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10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

In the Matter of the Application of
THOMAS JORLING,

No. 533913

Petitioner-Appellant,

v.

NEW YORK STATE ADIRONDACK PARK AGENCY ET AL.,

Respondents-Respondents,

For a Judgment Pursuant to Article 78 of
the Civil Practice Law & Rules.

BRIEF FOR STATE RESPONDENTS

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PRELIMINARY STATEMENT

The Saranac Lake Marina is a century-old, continuously operating commercial marina spread over two locations on Lower Saranac Lake. In a bid to rescue the financially struggling enterprise, new owner LS Marina, LLC (the Marina) developed a plan to replace the facility's original, dilapidated shoreline boathouses with modern, partially covered floating dock structures. Because the new dock structures would be within 50 feet of the shoreline and could impact wetland areas, the Marina applied to the Adirondack Park Agency (APA) for necessary approvals. Although the Marina razed the shoreline boathouses early in the permitting process, it retained the right to rebuild the nonconforming structures within their original footprints in the event of a permit denial.

Over the course of its lengthy and detailed review, APA successfully pressed the Marina to reduce project-related impacts by incorporating a series of environmentally friendly design changes. While the project as ultimately permitted and conditioned would increase the total number of boat berths at the facility by a third, it would also allow for significant revegetation in critical shoreline areas; improve water quality; reduce the number of boat slips in wetlands; calm and organize boat traffic; control

invasive species; and implement stormwater, wastewater, aesthetic, and other facility upgrades designed to minimize impacts to nearby property owners while improving local environmental conditions.

Petitioner, the owner of a vacation home across the lake from one of the project sites, commenced this proceeding to challenge APA's determination. Supreme Court, Essex County (Meyer, J.) denied the petition and dismissed the proceeding.

On appeal, petitioner claims APA misapplied its wetlands regulations, irrationally granted a variance from its shoreline setback requirements, failed to study boat traffic on the lake, and irrationally concluded that the Marina's project would not have an undue adverse impact on the Adirondack Park. But as Supreme Court correctly held, APA applied the right legal standards and, based on the extensive record before it, rationally determined that the project would yield a net environmental *benefit* for the lake and its users—especially as compared to reconstruction of the original shoreline boathouses. This Court should affirm.

QUESTIONS PRESENTED

1. Whether APA correctly applied its Freshwater Wetlands Act regulations.

Supreme Court did not address this question.

2. Whether APA rationally granted the Marina's application for a shoreline setback variance.

Supreme Court answered this question in the affirmative.

3. Whether APA rationally concluded that the Marina's project would not have an undue adverse impact on park resources.

Supreme Court answered this question in the affirmative.

4. Whether APA had authority to approve the Marina's permit application without first promulgating regulations specifically governing marinas.

Supreme Court did not address this unpreserved question.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Adirondack Park Agency Act (APA Act) charges 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 A.D.3d 756, 757 (3d Dep't 2011), *lv. dismissed*, 17 N.Y.3d 947 (2011), *lv. denied*, 18 N.Y.3d 806 (2012). As required by statute, APA has adopted a land use and development plan

classifying private lands into one of several land use areas. Lands classified as hamlet—including the project sites at issue here and the private lands surrounding them—are notable for their “diversity of residential, commercial, tourist and industrial development” and are “intended to accommodate a large portion of the necessary and natural expansion” of those uses. Executive Law § 805(3)(c)(1)–(2). All land uses are appropriate in hamlet areas; “[n]o overall intensity guideline is applicable.” *Id.* § 805(3)(c)(3)–(4).

The APA Act divides land uses or development into two classes, A and B. *See id.* § 810. “All land uses and development . . . involving wetlands” in hamlet areas are “class A regional projects” and require an APA permit. *See id.* §§ 809(2)(a), 810(1)(a)(1). Where, as here, a class A regional project is proposed for a “land use area not governed by an approved local land use program,” the APA Act sets forth a series of criteria the project must meet before a permit may issue. *See id.* § 809(10)(a)–(e). Separately, the APA Act restricts new land uses or development within 50 feet of the shoreline in hamlet areas. *See id.* § 806(1)(a)(2). And because APA regulates freshwater wetlands in the park under the Freshwater Wetlands Act, *see* Environmental Conservation Law § 24-0801(2),

agency regulations control new land uses or development having the potential to impact wetland resources. *See generally* 9 N.Y.C.R.R. part 578.

B. The Saranac Lake Marina

Established in 1924, the Saranac Lake Marina is a privately owned commercial marina located at two separate sites on the eastern end of Lower Saranac Lake. (Record on Appeal [R] 207, 369, 2457.) The main marina site is a 20-acre property containing approximately 655 feet of shoreline on an area of the lake known as Crescent Bay. (R208.) The annex site is a five-acre property containing approximately 1,355 feet of shoreline on an area of the lake known as Ampersand Bay. (R210.)

When the Marina purchased the properties, the main marina site contained 22 moorings in a mooring field in Crescent Bay and 102 slips in five nonconforming, dilapidated shoreline boathouses and along docks extending out into the bay. (R208.) The annex site contained 1 mooring; 82 slips in four nonconforming, similarly tumbledown boathouses; and at least 12 berths at beaching locations along the shore. (R210.) The Marina demolished all nine nonconforming shoreline boathouses between 2015 and 2020, allowing for the revegetation of over 16,000 square feet of littoral wetland. (R208, 210, 232.) The Marina retained the right, however,

to rebuild the nonconforming boathouses in their original footprints. *See* 9 N.Y.C.R.R. § 575.5(a).

C. The Proposed Rehabilitation Project and APA's Review

In April 2014, the Marina submitted an application for a shoreline setback variance to replace the preexisting boathouses with four floating covered dock structures at the main marina site and five floating covered dock structures at the annex site, increasing the overall number of berths at the facility from 219 to 300. (R212.) In May 2014, APA staff issued a request for additional information concerning the Marina's business plan and the economic justification for the number of slips proposed; visual impacts and mitigation measures; potential alternatives (including the use of a quick-launch boat launching system); potential impacts from increased boat traffic; and stormwater control and wastewater treatment plans. (R547–554.) In a July 2014 supplemental request, staff indicated that the main marina site contained areas of deep-water marsh with a value rating of three and that the annex site contained emergent and deep-water marsh with a value rating of two.¹ (R560.)

¹ Under APA's wetlands regulations, wetland resources are classified according to a value scale ranging from one (the most ecologically valuable) to four (the least). *See* 9 N.Y.C.R.R. §§ 578.5, 578.10.

In February 2016, the Marina renewed its request for a setback variance for both sites, submitted a Freshwater Wetlands Act permit application for the annex site, and responded to APA's May 2014 and July 2014 requests for additional information. (R217.) The Marina proposed shortening two of the floating dock structures at the main marina site to reduce visual impacts and to remain within the area historically occupied by the marina's mooring field, which would decrease the total number of slips from 300 to 292. (R1004–1005.) The Marina also stated that the floating dock structures would use green, non-reflective roof panels and dark brown supports and would incorporate hip roofs to lessen visual impacts; the project would include a boat wash station, an invasive species control plan, a stormwater management plan, and wastewater treatment system upgrades; and all lighting would be dark sky-compliant—that is, designed to minimize light pollution. (R1003–1004, 1006, 1008, 1010.) Regarding alternatives, the Marina explained that a quick-launch system was undesirable because, among other things, it would require construction of a large, warehouse-like structure. (R1021.) The Marina also submitted a formal business plan (R1302–1312) and a boat traffic study concluding that the proposed 73-slip increase would not adversely impact

the lake or its users (R1176–1197). Regarding wetland impacts at the annex, the Marina noted that removal of the preexisting shoreline boat-houses would allow for significant revegetation in the lake’s sensitive littoral or nearshore area; improved boat traffic patterns would better protect the shore and existing wetland areas; shading from the proposed dock structures would have limited impacts on subaquatic vegetation; and the project would reduce the overall number of slips in wetlands. (R1019–1020.)

In February 2016, APA issued a notice of incomplete permit application requesting that the Marina address wetlands impacts at the main marina. (R1298–1299.) The Marina complied. (R1321–1388.) In March 2016, APA issued a second notice of incomplete permit application for the wetlands permit and a second request for additional information for the variance application. (R1391–1398.) In its July 2016 response, the Marina stated that it had modified its project plans to reduce the need for a variance on upland areas within 50 feet of the lake; that it had considered but rejected the possibility of relocating three of the proposed floating docks at the annex site to avoid wetland impacts; and that any further

reduction in the total number of slips would be economically unsustainable. (R1459, 1469.)

In August 2016, APA issued a third notice of incomplete permit application for the Marina's wetlands permit and a third request for additional information for the variance request. (R2013–2021.) In a March 2017 response, the Marina conceded that it did not know who owned the submerged lands under portions of the proposed floating docks in Crescent Bay. (R2224.)

In May 2020, following an adverse possession action, *see LS Mar., LLC v. Acme of Saranac, LLC*, 174 A.D.3d 1104, 1108 (3d Dep't 2019), and after having secured title to an additional parcel of underwater land in Crescent Bay (R2541–2547), the Marina approached APA with a modified proposal (R2538–2540). While the Marina continued to request approval for 292 slips, it proposed to eliminate the roof over large portions of three of the four floating docks at the main marina and add skylights to the covered floating docks at the annex. (R2539, 2573–2574, 2945.) In support of its proposal, the Marina submitted a sun study concluding that the addition of skylights would significantly reduce the area of sub-aquatic vegetation impacted by shading. (R2587–2597.) The Marina also

submitted a biologist’s report concluding that the floating dock structures would have relatively minor impacts on subaquatic vegetation and could in fact “result in a positive benefit to the aquatic ecosystem.” (R2603.) At APA’s behest, the Marina later agreed to remove the roof over one of the floating docks at the annex site, thus further reducing potential wetland impacts. (R228, 2975.)

In August 2020, after more than six years of review, APA determined the Marina’s wetlands permit and variance applications were complete. (R230.)

D. APA’s Permit

After soliciting public comment on the applications, APA staff forwarded a draft permit and supporting findings to the APA board and recommended that the permit and variance request be granted with conditions. (R230–231, 238–239.) Staff presented their analysis to the board at a public meeting, and the board voted to grant the requested variance and issue the permit.² (R239–240.) The permit required that the Marina

² APA staff’s September 10, 2020 presentation to the board is part of the administrative record and is available on APA’s website at http://nysapa.granicus.com/ViewPublisher.php?view_id=2 (last visited Aug. 9, 2022).

implement all aspects of the project as approved, including provisions relating to stormwater and wastewater control, erosion control and plantings, buoys and signage, lighting, visual impact mitigation, and invasive species control. (R239.)

E. This Proceeding and the Decision Below

Petitioner subsequently commenced this combined C.P.L.R. article 78 proceeding and action for a declaratory judgment to annul the APA permit.³ (R92, 171.) Petitioner argued that APA miscategorized the wetland resources at the annex site, misapplied its variance regulations, and failed to explain the factual and legal bases for its permitting determination. Petitioner also argued that APA was required to conduct a boat traffic carrying-capacity study of the lake and that the administrative record did not support the agency's Freshwater Wetlands Act or APA Act determinations.

³ Petitioner also challenged a temporary Department of Environmental Conservation (DEC) permit issued in connection with planned dock construction at the annex site. Because petitioner withdrew his challenge to the DEC permit at oral argument (R5477), we do not address that challenge here. In any case, that permit expired in October 2021 (R4651) and has not been renewed.

APA answered (R175–206) and filed the certified administrative return (R308–4700) with three supporting affidavits (R207–307). Supreme Court denied the petition and complaint in its entirety and dismissed the proceeding. (R30.) The court held that APA provided adequate facts in its detailed permit (R23–24) and that the agency’s variance determination was rational in view of the record (R24–26). The court also held that petitioner’s carrying-capacity argument was not ripe for review (R27) and that APA had rationally concluded, based on the extensive record before it, that the project’s many environmental benefits outweighed any potential adverse impacts (R27–30).

Petitioner now appeals.

ARGUMENT

In proceedings in the nature of mandamus to review an agency determination, “[the court’s] role 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 N.Y.3d 184, 197 (2019). “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).

POINT I

APA PROPERLY ANALYZED WETLANDS IMPACTS

Petitioner’s contrary argument notwithstanding (*see* Br. at 20–23), APA properly applied its regulations when it classified the wetlands at the annex site as a value-two resource and rationally determined that the project satisfied value-two regulatory criteria.

A. APA Properly Applied its Wetlands Regulations.

Petitioner argues that the wetlands at the annex site possess three value-two characteristics and so should have been classified as a value-one resource under the agency’s rules. This argument is incorrect.

Under APA’s wetlands regulations, permitting requirements are indexed to the value rating of the wetlands affected; higher-value wetlands are subject to stricter controls. *See* 9 N.Y.C.R.R. § 578.10. The regulations assign values according to the affected wetlands’ particular characteristics, which in turn are grouped into six “factors” or classes. *See id.* § 578.5. “Where a wetland contains multiple values based upon more than one factor listed in section 578.5,” three or more value-two characteristics will

raise the wetland's overall value from two to one. *Id.* § 578.6(c).

APA promulgated its wetlands regulations in 1982. Since 1984, the agency has interpreted the word “factor” in 9 N.Y.C.R.R. § 578.6 to refer to the classes of characteristics identified in 9 N.Y.C.R.R. § 578.5.⁴ The agency has also long interpreted the phrase “more than one” in § 578.6 to require elevation to a value-one rating only where a wetland has value-two characteristics in at least three separate factors. Where, as here, “an agency adopts a construction [that] is . . . followed for a long period of time, such interpretation is entitled to great weight and may not be ignored.” *Andryeyeva v. New York Health Care, Inc.*, 33 N.Y.3d 152, 174 (internal quotation marks and citation omitted).⁵

⁴ APA's 1984 interpretative memorandum is appended to this brief, see 22 N.Y.C.R.R. § 1250.8(k), and is also available on the agency's website at https://www.apa.ny.gov/Documents/Guidelines/2012_and_1984_578_memos.pdf (last visited Aug. 8, 2022).

⁵ APA's interpretation is also entirely consistent with the language of the regulations, see 9 N.Y.C.R.R. § 578.6 (referring to multiple values based on “more than one factor”) and rationally avoids over-restricting the use of wetland resources. As the agency's memorandum suggests, the interpretation petitioner favors would, if adopted, have the effect of prohibiting virtually all human activity in large swaths of the Adirondack Park. See *id.* § 578.10(a)(1)(ii) (prohibiting regulated activities in value-one wetlands where the proposed activity would “result in degradation or loss of any part of the wetland or its associated values”).

The wetlands at the annex are composed of three covertypes: emergent marsh, deep-water marsh, and shrub swamp. (R210.) Because they contain areas of emergent marsh and are composed of two or more “structural groups” as defined by regulation, the annex wetlands possess two value-two characteristics under the “wetland covertypes” factor. *See* 9 N.Y.C.R.R. § 578.5(c), (g). Because the wetlands are between 2 and 20 acres in size and associated with open water, they also possess a value-two characteristic under the “wetlands related to surface water systems” factor. *See id.* § 578.5(k). The wetlands thus exhibit value-two characteristics under only two factors or classes of characteristics, not three, and APA properly analyzed them as a value-two resource under its longstanding interpretation of 9 N.Y.C.R.R. § 578.6(c).

B. APA Rationally Issued the Wetlands Permit.

In a conclusory footnote insufficient to raise the issue for the Court, *see Bombard v. Central Hudson Gas & Elec. Co.*, 205 A.D.2d 1018, 1020 (3d Dep’t 1994), petitioner challenges APA’s Freshwater Wetlands Act determination for the annex site as irrational even under value-two criteria. (*See Br.* at 22 n.10.) If the Court considers this argument, it should reject it.

To authorize regulated activities in a value-two wetland, APA must determine that the activities proposed “would result in minimal degradation or destruction of the wetland and its associated values” and are “the only alternative [that] reasonably can accomplish the applicant’s objective.” 9 N.Y.C.R.R. § 578.10(a). The agency made that determination here (R3545), and the record amply supports it.

Taking the “minimal degradation” prong first, APA rationally concluded that the project would (at most) minimally impact wetlands and, on balance, improve local environmental conditions. (R3535, 3541–3545.) At the annex site—where invasive Eurasian and variable-leaf watermilfoils are the “dominant” aquatic plants (R820, 2599)—the Marina’s sun study shows that between 13,986 and 16,321 square feet of lakebed could lack adequate sunlight for plant growth (R2636–2645, 2705). Removal of the preexisting shoreline boathouses, however, has allowed for the revegetation of approximately 14,871 square feet of wetland. (R210–211, 232.) Accordingly, the overall impact would range, depending on the light penetration threshold applied, from a net *gain* of 885 square feet of wetland to, in the most conservative scenario, a net loss of 1,450 square feet of wetland or slightly more than three hundredths of an acre. (R232, 2591,

3088–3097, 3169.)

Notwithstanding any small potential loss of area, the record shows the project would likely enhance the wetlands and their associated values in several ways. Removal of the nonconforming shoreline boathouses has allowed wildlife to move to and from the lake and “opened up the shallowest parts of the littoral zone” to plants and animals. (R3541.) *See* 9 N.Y.C.R.R. § 578.4(b), (d) (wetlands provide valuable habitat for wildlife). The revegetation facilitated by structure removal has also “helped to stabilize the shoreline and to prevent erosion and sedimentation into the lake,” thus reducing turbidity and improving water quality. (R3541.) *See* 9 N.Y.C.R.R. § 578.4 (a), (c) (wetlands reduce erosion and sedimentation and enhance water quality). And the permit requires the Marina to manage stormwater flows, follow a planting plan to further reduce erosion and sedimentation, and execute an invasive species removal and mitigation plan. (R3539–3540.)

To the extent petitioner suggests the proposed floating docks would physically disturb the lakebed (*see* Br. at 4), the record shows the docks’ support pipes measure only five inches each in diameter and would take up less than four square feet of underwater land *in total*—far less than

was occupied by the extensive cribbing under the original boathouses. (R495, 1004.) And while petitioner suggests the floating docks would degrade wildlife habitat (*see* Br. at 4, 16), the record shows that construction of the floating dock structures would create “thermal cover and resting/ambush habitat” and “could provide enhanced habitat for the . . . fish, mollusks, and other macroinvertebrates that inhabit the lake.” (R3029.)

Petitioner suggests boat propellers will harm wetlands. (*See* Br. at 16). On the contrary, the record shows the project would shift boat traffic into deeper water further from sensitive nearshore areas, thus reducing erosion, turbidity, and direct physical impacts from propeller strikes. (R684, 1468.) The elimination of boat beaching, a proposed buoy and signage plan, and an overall reduction in the number of boat slips in wetlands would further protect wetland areas. (R233, 936, 989, 1009–1010, 1467.)

In sum, based on the record before it and notwithstanding the possible loss of a small area of wetland vegetation, APA rationally concluded that the project “would result in minimal degradation or destruction of the wetland and its associated values.” 9 N.Y.C.R.R. § 578.10(a).

APA also rationally concluded that the project was “the only alternative [that] reasonably can accomplish the applicant’s objectives.” *Id.* As

the record makes clear, the agency repeatedly pressed the Marina to reduce wetland impacts through changes to the project's scope and design. In the first request for additional information, APA staff asked the Marina whether it had evaluated a quick-launch system or other alternatives "that could eliminate or reduce the size of the proposed covered dock structures." (R552.) The Marina responded that it had rejected the use of a quick-launch system at the annex because it would require construction of an "expansive warehouse building . . . approximately the size of a football field and [four] stories tall," as well as installation of additional impervious surface along the shore of the lake and a "headwall" for launching boats. (R1021.) And in response to APA staff questions regarding the need for an expanded number of covered slips, the Marina submitted a business plan and market analysis indicating that increasing the number of available covered slips was critical to the project's financial viability. (R1310–1311.)

In the second request for additional information, APA staff asked whether the Marina had considered eliminating or reconfiguring dock structures to avoid wetlands impacts. (R1397.) In response, the Marina stated that it had considered moving some of the floating dock structures

at the annex site to the west to avoid subaquatic vegetation. (R1469.) The Marina concluded, however, that such a design change would reduce the area of structures over wetlands by only 300 square feet while potentially interfering with the adjacent landowner's littoral rights. (R1469.)

In the third request for additional information, staff again pressed the Marina to limit wetlands impacts, including through the removal of all or at least some of the covers over the proposed floating dock structures. (R2017–2019.) The Marina ultimately agreed to remove the roof from one of the floating docks at the annex, thus reducing the area of proposed structures over wetlands by more than 8,300 square feet. (R2975.) The Marina further reduced wetlands impacts by agreeing to install skylights in the remaining covered structures to minimize shading of subaquatic vegetation. (R2587–2589.)

In sum, the record reflects that the Marina—at APA's behest— took a hard look at ways to reduce wetland impacts by modifying the project's scope or design, compromising when it could, and explaining why when further modifications were not feasible. Accordingly, APA rationally concluded that the project as proposed was the only reasonable alternative that could accomplish the Marina's objectives.

POINT II

APA RATIONALLY GRANTED THE MARINA'S VARIANCE REQUEST

Petitioner's contrary argument notwithstanding (*see* Br. at 16–20), APA rationally granted the Marina's request for a variance from the APA Act's 50-foot shoreline setback requirement.

Under the APA Act, “[t]he minimum setback of all principal buildings and accessory structures in excess of [100] square feet . . . from the mean high-water mark” of lakes, ponds, rivers, and streams in the park “shall be [50] feet in hamlet areas.” Executive Law § 806(1)(a).⁶ APA is authorized to relax the setback requirement, however, “where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the restrictions.” *Id.* § 806(3)(a). APA's rules, drawn from controlling case law, *see Sasso v. Osgood*, 86 N.Y.2d 374, 381 (1995), set forth the test the agency applies in evaluating requests for an area variance. Under 9 N.Y.C.R.R. § 576.1(b), APA must balance “the adverse consequences to the applicant resulting from denial” against “the public

⁶ While the statute excludes docks and boathouses from the setback requirement, the Marina's proposed floating covered structures are neither docks nor boathouses as defined under APA's rules. *See* 9 N.Y.C.R.R. 570.3(c), (j).

purpose sought to be served by the restriction.” 9 N.Y.C.R.R. § 576.1(c)

sets forth a non-exclusive list of factors for the agency to consider:

(1) whether the application requests the minimum relief necessary; (2) whether granting the variance will create a substantial detriment to adjoining or nearby landowners; (3) whether the difficulty can be obviated by a feasible method other than a variance; (4) the manner in which the difficulty arose; (5) whether granting the variance will adversely affect the natural, scenic, and open space resources of the park and any adjoining water body, due to erosion, surface runoff, subsurface sewage effluent, change in aesthetic character, or any other impacts which would otherwise not occur; and (6) whether the imposition of conditions upon the granting of the variance will ameliorate the adverse effects referred to in [factor five].

9 N.Y.C.R.R. § 576.1(c)(1)–(6).

To the extent petitioner renews his argument that the Marina cannot meet the “practical difficulties” standard without showing that the unique topography of the main marina and/or annex sites prevents it from complying with the setback restriction (*see* Br. at 19–20), that argument is mistaken. While physical impracticability is relevant to the variance analysis, *see, e.g., Sasso*, 86 N.Y.2d at 380, it is not determinative. To the contrary, because “there is no precise definition of the term ‘practical difficulties,’” APA must evaluate a variety of factors as it balances “whether strict application of the [setback restriction] in a given case will

serve a valid public purpose [that] outweighs the injury to the property owner” if the restriction is not varied. *Id.* at 381; *see also Matter of Friendly Ice Cream Corp. v. Barrett*, 106 A.D.2d 748, 749 (3d Dep’t 1984) (applying multi-factor test as part of an area variance balancing analysis).

Consistent with Executive Law § 806(1), the shoreline setback restriction is intended to “protect water quality and the qualities of Adirondack shorelines.” (R3052.) Here, APA carefully evaluated the project in view of the factors set forth in 9 N.Y.C.R.R. § 576.1(c), balanced public and private interests as required by 9 N.Y.C.R.R. § 576.1(b), and rationally concluded that granting the variance would better accomplish statutory objectives. (R3541–3545.)

Regarding whether the Marina sought the minimum relief necessary, *see* 9 N.Y.C.R.R. § 576.1(c)(1), APA noted that the Marina had significantly altered the project plans over time, thus greatly reducing the size of the variance necessary to meet its goals. (R3542.) In particular, the Marina abandoned most planned development above the lake’s mean high-water mark and reduced or removed the roofs over several proposed floating dock structures, thus reducing the areal extent of the variance

request by nearly 40 percent.⁷ (R3174, 3189, 3256.) And in response to APA staff's repeated suggestions that the Marina consider alternatives or scale back the project, the Marina showed that it had considered and rejected various alternatives and provided a business plan explaining why the project could not be further reduced in size. (R1021, 1302–1312, 1469.)

Regarding whether the project would “create a substantial detriment to adjoining or nearby owners,” 9 N.Y.C.R.R. § 576.1(c)(2), APA noted that the proposed floating dock structures—which would replace a set of unsightly and unsafe shoreline boathouses (R763, 766, 786–789)—would not be visible from the neighboring Saranac Lakes Wild Forest; that the structures would be painted green and brown to minimize visual impacts; and that stormwater management plans, planting plans, wetland revegetation, and other project attributes would (to the neighbors' benefit) improve water quality in the lake. (R3542–3543.)

While APA recognized that the project would result in an overall increase of 73 slips (which translates *at peak use* to approximately 12

⁷ The Marina did request—and was granted—a small shoreward variance to allow for reconstruction of the boat launch at the main marina site. (R3446.)

additional boats on the lake, *see infra* at 32), it also noted that the project involves a modest expansion at a century-old, continuously operating commercial marina in a hamlet area. (R3506, 3509.) Because hamlet areas are intended to “serve as the [park’s] service and growth centers” and to “accommodate a large portion of the necessary and natural expansion of the park’s housing, commercial and industrial activities,” Executive Law § 805(3)(c)(2), the agency rationally concluded that any minor project-related impacts were site-appropriate and within the reasonable expectations of nearby landowners. *See Matter of Protect the Adirondacks!, Inc. v. Adirondack Park Agency*, 121 A.D.3d 63, 71 (3d Dep’t 2014), *lv. dismissed and denied* 24 N.Y.3d 1065 (2014). In any case, impacts associated with a potential increase in boat traffic would be mitigated by the project’s signage and buoy plan (which would slow and organize boat traffic) and by the reorientation of boat traffic into deeper waters and away from sensitive littoral areas. (R1009, 1028, 1069, 1170–1175.)

Regarding whether the variance would “adversely affect the natural, scenic, and open space resources of the park and any adjoining waterbody,” 9 N.Y.C.R.R. § 576.1(c)(5), APA rationally concluded that the project would, on balance, benefit the lake in several ways. Replacement

of the preexisting shoreline boathouses with floating dock structures extending into the lake would protect sensitive nearshore areas by keeping boats further from shore. (R1467–1468.) Transitioning from shoreline boathouses to floating docks would allow for the reestablishment of significant areas of wetland vegetation, which in turn would benefit animal communities by improving habitat and reducing erosion and sedimentation into the lake. (R3541.) The project would protect water quality by implementing a stormwater management plan for both project sites and by replacing antiquated septic systems—some of which may have been constructed within 100 feet of the lake (R234)—with modern wastewater treatment systems (R1066, 3534). As APA noted, the proposed covered docks would cause no additional runoff or erosion (R3541), and the project’s other features, including planting requirements and the incorporation of dark sky-compliant lights and permeable surfaces, would benefit the shoreline and the lake alike (R1006–1007, 2262–2264, 2571, 3544). *See* 9 N.Y.C.R.R. § 576.1(c)(6).

In view of the foregoing, APA rationally concluded that granting the variance would avoid adverse economic consequences to the Marina *and* further the purposes of the shoreline setback restriction. (R3541–3542.)

See 9 N.Y.C.R.R. § 576.1(b). In reaching that conclusion, APA properly compared the variance request to the building rights the Marina or a subsequent owner would possess in the *absence* of a variance. The Marina’s operation is a nonconforming use that predates the APA Act. Under the Act and the agency’s regulations, the Marina has a right to rebuild approximately 27,000 square feet of shoreline structures within the 50-foot setback. (R3544.) *See* 9 N.Y.C.R.R. § 575.5(a). Reconstruction of the nonconforming boathouses would harm the environment by eliminating revegetated littoral wetlands and animal habitat, increasing erosion and sedimentation into the lake and, ultimately, decreasing water quality. (R3542.) And while rebuilding the shoreline boathouses could result in a smaller number of slips, the Marina would retain the right to build uncovered docks of unlimited length without agency review or approval, so long as the structures qualified as docks under APA’s regulations and were not in wetlands. (R3544.) *See* Executive Law § 806(1)(a)(2) (setback does not apply to “docks or boathouses”); 9 N.Y.C.R.R. § 570.3(j) (defining “dock”). Denying the Marina’s variance request thus could *increase* project-related impacts. *See* 9 N.Y.C.R.R. § 576.1(c)(3). And because the Marina could rebuild the shoreline boathouses and add uncovered docks

without seeking APA approval, the agency would be unable to impose the stormwater pollution prevention, wastewater treatment, or other similarly protective requirements on which it conditioned the challenged permit. *See* 9 N.Y.C.R.R. § 576.1(c)(6).

In sum, by approving the variance, APA not only made permanent the environmental gains flowing from the removal of the nonconforming boathouses but also secured the ability to minimize impacts through permit conditions. Because the shoreline setback requirement is designed to protect the shoreline and water quality and granting the variance would better accomplish those goals, APA's decision to grant the variance was rational.

POINT III

APA RATIONALLY CONCLUDED THAT THE PROJECT SATISFIED THE APA ACT'S PERMITTING CRITERIA

As Supreme Court correctly held, APA had no obligation to conduct a study of the lake's boat traffic carrying capacity before it concluded—rationally—that the project would not have an undue adverse impact on park resources.

As an initial matter, petitioner claims Supreme Court erroneously rejected his carrying-capacity argument on ripeness grounds. (*See* Br. at

13–15.) The court appears to have concluded that DEC has yet to conduct the carrying-capacity study called for in its 2019 unit management plan for the Saranac Lakes Wild Forest and, therefore, that any challenge to that administrative action (or inaction) is unripe. (R55–56.) But even if Supreme Court erred in this analysis, remand on the issue is unnecessary. As discussed below, neither the Adirondack Park state land master plan nor the Saranac Lakes Wild Forest unit management plan applies to the Marina’s private property.

A. APA Was Not Required to Conduct a Carrying-Capacity Study.

Contrary to petitioner’s argument (*see* Br. at 6–13, 23–25), the master plan did not obligate APA to conduct a carrying-capacity study of Lower Saranac Lake before issuing a permit. As even petitioner appears to recognize (*see* Br. at 7–8), the master plan and related unit management plans apply only to state-owned land. *See* Executive Law § 802(34) (specifying that the master plan is for management of state lands); *id.* § 816(1) (directing DEC to develop unit management plans “for units of land classified in the master plan for management of state lands”). APA is simply not required to apply provisions of the master plan in a permitting proceeding that, as here, concerns private property.

Petitioner attempts to avoid this fatal flaw in two ways, neither of which has merit. First, he argues that the whole of Lower Saranac Lake constitutes “waters of the State of New York” and is therefore subject to regulation under the master plan. (Br. at 9.) But whether the waters of the lake are, as petitioner asserts (*see* Br. at 9 n.6), burdened by a public right of navigation has nothing to do with whether or to what extent the lakebed and the waters above it belong to the State. As the record makes clear, the portions of the lakebed adjacent to both project sites are privately owned. (R264–265, 2507–2513.) Consequently, neither the master plan nor the Saranac Lakes Wild Forest unit management plan applies to the Marina’s project.

Second, petitioner argues that the master plan governs the Marina’s private property because the APA Act requires consideration of a project’s “[c]onformance with other governmental controls.” (Br. at 25, quoting Executive Law § 805(4).) But that requirement cannot reasonably be read to incorporate *any* governmental regulation, including those that have no application to a project in the first place. The Court should not conclude that the Legislature intended through § 805(4) to surreptitiously apply the master plan to public and private lands alike, in direct

contravention of the APA Act’s plain text and overarching scheme. *See* Executive Law § 805(1)(a); *see also id.* former § 807(1).

B. APA’s Adverse Impact Analysis Was Rational.

Turning to the APA Act analysis, the record—which, notably, includes a boat traffic study—amply supports the agency’s conclusion that the project would not unduly impact water quality, wetlands, neighboring property owners, or other resources in the park. (R3543.)

Before permitting land use or development involving wetlands in a hamlet area, APA must determine 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 or upon the ability of the public to provide supporting facilities and services made necessary by the project, taking into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project.

Executive Law § 809(10)(e). APA Act § 805 sets forth 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 water quality impacts, erosion and sedimentation, changes to drainage and runoff patterns, wetlands impacts, and impacts on fish and wildlife, aesthetics, and adjoining and nearby land uses. *See*

id.

During the project planning process, the Marina submitted a boat traffic study to the Town of Harrietstown. (R1176–1197.) Based on a survey of available literature supplemented with on-the-ground observations conducted on a sunny holiday weekend (R1183), the Marina’s consultant concluded that 16% of the boats docked at the marina were likely to be on the water at times of peak use. (R1185–1187.) Based on that “conservative” peak-use factor (R1187), the project’s 73-slip increase would translate at most to only *12 additional boats* on 2,200-acre Lower Saranac Lake (R1178). Accounting for the traffic-calming effects of the project’s signage and buoy plan (R1009–1010), APA rationally weighed this small potential increase in boat traffic against the project’s significant ecological benefits and determined that the project would not have an undue adverse impact on park resources.⁸

⁸ Pointing to an email from an APA staff member, petitioner claims the Marina’s boat traffic study was not part of the agency record. (*See Br.* at 12.) The referenced email, however, is incorrect: as the record makes clear, the Marina submitted the boat traffic study in response to APA’s May 2014 request for additional information. (R554, 994, 997.) The study was part of the permitting record submitted to the APA board for review and was discussed at the board’s September 10, 2021 meeting. *See APA board meeting (Sept. 10, 2021) at 2:30–2:50, 3:05–3:11, 3:21–3:34.*

To the extent petitioner claims—cursorily—that the APA failed to adequately review potential water quality and wetlands impacts (*see* Br. at 23–24), he is mistaken. The agency extensively reviewed the potential for such impacts in the context of its wetlands permitting and variance analyses. *See supra* at 16–20, 24–26. Given that the Marina could lawfully rebuild approximately 27,000 square feet of nonconforming structures directly along the shoreline without an APA permit and in view of the project’s many environmental benefits, the agency rationally balanced impacts and determined that issuing the permit would better protect the shoreline and water quality. (R3545.)

Likewise meritless is petitioner’s claim that APA somehow failed to account for adverse impacts to nearby public lands. (*See* Br. at 24–25.) Petitioner does not explain how the proposed project might impact DEC’s Saranac Lake Islands campground or its non-motorized boat launch in Ampersand Bay. On the basis of extensive visual analysis materials submitted with the permit application, APA concluded that the proposed floating dock structures at the main marina would be visible almost exclusively from private lands in hamlet, moderate-intensity use, or low-intensity use areas. (R235.) To the extent petitioner suggests the dock

structures would impact views from the Saranac Lakes Wild Forest, the record shows the Marina shortened the proposed docks at the main marina site to ensure they would *not* be visible from neighboring state lands. (R235.)⁹ And at the annex, the record shows the proposed floating dock structures would be visible only from nearby hamlet areas and from the intensive-use areas surrounding the DEC non-motorized boat launch in Ampersand Bay. (R236.) In any case, as APA noted, Ampersand Bay is already home to a resort hotel and marina and various shoreline residences (R236), and DEC’s navigability analysis indicates that permitted activities at the annex site would not adversely impact navigation on the lake (R4694).

POINT IV

APA HAS NO LEGAL OBLIGATION TO PROMULGATE MARINA-SPECIFIC REGULATIONS

On appeal, petitioner argues that APA acted arbitrarily by issuing a permit without first promulgating specific regulatory standards for marinas. (*See Br.* at 26–28.) Because petitioner raised this argument for the first time in his reply brief before Supreme Court, it is unpreserved for

⁹ While petitioner suggests the project would adversely impact a popular swimming rock in Crescent Bay (*see Br.* at 24), that rock is on the Marina’s private property. (R209.)

the Court's review. *See Matter of Held v. State of N.Y. Workers' Compensation Bd.*, 103 A.D.3d 1063, 1065 n.1 (3d Dep't 2013). To the extent petitioner invokes the State Administrative Procedure Act (SAPA) (*see* Br. at 26), that argument too is unpreserved. *See id.*

These arguments are also incorrect. As an initial matter, APA may only exercise the authority conferred upon it by the Legislature. While the APA Act grants the agency class B regional project jurisdiction over marinas in moderate-intensity, low-intensity, rural, and resource management land use areas, *see* Executive Law § 810(2)(a), (b), (c), (d), it does not extend APA jurisdiction to marinas in areas designated as hamlet, *see id.* § 810(1)(a). The agency cannot through rulemaking give itself authority the Legislature has not seen fit to grant.

In any event, even assuming APA had an independent statutory basis for regulating marina projects in hamlet areas, there is no general requirement that agencies translate statutory directives “into formal and detailed rules of thumb prior to their application to a particular case.” *American Power & Light Co. v. SEC*, 329 U.S. 90, 106 (1946); *accord Matter of Occidental Chem. Corp. v. New York State Envtl. Facilities Corp.*, 113 A.D.2d 4, 6 (3d Dep't 1985), *lv. denied*, 67 N.Y.2d 604 (1986). The

APA Act determines what projects require an agency permit and defines the criteria a project must satisfy before a permit may be issued. *See* Executive Law § 809(10). While APA may promulgate more specific regulations to guide its permitting analysis, *see id.* § 804(9) (empowering the agency to adopt, amend, and repeal regulations), it may also review permit applications using only the detailed criteria set forth in the statute. The agency’s sole obligation is to “effect [the APA Act’s] mandate in any particular instance in conformity with the statutory language and policy.” *Matter of Occidental Chem. Corp.*, 113 A.D.3d at 6.

To the extent petitioner relies on SAPA, the introductory provision he quotes does not impose an enforceable obligation on state agencies. *See* SAPA § 101.

CONCLUSION

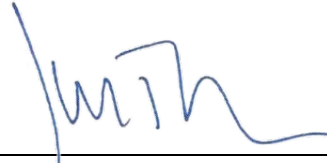
For the reasons stated above, Supreme Court’s order and judgment should be affirmed.

Dated: August 10, 2022
Albany, New York

Respectfully submitted,

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ADDENDUM



MEMORANDUM

TO: File

FROM: Mark Rooks

MR

DATE: October 17, 2012

RE: 1984 memo from Ray Curran and Gary Duprey

Ray and Gary wrote a memo to Acting ED Ed Lynch in 1984 about interpreting Agency regulations addressing wetland values. The copy I have has been copied so many times as to be almost illegible and I can't find the original or a good copy, so I am transcribing the memo. The poor copy will be reproduced because it depends in part on a hand-drawn diagram.

C: Daniel M. Spada
Mary O'Dell

[Transcription begins]

To: Edmund E. Lynch

From: Raymond P. Curran and Gary J. Duprey

Date: June 17, 1984

Subject: Interpreting Part 578 of the Agency's Rules and Regulations

Since May 1, 1983 the Agency's Rules and Regulations regarding the implementation of the New York State Freshwater Wetlands Act have been in effect. To date, 62 applications for wetland permits have been received. Of the 62 applications, 30 have been for the purpose of constructing woods roads for forestry activities. Based on staff's field experiences in applying the Rules and Regulations, it is apparent that Sections 578.5(k) (associated with open water) is too tightly written with regard

to the value rating. It does not provide flexibility in evaluating the impact of projects with widely varying scales of disturbance on wetlands associated with open water. Often these wetlands are narrow bands of scrub shrub and/or wet meadow that are a small part of the overall wetland complex. If interpreted too narrowly, the regulations would prohibit the construction of a woods road across any portion of the wetland because it has a value rating of "1" pursuant to Section 578.5(k).

Considering the nature of a woods road that will be used for forestry activities and the opportunity to abate the negative impacts of the project on hydrologic values via permit conditions, i.e., use of geotextile fabrics, corduroying and culverting, it is hard to conceive that these types of projects were ever meant to be rejected unless there are other reasons to do so: i.e. multiple similar value ratings that indicate that the wetland is a more diverse and therefore valuable area.

Recently reviewed projects have highlighted the need to interpret Section 578.5(k) in the manner that was originally intended. To that extent, we propose the following interpretation:

1. Those portions of wetlands that have more than 20 contiguous acres located within the mean high water mark of open water have a value rating of 1. Those portions of wetlands that are located outside the mean high water mark of the open water have a value rating of 2.
2. Wetlands that have less than 20 contiguous acres located within the mean high water mark of open water will have a value rating of 2. If the wetland area is less than 2 acres within the mean high water mark of the open water, the wetland will have a value rating of 3.
3. When separate wetland covertypes exist adjacent to open water, only that covertype which is within or adjacent to the open water will receive a value rating pursuant to Section 578.5(k).

EXAMPLE

[hand-drawn diagram, see copy below]

Memorandum to File
October 17, 2012
Page 3

For the purpose of determining the value rating of a wetland pursuant to Section 578.6 (multiple values rating), the highest value rating of the wetland in each value class shall be used. The value classes of wetlands are as follows:

- 1) Values/wetland coertype - (a) through (j)
- 2) Values/related to surface water systems - (k) and (l)
- 3) Values/productivity or diversity - (m) through (o)
- 4) Values/presence of threatened or endangered species (p) and (q)
- 5) Values/Geological Features - (r) and (s)
- 6) Values/Social Factors - (t) through (x)

May we meet with you and those receiving a copy of this memo to discuss the documentation of the interpretation of the value rating system.

[four hand-written lines, apparently in the same hand as the diagram, transcribed below]

>20A & w/out MHWM = 2
>20A & w/in MHWM = 1
<20A & w/in MHWM = 2
<2A & w/in MHWM = 3

GJD:RPC:kal

Cc: R. Glennon
J. Banta
G. Hill
E. Hood
J. Hill

[transcription ends, copy follows]

State of New York Executive Department

Adirondack Park Agency

Herman F. Cole, Jr.
~~XXXXXXXXXXXXXXXXXXXX~~
Chairman
Edmund E. Lynch, Acting
~~XXXXXXXXXXXXXXXXXXXX~~
Executive Director

M E M O R A N D U M

TO: Edmund E. Lynch

FROM: Raymond P. Curran and Gary J. Duprey *D JLD*

DATE: June 27, 1984

SUBJECT: Interpreting Part 578 of the Agency's Rules and Regulations

Since May 1, 1983 the Agency's Rules and Regulations regarding the implementation of the New York State Freshwater Wetlands Act have been in effect. To date, 62 applications for wetland permits have been received. Of the 62 applications, 30 have been for the purpose of constructing woods roads for forestry activities. Based on staff's field experiences in applying the Rules and Regulations, it is apparent that Section 573.5(k) (associated with open water) is too tightly written with regard to the value rating. It does not provide flexibility in evaluating the impact of projects with widely varying scales of disturbance on wetlands associated with open water. Often these wetlands are narrow bands of scrub shrub and/or wet meadow that are a small part of the overall wetland complex. If interpreted too narrowly, the regulations would prohibit the construction of a woods road across any portion of the wetland because it has a value rating of "1" pursuant to Section 573.5(k).

Considering the nature of a woods road that will be used for forestry activities and the opportunity to abate the negative impacts of the project on hydrologic values via permit conditions, i.e., use of geotextile fabrics, corduroying and culverting, it is hard to conceive that these types of projects were ever meant to be rejected unless there are other reasons to do so, i.e., multiple similar value ratings that indicate that the wetland is a more diverse and therefore valuable area.

Recently reviewed projects have highlighted the need to interpret Section 573.5(k) in the manner that was originally intended. To that extent, we propose the following interpretation:

PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared using a computer. A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook

Point size: 14

Line spacing (excluding headings and footnotes): Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 7,129.