
**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, THIRD DEPARTMENT**

In the Matter of
THOMAS JORLING,

Case No. 533913

Petitioner-Appellant,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules
And for Declaratory Relief

-against-

NEW YORK STATE ADIRONDACK PARK
AGENCY, NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, and LS
MARINA, LLC,

Respondents-Respondents.

**BRIEF OF *AMICI CURIAE* ADIRONDACK WILD: FRIENDS OF THE FOREST
PRESERVE AND SIERRA CLUB
IN SUPPORT OF PETITIONER-APPELLANT**

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INTEREST OF AMICI CURIAE

Amicus Adirondack Wild: Friends of the Forest Preserve (hereinafter “Adirondack Wild”) is a not-for-profit, membership organization whose mission is to safeguard the legal protections governing New York’s Forest Preserve lands in the Adirondack and Catskill Parks, and to promote public and private land stewardship in those parks that is consistent with wild land values through education, advocacy, and research. (Gibson aff, exhibit A, ¶ 4; *Our Mission*, Adirondack Wild, available at <https://adirondackwild.org/our-legacy/our-mission/> [last accessed Sept. 9, 2022]). Members of Adirondack Wild have consistently monitored the land use planning, policy, and management responsibilities of Respondents Adirondack Park Agency (hereinafter “APA” or “Respondent”) and New York State Department of Environmental Conservation (hereinafter “NYSDEC”) in the Adirondack Park (hereinafter “Park”), as they feel it is their duty to ensure that the laws and regulations protecting the Park’s natural resources and scenic beauty remain unviolated. (Gibson aff, exhibit A, ¶ 5).

Multiple Adirondack Wild members and board directors live in, and around, the Park. (*Id.* at ¶ 6). These members regularly utilize the Park through canoeing, kayaking, and enjoying the serenity and natural beauty of the Lower Saranac Lake, as well as the many other lakes and ponds located in the Saranac Lakes Wild Forest portion of the Adirondack Forest Preserve. (*Id.*) The interests of these members’ ability to continue to use and enjoy the Park are harmed whenever the carrying capacity of the land and waters of the Park are exceeded past what the land and water can tolerate, through grants or permits by the APA and/or NYSDEC to allow increased activity. (*Id.* at ¶ 7).

Adirondack Wild, and a predecessor the Association for the Protection of the Adirondacks (hereinafter “the Association”), have consistently supported the Adirondack Park State Land Master Plan’s mandate that both lands and waters here and elsewhere be classified, managed, and used to ensure that the protection and preservation of the natural resources of these state lands is paramount, and that the physical, social and biological carrying capacity of the Park’s lakes and ponds to accept human uses are not exceeded. (*Id.* at ¶ 8; *see also* Adirondack Park State Land Master Plan, p. 3-4 [hereinafter “APSLMP”] (explaining that “[t]he protection of the major watersheds [sic] of the state was a major reason for the creation of the forest preserve...[and] [w]aters, particularly lakes and ponds, have their carrying capacity from a physical, biological and social standpoint...”).

The Association was a co-plaintiff in *Matter of Adirondack Mountain Club, Inc. v. Adirondack Park Agency* (33 Misc 3d 383 [Sup Ct, Albany County 2011]), affirming the right and responsibility of the APA and NYSDEC to classify waterbodies. Adirondack Wild was also an *amicus curiae* in the *Protect the Adirondacks! v. New York State Department of Environmental Conservation & Adirondack Park Agency* (2021 NY Slip Op 02734, *1 [Ct App, NY 2021]), where the Court found the preservation of state-owned land within the Park was necessary under the forever wild clause. At their core, both of these cases were brought to uphold State government’s duty of stewardship of the land, water, air, and other natural resources of New York state and to prevent the development of the Park without proper consideration of the environmental impact.

Amicus Sierra Club is a national nonprofit organization with over 60 chapters and over 800,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth’s ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment;

and to using all lawful means to carry out these objectives. (Gray aff, exhibit B, at ¶ 4; *see also About the Sierra Club*, Sierra Club, available at <https://www.sierraclub.org/about-sierra-club> [last accessed Oct. 12, 2022]). The Atlantic Chapter of the Sierra Club has approximately 50,000 members. (Gray aff, exhibit B, at ¶ 5). The Club’s particular interest in this case and the issues which the case concerns stem from member’s use and enjoyment of the Adirondack Park. (*Id.* at ¶ 6). Members canoe and boat on Lower and Middle Saranac Lake and would be directly impacted by this ruling. (*Id.*).

The Atlantic Chapter of the Sierra Club (“Atlantic Chapter”) is responsible for membership activities in New York State. (*Id.* at ¶ 5; Red Hoppenstedt, *Sierra Club, Atlantic Chapter: History* [2012], available at <https://www.courthousenews.com/wp-content/uploads/2021/03/SierraClub-amicus.pdf> [last accessed Oct. 12, 2022]). The Atlantic Chapter has been headquartered in Albany since 1978 and devotes significant resources to cleaning up pollution and opposing environmentally unsound development projects. (*Id.*). The Atlantic Chapter has relied on the APSLMP and its Unit Management Plan process for protecting the open space qualities of the Adirondack Park in its work through the decades, from opposing an 18,000-acre Ton-Da-Lay development in 1972, to campaigning for protection of the 15,000-acre Whitney Park in the late 1990’s. (Gray aff, exhibit B, at ¶ 5; *see also Ton-Da-Lay, Ltd. v. Diamond*, 44 AD2d 430 [3d Dept 1974]).

The Atlantic Chapter took particular note of the lawsuit filed by former NYSDEC Commissioner Thomas Jorling against the APA. (Gray aff, exhibit B, at ¶ 7). Sierra Club believes that the APA’s failure to conduct a carrying capacity study of Adirondack lakes, as required by the APSLMP, represents a long-standing dereliction of duty by the APA. (*Id.* at ¶ 6). Earlier this year, a Sierra Club member, who uses the interconnected chain of Adirondack lakes, brought to

the Club's attention the fact that the same developer had purchased another old, small, marina on Upper Saranac Lake and had proposed a similar marina expansion to the APA. (*Id.* at ¶ 7). Sierra Club believes that the impending future development emphasizes the need for Sierra Club to weigh in on the importance of the APA to performing their statutory responsibility to conduct a carrying capacity study of this and other waterbodies in the Adirondack Park. (*Id.*).

PRELIMINARY STATEMENT

Amici agrees with Petitioner-Appellant that “the mandatory duty of [the] APA to protect the natural resources of the Adirondack Park (e.g., Lower Saranac Lake) cannot be lawfully fulfilled without the required carrying capacity study having been completed.” (Jorling Reply Brief, Doc. No. 33, at 12). Since the APA itself admits that “carrying-capacity study [is] called for in [the] 2019 unit management plan for the Saranac Lakes Wild Forest” and that it was not completed (APA Brief, Doc. No. 26, at 29), this Court should find reversible error on the part of the lower court. Without the carrying capacity analysis, the APA could not have evaluated the Marina Project's potential “undue adverse impact” upon the Lower Saranac Lake, as required under the Adirondack Park Agency Act. (*See* APA Act §§ 805[4][a], [c], 809[10][e]).

Amici's intention in submitting this brief is to aid the Court in better understanding that carrying capacity analysis is a requirement even when the State does not own the entirety of a water body's shoreline. Both the State and Marina Respondents argue that the APA was “not required to apply provisions of the master plan in a permitting proceeding that, as here, concerns private property.” (APA Brief, at 29; *see also* LS Marina Brief, Doc. No. 27, at 17). Petitioner-Appellant argues that “compliance with the provisions of the SLMP is required to satisfy APA's obligations in its review of a proposed project subject to APA's jurisdiction. The permitting proceeding at issue here concerns more than simply the applicant's private property; public

property and waterbodies located in the Adirondack Park are also involved.” (Jorling Reply Brief, at 15). This argument would benefit from further exploration, and *amici* believe that they can shine additional light on the issue. Further, *amici* aim to establish that this major failure on the part of APA is an example of a fatal flaw in the administrative record, as well as an error on the part of the lower Court’s in its decision. Additionally, this proceeding raises issues of important public and environmental interest as it concerns the APA and NYSDEC’s ability to permit waterbodies or waterfront recreational development without first determining the carrying capacity of that waterbody

Simply, this brief provides ample basis for overruling the judgment of the lower Court based on the record that is closely related to, but not covered by Petitioner-Appellants in this matter and was nonetheless fully within the Supreme Court’s judicial review. (*See Menorah Nursing Home v. Zukov*, 153 AD2d 13, 25-26 [2d Dept 1989]; *see also Vest v. Simcoe*, 61 AD2d 869, 870 [3d Dept 1978], affirming the Supreme Court’s dismissal of an Article 78 petition on alternative grounds; *Meehan v. Nassau Community. Coll.*, 243 AD2d 12, 19 [2d Dept 1998], affirming the lower Court’s decision on alternative grounds supported by the record).

ARGUMENT:

The Supreme Court Erred in Finding that Respondent APA Acted Reasonably and Non-Capriciously. The Master Plan and the Unit Management Plan Apply to the Marina Project, Regardless of Whether Portions of the Lakebed are Privately Owned, and as such, Carrying Capacity Analysis of the Lower Saranac Lake was Required.

This brief will not repeat arguments regarding the law ably set forth in the brief of Petitioner-Appellant.

The APA’s primary duty is to protect the environment of the Park, including both privately owned and State lands contained with the Park. (Executive Law § 801 (explaining that “[t]he basic purpose of this article is to insure [sic] optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack Park.”). For private development projects within the Park, APA must review the proposal for compliance with the Adirondack Park Agency Act and the Adirondack Park Land Use and Development Plan. (Executive Law § 805).

The Adirondack Park State Land Master Plan (“APSLMP”), as explained in the original Adirondack Park Agency Act (“The Act”), was to be “developed in consultation with the department of environmental conservation, for management of State lands...located in the Adirondack Park. Such plan shall (1) classify such lands according to their characteristics and capacity to withstand use and provide general guidelines and criteria for the management and use of lands within such classifications, and (2) reflect the actual and projected uses of private lands within the park . . .” (1971 APA Act § 807 [Laws of 1971, ch. 706]). The APSLMP requires carrying capacity analysis. (APSLMP, at 4). Carrying capacity analysis is a study “to determine each water body’s capacity to withstand various uses, particularly motorized uses and to maintain and enhance its biological natural and aesthetic qualities.” (*Id.*)

Carrying capacity analysis is a mandatory duty. The APSLMP explicitly states that “unit management plants *will* contain...an assessment of the physical biological, and social carrying capacity of the area with particular attention to portion of the area threatened by overuse in light of its research limitations and its classification under the master plan.” (APSLMP, at 10-11 [emphasis added]). Such a mandate is clear from the plain language of the APSLMP and it is supported by the further requirements and recommendations for studies that the APA must complete. For example, the APA is required by law to evaluate private project’s “potential for adverse impacts” upon the water and “adjoining nearby land uses.” (APA Act § 805[4][a], [c]). The Act also mandates that APA must evaluate the Project’s “conformance with other government controls,” which includes the APSLMP, UMP, and their requirement of carrying capacity analysis. (See APA Act § 805[4][e]). The APA Act and the APSLMP makes mandatory carrying capacity analysis to adequately determine whether permits can be granted.

It is not a novel concept that the APA should conduct carrying capacity analysis. The APSLMP has recommended since 1972 that waterbodies should be studied for carrying capacity:

A comprehensive study of Adirondack lakes and ponds should be conducted by the Department of Environmental Conservation to determine each water body's capacity to withstand various uses, particularly motorized uses and to maintain and enhance its biological, natural and aesthetic qualities. First emphasis should be given to major lakes and ponds totally surrounded by state land and to those on which state intensive use facilities exist or may be proposed. The importance of the quality of these resources cannot be overemphasized.

(APSLMP, at 4). There is a long history of the importance of carrying capacity analysis that is recommended in addition to the UMP carrying capacity requirement. Neither the recommendation nor the requirement has been followed by the APA in more than 50 years.

Respondent APA argues that “portions of the lakebed adjacent to both project sites are privately owned [and] [c]onsequently, neither the master plan nor the Saranac Lakes Wild Forest

unit management plan applies to the Marina’s project.” (APA Brief, at 30). The APA’s opinion on this matter reflects APA and NYSDEC’s longstanding, while incorrect, habit of not classifying nor managing the water body’s surface area when the State did not own the entire shoreline. (*Matter of Adirondack Mtn. Club v. Adirondack Park Agency*, 33 Misc 3d 383, 389 [Sup Ct, Albany County 2011] quoting APA General Counsel John Banta, aff. ¶ 22). This refusal to classify was examined in *the Matter of Adirondack Mtn. Club v. Adirondack Park Agency*. (33 Misc 3d 383 [Sup Ct, Albany County 2011]). The Court in that case found that “[t]he APA’s determination that it did not have to propose a classification for State owned bodies of water where the state did not own all of the shorefront around the water was a matter of statutory interpretation of the APA Act and the APSLMP,” and thus the Court did not afford the APA any deference. (*Id.* at 389-390). Accordingly, the Court found that both the Act and the APSLMP “require the APA to classify State owned bodies of water even if the water is contiguous to a private land holding.” (*Id.* at 390). The Court specifically held that no provision of the Act or the APSLMP “provides or suggests that the APA can choose not to propose a classification for State land, including State-owned bodies of water and State owned water subject to littoral or riparian rights (*Id.* at 391, citing to Executive Law § 802[27]; APSLMP, at 14-15). As such, the Court ordered that the “1987 approval of ‘the classification of the 9,100 acre Bog River Flow acquisition’ included the beds and waters of Lows Lake, Hitchins Pond, the Bog River, and Grass Pond.” (*Id.* at 397).

Here, as the Supreme Court found in the *Matter of Adirondack Mtn. Club v. Adirondack Park Agency*, the classification of the land surrounding Lower Saranac Lake should apply to the waters of the lake, regardless of private ownership of the shoreline. Consequently, the Lower Saranac Lake waters and lands under those waters are part of the Saranac Lake Wild Forest classification, and the carrying capacity of the Lake should be analyzed.

While classification is a separate process than carrying capacity analysis, it proceeds and sets the parameters in the APSLMP for the UMP planning process. The Act section 816 “directs the [NYSDEC] to develop, in consultation with the [APA], individual unit master plans for each unit of land [or waterbody] under its jurisdiction classified in the master plan.” (APSLMP, at 10 citing APA Act § 816). UMP’s “will contain....an assessment of the physical, biological and social carrying capacity of the area with particular attention to portions of the area threatened by overuse in light of its resource limitations and its classification under the master plan.” (*Id.* at 10-11). Classification is necessary so that the UMP reflects the guidelines of that classification. As it is explained in the APSLMP, once a classification for a waterbody is set, under the Act the NYSDEC and APA must create a UMP for the water body, which *will* contain carrying capacity analysis. (*Id.*) Thus, carrying capacity analysis, is required by law, regardless of the ownership of the water body’s shoreline.

While carrying capacity analysis is required by law, NYSDEC has indicated that it already has plans to do this analysis on the Lower Saranac Lake. NYSDEC’s expansion of the Second Pond boat launch was predicated on the fact that carrying capacity analysis would be completed as a part of the Saranac Lake Wild Forest UMP.

This site’s (Second Pond Boat Launch Site) carrying capacity will therefore be developed as a part of the Saranac Wild Forest UMP. Although they have different land classifications (Intensive use and Wild Forest), the Saranac Lake Wild Forest and Second Pond BLS are integral, and if conditions on the waters and lands of the Saranac Lakes Wild Forest are found to be outside acceptable limits, changes to the management of the Second Pond Intensive Use Area may be required.

(Second Boat Launch Unit Management Plan Final Supplemental Environmental Impact Statement, at 7, [May 2013], https://www.dec.ny.gov/docs/lands_forests_pdf/spblpfump.pdf [last visited Sept. 29, 2022]). NYSDEC indicated that the carrying capacity should be developed as part

of the Saranac Wild Forest UMP. The following management objectives and actions were identified by NYSDEC:

Objectives: The Department develops and coordinates a comprehensive study of lakes and ponds in the SLWF. Management Actions: Establish desired conditions to determine if carrying capacity has been exceeded. Desired conditions for water bodies may be ones that demonstrate the integrity of the water body ecosystem and appropriate recreation quality. Develop and implement a comprehensive monitoring program. Monitoring use of water bodies will help measure and determine impacts to better inform carrying capacity development and long-term planning. Final specifics will be detailed in the guidance for carrying capacity of Adirondack lakes and ponds. Monitoring could include photo point locations, boat counts, water analysis, and visitor surveys.

(NYSDEC Saranac Lakes Wild Forest UMP, at 112-113 [Feb. 2019], https://www.dec.ny.gov/docs/lands_forests_pdf/saranaclakesump.pdf [last visited Oct. 5, 2022]).

This was approved by the APA.

Establishing carrying capacity is crucial to ensure the integrity of waterbodies, as recognized by the NYSDEC. The APA should have delayed the approval of the Project until this legal obligation was fulfilled. The APA acted arbitrary, capriciously, and contrary to law in failing to conduct carrying capacity analysis. Consequently, it was not possible for the APA to approve the project because it could not, by definition, determine environmental impacts without knowing the carrying capacity of the lake. As such, the lower court must be reversed, and the approval must be annulled until and unless the APA completes its mandatory carrying capacity analysis.

CONCLUSION

For the foregoing reasons, and those stated in Plaintiff-Appellant's brief, this Court should reverse the Supreme Court of Essex County's order and annul, vacate, and set aside APA's September 2020 Order and DEC's temporary revocable permit. The Adirondack Park State Land Master Plan requires the development of individual Unit Master Plans, which require the creation

of carrying capacity. The Lower Saranac Lake surface water must be classified and addressed directly under the UMP with carrying capacity analysis prior to granting of a permit. APA's approval of the project without doing so is contrary to law and is thus arbitrary and capricious. The holding below should be reversed.

Dated: October 14, 2022

White Plains, New York

Respectfully Submitted,



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