long and 28,000 acres in size. It lies within the upper region of the Great Appalachian Valley and drains all the way northward into Lake Champlain and the St. Lawrence River drainage basin, and is

¹ The Court notes that *Bartlett, Pontiff, Stewart and Rhodes, P.C.*, Glens Falls (*Karla Williams Buettner*, of counsel), has also appeared on behalf of respondent Lake George Park Commission as well.

classified by respondent New York State Department of Environmental Conservation (hereinafter the DEC) as AA-Special for its fresh surface waters. Eurasian watermilfoil (hereinafter EWM) is an aquatic invasive plant that is not native to the United States. It has been found in numerous locations in Lake George since the 1980s, presumably as the result of plant fragments being transported from other waterways on boats and trailers.

EWM is very difficult to eradicate once it is established. There are no natural predators to keep the population in check, the roots must be completely pulled or killed to prevent regrowth, and removal typically creates fragments that propagate and exacerbate the spread of the species. EWM grows densely at the surface of the water, making recreation difficult if not impossible. It also prevents sunlight from penetrating into the water column and chokes out other vegetation. Suffice it to say that all parties to this proceeding agree that EWM is dangerous to the waters of Lake George and must be eradicated. Indeed, they have worked together toward this common goal for decades.

In 2016, respondent NYS Adirondack Park Agency (hereinafter the APA) issued a permit to respondent Lake George Park Commission (hereinafter the LGPC) for the use of hand harvesting and benthic matting in the removal of EWM from Lake George. Hand harvesting involves divers manually pulling the plant and root systems from the lakebed. In areas with large multi-stemmed plants, hand harvesting also involves the use of a vegetation conveyance device known as a Diver Assisted Suction Harvester (hereinafter DASH); this is a vessel which acts as a large vacuum to transport harvested plants out of the water. Benthic matting involves the laying of mats over beds of EWM. It successfully eradicates the EWM beneath the mats, but kills all other plant species there as well. It appears that hand-harvesting has proven most successful at eradicating EWM in Lake George, but it is labor-intensive and expensive.

Petitioner Lake George Association (hereinafter the LGA) alone has contributed over \$1.1 million to the effort since 2013.

ProcellaCOR EC (hereinafter ProcellaCOR) is an aquatic herbicide used in the management of EWM. It was approved by the United States Environmental Protection Agency in February 2018 and then by the DEC in February 2019. Review by the DEC involved review by the Bureau of Ecosystem Health and the Division of Health and Wildlife for ecotoxicity. It has also been reviewed by the New York State Department of Health to ensure no human health concerns. New Hampshire has used ProcellaCOR on 43 occasions to manage EWM in its lakes, and Vermont has used it on 18 occasions. ProcellaCOR has also been used with success in this State in Chautauqua Lake, Glen Lake, Minerva Lake and Saratoga Lake, among others.

On February 22, 2021, in response to a request from the LGPC, the APA opened a pre-application file for initial analysis of a draft proposal for the application of ProcellaCOR to eradicate EWM from underwater lands within Blairs Bay and Sheep Meadow Bay – both of which include wetlands.² Blairs Bay and Sheep Meadow Bay are approximately 8 miles apart, with both located in the Town of Hague on the northeastern side of Lake George. From 2007 to 2017, the LGPC managed EWM in Blairs Bay with both hand harvesting and benthic matting, apparently with little success. Nothing further has been done there since 2017. Hand harvesting and benthic matting were used in Sheep Meadow Bay as well from 2007 to 2009 and from 2012 to 2014,³ with these efforts also proving largely unsuccessful. There has been no further management there since 2014.

² Under the Freshwater Wetlands Act, a permit from the APA is required for the application of herbicide in wetlands (*see* ECL 24-0801; 9 NYCRR 578.2, 578.3 [n] [2] [i]).

³ There is apparently “no available date” for the treatment of EWM in Sheep Meadow Bay in 2010 and 2011.

On May 24, 2021, members of the APA, LGPC, DEC, LGA and SOLitude Lake Management (hereinafter SOLitude) – an aquatic herbicide applicator and consultant for LGPC – met to discuss the proposal relative to Blairs Bay and Sheep Meadow Bay. Staff members from the APA, LGPC and LGA thereafter conducted site visits to the Bays on July 28, 2021. The wetland in Blairs Bay was assigned a value rating of 1 due to the presence of alternate-flowered water milfoil – listed as threatened in this State – and the wetland in Sheep Meadow Bay was assigned a value rating of 3 (*see* 9 NYCRR 578.5, 578.6).⁴

Applications for the use of ProcellaCOR in Blairs Bay and Sheep Meadow Bay were subsequently submitted by SOLitude – as representative of the LGPC – on January 7, 2022. The application for Blairs Bay sought to apply up to 4.2 gallons of ProcellaCOR within a 4-acre area, including a 0.33± acre wetland. In Sheep Meadow Bay the LGPC sought to apply up to 4.77 gallons of ProcellaCOR EC within a 3.6-acre area, including a 0.5± acre wetland. The LGPC proposed to complete the treatments between May 17 and June 30, 2022, primarily to shield alternate-flowered water milfoil and other native species from any potential effects of the herbicide – although no effects are expected given how quickly the chemical breaks down in the water.

On January 11, 2022, the APA notified adjoining landowners that the applications had been received. The APA then issued notices of incomplete permit applications for both project sites on January 25, 2022. These notices requested additional vegetative survey information, revisions to the site mapping, explanations of efforts to avoid and minimize impacts to wetlands,

⁴ 9 NYCRR 578.5 provides a “list describ[ing] several wetland covertypes and most other wetland characteristics and assigns one of four value ratings to each.” These “value ratings indicate the overall worth of a given wetland” (9 NYCRR 578.5), and must be considered by the APA when determining whether to issue a permit (*see* 9 NYCRR 578.10).

and additional details of the proposed herbicide use, among other materials. The APA received all requested materials on or about February 18, 2022 and, on March 3, 2022, all interested parties were advised that the application had been deemed complete and that written comments on the proposal would be accepted until March 31, 2022.

The APA thereafter received 325 comment letters, with 300 in opposition to the project and 22 in support. The comment letters in opposition included, *inter alia*, a 15-page letter dated March 31, 2022 from the LGA and petitioner Lake George Waterkeeper and an 11-page letter dated March 31, 2022 from Carol D. Collins, Ph.D., a liminologist who has spent years studying Lake George. The LGA and Lake George Waterkeeper expressed several concerns, including that “[t]he circulation and hydrodynamics of Lake George will result in the wide-spread distribution of the herbicide well beyond the cited dilution zone in the current [a]pplications” [LGA/Lake George Waterkeeper March 31, 2022 letter, attached as Exhibit “D” to Petition, at p 2], the “[h]erbicide treatment of [EWM] will result in significant nutrient loading from decomposing plants, especially phosphorus, that will cause algae growth and increase the potential for [h]armful [a]lgae [b]looms” [LGA/Lake George Waterkeeper March 31, 2022 letter, at p 7], and there will be “significant . . . impacts to native macrophytes and organisms” [LGA/Lake George Waterkeeper March 31, 2022 letter, at p 12]. The LGA and Lake George Waterkeeper implored the APA to conduct studies with respect to the ecology of Lake George specifically – given its AA-Special classification and use as a drinking water source – as well as to hold a public hearing before proceeding with approval of the permits. Collins stated similarly in her letter:

“I find that the use of ProcellaCOR in Lake George is likely to have highly significant adverse impacts on the plant and animal communities, fisheries, water quality and drinking water. The application is premature, rushed, absent of critical information, misleading and incomplete. Given these problems, it is not possible

at present to fully evaluate the impact ProcellaCOR will have on the Lake George ecosystem. I strongly urge the [APA] to table this application and take the time to fully investigate the impacts of this toxin. Trials of this herbicide should not be conducted in the waters of Lake George that so many rely upon for drinking water, fishing and recreation until more information is available” [Collins March 31, 2022 letter, attached as Exhibit “H” to Petition, at p 1].

On April 1, 2022, David Wick, the Executive Director of the LGPC, submitted a document to the APA summarizing the ecological and other benefits to be derived from the proposed application of ProcellaCOR including, *inter alia*, the fact that the herbicide is very targeted and eradicates EWM while having little if any impact upon native species. Wick also noted that the application of ProcellaCOR is not labor intensive and is much less costly, with no regrowth of EWM for at least three years. Wick then submitted a document to the APA on April 7, 2022 in response to the several comment letters received in opposition to the project, advising that the herbicide breaks down quickly after being introduced into the water and, as such, will not be distributed widely. He further advised that the annual die-back of EWM results in harmful algal blooms, and the application of ProcellaCOR will prevent this going forward. Finally, Wicks advised that data from Minerva Lake and other locations demonstrates that – even where native species are impacted initially from treatment with ProcellaCOR – within a short time frame the removal of EWM results in a return to a healthy and diverse native plant community.

It appears that additional comments were accepted from the public until April 13, 2022, with the LGA and the Lake George Waterkeeper submitting an 11-page letter on that date to supplement their earlier submission. Petitioner Town of Hague also submitted a resolution it passed on April 12, 2022 “opposing the application of ProcellaCOR in Lake George at this time” [Resolution #87 of 2022, attached as Exhibit “A” to Petition, at p 1].

APA staff provided a detailed presentation of the specifics of the proposals to the board during their public meeting on April 14, 2022, recommending that the applications be approved with conditions including post-treatment monitoring and plant surveys. APA staff further recommended that the permits be issued without the necessity of a public hearing (*see* 9 NYCRR 580.2). Following a discussion which reflected an obvious divide among the board members, the applications for ProcellaCOR treatments in Blairs Bay and Sheep Meadow Bay were approved – as recommended – in a 6-4 vote.

Meanwhile, on January 7, 2022, the LGPC submitted two applications to the DEC for permits to apply ProcellaCOR for the management of EWM in Lake George, one for Blairs Bay and one for Sheep Meadow Bay.⁵ These applications were reviewed by Brian A. Primeau, a “Pesticide Control Specialist 2” for the DEC [Primeau Affidavit, at ¶ 1]. Notification of these applications was sent to all riparian owners potentially impacted by the herbicide treatments – specifically with respect to water use restrictions⁶ – with the notification giving them “21 days to provide a written objection to DEC, addressed to [Primeau]” [Primeau Affidavit, at ¶ 26]. Only one written comment was received, with the owner of the Adirondack Camp “urg[ing the LGPC] to conduct the lake treatment . . . well in advance of June” because “campers and staff swim[] and [boat[] in [the] area during the dates of 6/10/202 [sic] through 8/20/2022” [January 27, 2022 correspondence, attached as Exhibit “I” to Primeau Affidavit].

⁵ Anyone seeking to apply a pesticide to control or eliminate aquatic vegetation must obtain a permit from the DEC (*see* 6 NYCRR 327.1).

⁶ According to Primeau, “[t]he water use restrictions specified on the ProcellaCOR EC label are irrigation restrictions and livestock watering restrictions” [Primeau Affidavit, at ¶ 23]. Primeau further states that the ProcellaCOR EC label “does not contain water use restrictions for potable water, domestic water, or swimming” [Primeau Affidavit, at ¶ 23].

On February 1, 2022, Primeau advised LGPC and SOLitude that the applications were incomplete. SOLitude addressed the deficiencies outlined and the applications were then deemed complete on February 15, 2022, at which time Primeau sent the completed applications

“to the following reviewers via email . . . : NYSDOH Water Bureau; New York State Office of General Services; Adirondack Park Agency; DEC BPM’s Pesticide Compliance & Lab Services Section; DEC Region 5 Division of Water; DEC Region 5 Division of Lands and Forests; and the Bureaus of Fisheries, Wildlife, and Ecosystem Health in the DEC Region 5 Division of Fish and Wildlife” [Primeau Affidavit, at ¶ 27].

Primeau provided the reviewers with 21 days in which to comment on the completed applications and “informed [them] that no response . . . would be considered no objection to the proposed project” [Primeau Affidavit, at ¶ 28]. Primeau thereafter received responses from the APA, DEC Region 5 Fisheries and NYSDOH, none of whom objected to issuance of the permits. The permits were then issued on March 10, 2022, with the DEC authorizing the LGPC to use (1) “up to 4.2 gallons of ProcellaCOR EC in up to 4 acres of Blairs Bay . . . at a dosage rate not to exceed 12.68 fl. oz. . . . per acer foot” [Primeau Affidavit, at ¶ 29 (a)]; and (2) “up to 4.78 gallons of ProcellaCOR EC in up to 3.6 acres of Sheep Meadow Bay . . . at a dosage rate not to exceed 12.68 fl. oz. . . . per acer foot” [Primeau Affidavit, at ¶ 29 (b)].

On May 12, 2022, this CPLR article 78 proceeding was commenced by the LGA, the Lake George Waterkeeper, the Town of Hague and petitioner Helen G. Rice, who owns property immediately adjacent to the treatment area in Sheep Meadow Bay. Petitioners challenge the APA’s issuance of the permits authorizing the application of ProcellaCOR to the wetlands in Blairs Bay and Sheep Meadow Bay, setting forth eight causes of action:

- (1) The APA staff failed to uniformly notice all public comments as one package for review, failed to provide board members with the number of public comments actually received, and failed to accurately summarize the substance of the comments in opposition to the application.

- (2) While Blairs Bay and Sheep Meadow Bay are in the Town of Hague, the land adjoining Blairs Bay is located in the Town of Dresden, Washington County and the land adjoining Sheep Meadow Bay is located in the Town of Putnam, Washington County. The failure to include this information in the notices sent to adjoining landowners was a violation of lawful procedure.
- (3) The approval process was rushed by the APA and was significantly lacking in comparative analysis.
- (4) Both permits include a provision indicating they need not be recorded with the County Clerk, in contravention of Executive Law (hereinafter APA Act) § 809 (7).
- (5) The APA failed to recognize the current DASH management program for EWM in Lake George as an alternative to the application of ProcellaCOR, in contravention of 9 NYCRR 578.10.
- (6) Notwithstanding the myriad of public comments received in opposition to the project and the scientific evidence presented, the APA made no effort to seek additional information before approving the permits.
- (7) The DEC's designee is a voting member of the board of the APA and should have recused from the vote on April 14.
- (8) The APA should have held a public hearing before approving the permits.⁷

Presently before the Court is petitioners' motion by Order to Show Cause for a preliminary injunction barring the LGPC from undertaking any ProcellaCOR applications to Lake George pending the conclusion of this proceeding. Petitioners also sought a Temporary Restraining Order (TRO) pending a decision on the motion. The LGPC, however, agreed not to administer the ProcellaCOR prior to June 15, 2022, thus providing the Court with sufficient time to issue a decision on the motion. As a result, the application for the TRO was not considered.

⁷ Interestingly, petitioners have not commenced a CPLR article 78 proceeding to challenge the DEC's issuance of the permits approving the application of ProcellaCOR in Blairs Bay and Sheep Meadow Bay, with the statute of limitations for such a proceeding having now passed. As noted by respondents, this may have ramifications relative to the issues raised in this proceeding. The Court, however, finds it unnecessary to address these possible ramifications in the context of this motion.

“To establish entitlement to a preliminary injunction, [petitioners are] required to demonstrate a likelihood of success on the merits, irreparable harm if the injunction is not granted and that the balance of the equities is in [their] favor” (*Sync Realty Group, Inc. v Rotterdam Ventures, Inc.*, 63 AD3d 1429, 1430 [2009]; see CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; *Petry v Gillon*, 199 AD3d 1277, 1278 [2021]; *Emerald Green Prop. Owners Assn., Inc. v Jada Developers, LLC*, 63 AD3d 1396, 1397 [2009]).

Beginning with the likelihood of success on the merits, “it is not for this court to determine finally the merits of an action upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the [s]tatus quo until a decision is reached on the merits” (*Tucker v Toia*, 54 AD2d 322, 326 [1976]). To that end, “the showing of a [l]ikelihood of success on the merits required before a preliminary injunction may be . . . issued must not be equated with the showing of a [c]ertainty of success” (*Tucker v Toia*, 54 AD2d at 326; see *Cooperstown Capital, LLC v Patton*, 60 AD3d 1251, 1252-1253 [2009]). Indeed, “[w]here, as here, the denial of a preliminary injunction would disturb the status quo and render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced” (*Congregation Erech Shai Bais Yosef, Inc. v Werzberger*, 189 AD3d 1165, 1167 [2020], quoting *North Fork Preserve, Inc. v Kaplan*, 31 AD3d 403, 406 [2006]; see *Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942, 943 [2009]; *State of New York v City of New York*, 275 AD2d 740, 741 [2000]; cf. *Waldron v Hoffman*, 130 AD3d 1239, 1239 [2015]).

The importance of this case to the residents and profound numbers of visitors who enjoy the waters of Lake George and its attendant economic benefits year round – and to the flora and fauna who call these waters home – is not lost on this Court. The Court will thus address each

cause of action *ad seriatim*, mindful that review in this CPLR article 78 proceeding is limited to whether the determination lacks a rational basis and is, thus, arbitrary and capricious (*see Matter of Smith v City of Norwich*, 205 AD3d 140, 2022 NY Slip Op 02324 *1 [2022]; *Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 161 AD3d 169, 176 [2018], *affd* 34 NY2d 184 [2019]). In this regard,

“[a]n action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. If the agency’s determination has a rational basis, it will be sustained, even if a different result would not be unreasonable. [The Court] may not substitute [its] judgment for that of the agency responsible for making the determination, and deference to the judgment of the agency, when supported by the record, is particularly appropriate when the matter under review involves a factual evaluation in the area of the agency’s expertise” (*Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency*, 161 AD3d at 176, quoting *Matter of Fuller v New York State Dept. of Health*, 127 AD3d 1447, 1448 [2015] [internal quotation marks, brackets and citation omitted]).

With respect to the first cause of action, 9 NYCRR 572.8 – entitled “[n]otice of application completion and advisory comments” – provides, in pertinent part:

- (a) Copies of notices of application completion required to be sent by [APA Act §] 809 (2) . . . shall also be sent, in the case of non-minor projects, to adjoining landowners to the extent reasonably discernible from the latest completed tax assessment roll.
- (b) The mailing of a notice shall constitute an invitation to submit written advisory comments on the project. Advisory comments in response to a notice of application completion shall be submitted to the agency . . . within 15 days of mailing of the notice of application completion, or any lesser time that is agreed upon by the board or official and the agency.
- (c) Persons receiving copies of a notice are encouraged to discuss any aspect of the project with the agency staff.
- (d) The issuance of a notice of application completion shall mean that an application is in an approved form and is complete for the purpose of commencing review of the application. During the course of review, reasonable additional information may be required in order to enable the agency to make the findings and determinations required by the [APA] Act or these regulations.”

There is no requirement that any public comments be posted for public review, but Robert Lore – the Deputy Director of Regulatory Programs for the APA – indicates that “in recent years[the Agency has] made an effort to post comments when reasonably possible, to allow for even greater transparency in the . . . review process” [Lore Affidavit, at ¶ 21].

Here, it is undisputed “that a number of public comments related to the ProcellaCOR applications [were] automatically directed to the [APA’s] spam email folder” [Ziemann Affidavit, at ¶ 43] and, as a result, were not immediately posted on the APA’s website. That being said, petitioners advised APA staff of the error on April 6, 2022 and it was then addressed, with “[a]gency staff reviewing every public comment received” [Ziemann Affidavit, at ¶ 44].

Upon a review of the presentation by APA staff to the board during the April 14 meeting, it is evident that Aaron Ziemann – the Associate APA Project Analyst who conducted the presentation – provided a slide stating as follows:

“Public Comment

- Public Notice
 - Agency Noticed all shoreline owners that were also noticed by the NYSDEC.
 - Notice of Completion was Published in ENB
- Comment Letters
 - 183 received up to this morning
 - 134 against (generated by LGA campaign)
 - 24 others against
 - 18 in support” [Video of April 14 meeting, attached as Exhibit “G” to Lore Affidavit and available online at http://nysapa.granicus.com/MediaPlayer.php?view_id=2&clip_id=583, at 3:43:52 (emphasis in original)].

While still presenting this slide, Ziemann apprised the board of the error resulting in several comment letters going to a spam folder and advised that in fact 325 letters had been received, with 300 in opposition and 22 in support. He then presented a slide with the notable

supporters of the project as well as those who appeared in opposition, and proceeded to share five additional slides which set forth a summary of the comments received in opposition. As such, board members were provided with the number of public comments actually received as well as a summary of the comments in opposition to the project – contrary to petitioners’ contentions.

That being said, the Court cannot – at this juncture – determine the accuracy of the summary provided to the board by Ziemann. As articulated during oral argument by counsel for petitioners, and as conceded by counsel for respondents, the Court does not have copies of all 300 letters submitted in opposition. There exists the possibility that the summary was inaccurate, and perhaps the board members should have been provided with additional information. In this regard, the Court finds that petitioners have succeeded in establishing a likelihood of success on the merits with respect to their first cause of action, recognizing the reduced degree of proof required in a case such as this where denial of the preliminary injunction will disturb the status quo (*see Congregation Erech Shai Bais Yosef, Inc. v Werzberger*, 189 AD3d at 1167; *North Fork Preserve, Inc. v Kaplan*, 31 AD3d at 406).

With respect to the second cause of action, the notice sent by the APA to adjoining landowners of the Blairs Bay project states, in pertinent part:

“The Agency has received an application from **Lake George Park Commission** for a project located on or near **Blairs Bay, Lake George**, in the Town of Hague, Warren County, in an area designated as **Underwater** on the Adirondack Park Land Use and Development Plan Map. The attached map shows the approximate location of the project site” [January 11, 2022 notice, attached as Exhibit “A” to Lore Affidavit, at p 3 (emphasis in original)].

The map attached to the notice then plainly labels the adjoining land as located in Putnam. The notice sent by the APA to adjoining landowners of the Sheep Meadow Bay project

includes an identical statement – but for the location of the project – as well as a map which plainly labels the adjoining land as located in Dresden.

While Rice has submitted an affidavit indicating that she was confused by the notice because she does not reside in Hague and has “never heard of [her] bay being referred to as Sheep Meadow May” [Rice Affidavit, at ¶ 6], the map attached to the notice clearly depicts the location of Sheep Meadow Bay and the adjoining lands in Dresden. Indeed, Rice admits that she “did not pay any attention to the map” attached to the notice [Rice Affidavit, at ¶ 7]. Under the circumstances, the Court declines to find that petitioners have succeeded in demonstrating a likelihood of success on their second cause of action.

Turning now to the third cause of action, petitioners contend that the approval process was rushed and lacking in comparative analysis. In this regard, while the APA opened its pre-application file in February 2021 and its staff have – by all accounts – spent substantial time analyzing all the issues raised, there were nonetheless four board members who clearly felt that they did not have sufficient information from staff to approve the applications during the April 14 meeting. Indeed, one of these board members indicated that she had just received the resolution from the Town of Hague opposing the project and, while she had not yet had an opportunity to thoroughly review it, she was nonetheless concerned. The other three board members indicated that they would consider voting in favor of the project in the future, but want additional information with respect to how ProcellaCOR will affect the ecology of Lake George specifically. Under the circumstances, the Court finds that petitioners have succeeded in establishing a likelihood of success on the merits with respect to their third cause of action -- again cognizant of the reduced degree of proof required (*see Congregation Erech Shai Bais*

Yosef, Inc. v Werzberger, 189 AD3d at 1167; *North Fork Preserve, Inc. v Kaplan*, 31 AD3d at 406).

With respect to the fourth cause of action, APA Act § 809 (7) (a) provides that permits issued under the APA's class A and class B regional project authority "shall expire within [60] days from the [issuance] date" unless recorded in the county clerk's office in the county where the project is located. As noted above, however, the APA permits under consideration here were issued under the Freshwater Wetlands Act – not the APA Act. While the APA's regulatory rules require the review procedures in APA Act § 809 to be followed with respect to applications for a freshwater wetlands permits (*see* 9 NYCRR 572.1 [a]), the same is not true of the recordation requirement. As such, the Court declines to find that petitioners have succeeded in demonstrating a likelihood of success on their fourth cause of action.

Turning now to the fifth cause of action, 9 NYCRR 578.10 (a) (3) provides that

“[u]nless the economic, social and other benefits to be derived from the activity proposed compel a departure from these guidelines, the [APA] shall [only] issue a permit for regulated activities in [w]etlands rated 3[where t]he proposed activity:

- (i) would result in the minimum possible degradation or destruction of any part of the wetland or its associated values;
- (ii) is the only alternative which reasonably can accomplish the applicant's objectives; and
- (iii) would, weighing the benefits of the activity against its cost and the wetland values lost, provide a net social and/or economic gain to the community.”

Petitioners contend that the APA failed to recognize the current DASH management program for EWM in Lake George as an alternative to the application of ProcellaCOR. Although petitioners fail to indicate that this contention applies solely to Sheep Meadow Bay, presumably it must since only Sheep Meadow Bay has a value rating of 3. In any event, the

record reveals that the APA did not recognize the DASH management program as an alternative because it has previously proven ineffective in both Blairs Bay and Sheep Meadow Bay. That being said, at this juncture there is very little in the record relative to the hand harvesting previously done in these Bays. Moreover, it has been five years since any EWM management has been done in Blairs Bay – and eight years since it has been done in Sheep Meadow Bay. There thus exists the possibility that conditions have changed and hand harvesting in these Bays will now prove more successful – making it a reasonable alternative. Under the circumstances, the Court finds that petitioners have succeeded in establishing a likelihood of success on the merits with respect to their fifth cause of action (*see Congregation Erech Shai Bais Yosef, Inc. v Werzberger*, 189 AD3d at 1167; *North Fork Preserve, Inc. v Kaplan*, 31 AD3d at 406).

Turning now to the sixth cause of action, as set forth hereinabove in the discussion relative to petitioners' third cause of action, several board members indicated that they would consider voting in favor of the project in the future but wanted additional information with respect to how ProcellaCOR will affect the ecology of Lake George. Without the full administrative return – including the public comments submitted in opposition to the applications – it is impossible for the Court to ascertain whether additional information should have been sought before the permits were issued. In this regard – and mindful of the reduced degree of proof required – the Court finds that petitioners have succeeded in establishing a likelihood of success on the merits with respect to their sixth cause of action (*see Congregation Erech Shai Bais Yosef, Inc. v Werzberger*, 189 AD3d at 1167; *North Fork Preserve, Inc. v Kaplan*, 31 AD3d at 406).

Insofar as the seventh cause of action is concerned, petitioner contends that the DEC's designee on the APA should have recused himself from the April 14 vote relative to the permits

because the DEC had already approved permits for the project. In support of this contention, petitioner notes that the DEC's designee on the LGPC recused herself from that agency's vote to award the contract for the ProcellaCOR application to SOLitude on April 26, 2022. The Court, however, is not persuaded. The DEC is the sole regulator of pesticide and herbicide projects and it would have been "inherently incompatible with procedural due process" (*Matter of Washington County Cease v Persico*, 99 AD2d 321, 329 [1984]) for its designee to vote as both regulator and applicant at the LGPC meeting. This of course was not the case with respect to the APA's vote on April 14. There the DEC was regulator with respect to both the permits it issued and those issued by the APA. Indeed, as stated by Lore:

"Every year, numerous projects are presented to the board that require permits for both APA and DEC. To my knowledge, the designee for DEC has never recused from a vote simply because a DEC permit is also required. Requiring recusal by the designee for DEC for every project that is also subject to DEC jurisdiction would effectively reduce the number of APA members from 11 to 10 for private land permitting" [Lore Affidavit, at ¶ 14].

Turning now to the eighth cause of action, APA Act § 809 (3) (d) provides, in pertinent part:

"The determination of whether or not to hold a public hearing on an application shall be based on whether the agency's evaluation or comments of the review board, local officials or the public on a project raise substantive and significant issues relating to any findings or determinations the agency is required to make pursuant to this section, including the reasonable likelihood that the project will be disapproved or can be approved only with major modifications because the project as proposed may not meet statutory or regulatory criteria or standards. The agency shall also consider the general level of public interest in a project."

9 NYCRR § 580.2 (a) then sets forth the following criteria for determining whether a public hearing should be held:

"(1) the size and/or complexity of the project, whether measured by cost, area, effect upon municipalities, or uniqueness of resources likely to be affected;

“(2) the degree of public interest in the project, as evidenced by communication from the general public, governmental officials or private organizations;

“(3) the presence of significant issues relating to the criteria for approval of the project;

“(4) the possibility that the project can only be approved if major modifications are made or substantial conditions are imposed;

“(5) the possibility that information presented at a public hearing would be of assistance to the agency in its review;

“(6) the extent of public involvement achieved by other means; [and]

“(7) whether an environmental impact statement will be prepared pursuant to the State Environmental Quality Review Act”

Here, there were 300 letters submitted by members of the public in opposition to the project, as well as a resolution passed by the Town of Hague. It is therefore evident that there exists a *high* degree of public interest. Indeed, while not part of the record it bears noting that the courtroom was nearly full during oral argument on June 8, 2022. Petitioners also raise the “uniqueness of [the] resources likely to be affected” (9 NYCRR § 580.2 [a] [1]) – namely a lake rated AA-Special – as well as the possibility that information presented at a public hearing would be helpful to the board in reviewing the applications.

The Court is cognizant that the language of APA Act § 809 (3) (d) reflects the APA’s discretion to determine whether a public hearing is necessary and, as such, petitioners may not ultimately prevail on their eighth cause of action. This notwithstanding, the Court finds that petitioners have succeeded in establishing the merits of this cause of action to the extent necessary on this motion (*see Congregation Erech Shai Bais Yosef, Inc. v Werzberger*, 189 AD3d at 1167; *North Fork Preserve, Inc. v Kaplan*, 31 AD3d at 406).

Having found that petitioners have established the merits of their first, third, fifth, sixth and seventh causes of action, the Court now proceeds to the second prong of the inquiry. While

the Court is not entirely convinced that the application of ProcellaCOR will result in injury to Lake George, petitioners have succeeded in raising questions in this regard – and it is indisputable that if ProcellaCOR does result in injury, that injury will be irreparable. There is no removing the chemical from the Lake once it has been introduced. The Court thus finds that the second prong of the inquiry has also been satisfied.

Finally, insofar as the balance of the equities is concerned, counsel for petitioners began his impassioned argument on this motion by inviting the Court to imagine the “two worst case scenarios.” If, on the one hand, the motion is denied and the ProcellaCOR treatments are done this month, then the treatments cannot be undone – even if petitioners ultimately prevail. If, on the other hand, the motion is granted and the ProcellaCOR treatments are delayed one year, then the status quo is simply maintained. The LGPC can do hand harvesting in Blairs Bay and Sheep Meadow Bay this summer, if it so chooses. The proceeding can be decided on the merits and, if petitioners lose, the treatments can be done next year. Given the several years that have already passed since the last EWM treatments in these Bays, it is unclear why – now – there is such an imminent need. Indeed, when this question was posed to counsel for respondents during oral argument, his response focused primarily upon the deleterious effects of EWM on Lake George – but these effects have been ongoing for decades. Under the circumstances, the Court finds that the balance of the equities lies with petitioners.

In sum, this Court firmly believes that everyone should have an opportunity to be heard and – without the issuance of this injunction – petitioners will be denied that opportunity. While petitioners may not ultimately prevail, they have set forth the minimum degree of proof required to demonstrate a prima facie case on several causes of action – and respondents have been unable

to provide any compelling reason why ProcellaCOR must be applied now. With that said, the Court can find no discernible reason why petitioners should not have their day in Court.

Based upon the foregoing, petitioners' motion for a preliminary injunction pending the conclusion of this proceeding is granted.

In accordance with CPLR 6312 (b), this preliminary injunction is contingent upon petitioners posting an undertaking in the amount of \$100,000.00 within **fifteen (15) days** of the date of this Decision and Order, with a copy to both the Court and counsel for respondents. The Court finds this amount rationally related to the damages respondents will sustain in the event the injunction is ultimately deemed unwarranted (*see Sardino v Scholet Family Trust*, 192 AD3d 1433, 1435 [2021]; *Cooperstown Capital, LLC v Patton*, 60 AD3d at 1253; *Bonded Concrete, Inc. v Town of Saugerties*, 42 AD3d 852, 854-855 [2007]).

Counsel for the parties are hereby directed to appear for a conference on **June 29, 2022 at 10:00 A.M.** for the purpose of establishing a briefing schedule. This conference will be conducted virtually using Microsoft Teams.

Therefore, having considered NYSCEF documents 1 through 17, 20 through 24, 33 through 66, and 69 through 74, and oral argument having been heard on June 8, 2022 with Michael Crowe, Esq. appearing on behalf of petitioners and Karla Williams Buettner, Esq., Joshua M. Tallent, Esq. and Susan L. Taylor, Esq. appearing on behalf of respondents, it is hereby

ORDERED that petitioners' motion for a preliminary injunction is granted; and it is further

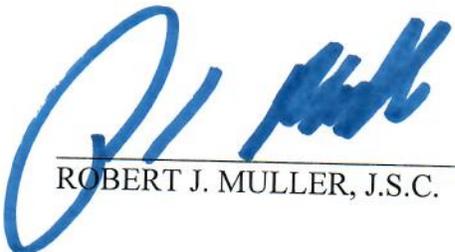
ORDERED that respondents are directed to refrain from administering, injecting or in any way introducing the chemical herbicide ProcellaCOR into the waters of Lake George pending the conclusion of this proceeding; and it is further

ORDERED that this preliminary injunction is contingent upon petitioners posting an undertaking in the amount of \$100,000.00 within **fifteen (15) days** of the date of this Decision and Order; and it is further

ORDERED that counsel for the parties shall appear for a conference on **June 29, 2022 at 10:00 A.M.**, which conference will be conducted virtually using Microsoft Teams.

The original of this Decision and Order has been filed by the Court. Counsel for petitioners is hereby directed to obtain a filed copy of the Decision and Order for service with notice of entry in accordance with CPLR 5513.

Dated: June 13, 2022
Lake George, New York



ROBERT J. MULLER, J.S.C.

ENTER: