

SUPREME COURT
APPELLATE DIVISION

STATE OF NEW YORK
THIRD DEPARTMENT

In the Matter of

THOMAS JORLING,

Petitioner-Appellant,

AFFIDAVIT

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

CASE NO. 533913

Supreme Court Index No.

CV21-0002

-against-

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

Respondents-Defendants.

STATE OF NEW YORK)
) ss.:
COUNTY OF Essex)

MARK ROOKS, being duly sworn, deposes and says:

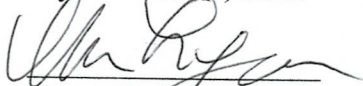
1. I not a party to this proceeding, but I submit this affidavit to the Court for its consideration in the above-captioned appeal.
2. I was a member of the Adirondack Park Agency staff from 2000 to 2019, retiring as a Biologist 2 (Ecology).
3. During my time at the Agency, I was involved in the review of many projects, including the review of the permit application by LS Marina LLC (“Applicant”) for the construction of a marina project in the Town of Harrietstown, Franklin County, New York (the “Project”).

4. After taking part in the review of the Project, I authored the memorandum dated April 4, 2016 from me (Mark Rooks) to the "File", a copy of which is annexed hereto as Exhibit A, which I understand was an addendum to Appellant's Reply Brief in this appeal.
5. The 2016 memorandum was written by me at the time to document the errors with the Agency's review of the Project, particularly with the wetland value rating determinations of the Annex portion of the Project. The memorandum is an accurate reflection of the events and facts at the time, and I stand by the memorandum's veracity.
6. I advised my supervisor of the contents of this memorandum, but he took no action. In any event, it is a record that I prepared about this Project.



MARK ROOKS

Sworn to me this 6
day of October, 2022



Notary Public

CHERI L. LYON
NOTARY PUBLIC, State of New York
No. 01LY6046025
Qualified in Essex County
Commission Expires August 7, 2026

EXHIBIT A



LEILANI CRAFTS ULRICH
Chairwoman

TERRY MARTINO
Executive Director

***Staff Consultation
For Internal Agency Use Only***

MEMORANDUM

TO: File

FROM: Mark Rooks *MR*

DATE: April 4, 2016

RE: P2016-0029, summary of value rating problems

This memo is intended to summarize and document mistakes that we made relating to wetland value rating determinations for the Annex portion of the LS marina project. Three mistakes are identified along with a concern that we are heading towards the practice of not following Agency regulations in order to justify these past mistakes.

After an initial site visit and air photo interpretation, I assigned what was called a “preliminary value rating” of 2 to the Annex wetland complex. This was communicated to the applicants and their consultants in a July 30, 2014 “Supplemental Request for Additional Information” (docA). This value rating was assigned without an analysis thorough enough to determine if there were three or more high value characteristics that would raise the wetland value to 1 (§578.6(c)). In fact, it had not been our practice to carry out such a thorough evaluation on most wetlands in the past, but to assign value ratings based on cover types, acreage within mean high water and on the presence of endangered or threatened species.

During the course of the Town of Harrietstown SEQRA review, Raymond Curran, a consultant hired by adjacent landowners, pointed out that the wetland complex most likely had a value of 1, because there were three or more high value characteristics. This was in an October 8, 2014 letter to the Town from William Favreau of O’Connell & Aronowitz (docB; the Curran report starts on page 26). Curran retired from the Agency after serving as RASS supervisor.

Leigh Walrath and I reviewed his report, carried out a thorough analysis of the wetland using field notes, air photo interpretation, GIS, and other information made available to the Town, and determined that the wetland did, in fact have a value of 1. There were actually four of the necessary three high value characteristics needed:

- Emergent marsh (§578.5(c))
- Two or more structural groups (§578.5(g))
- Between two and 20 acres within mean high water (§578.5(k))
- Unusual species abundance or diversity (§578.5(m)).

This last was based on a September 16, 2014 letter to the Saranac Lake Fish & Game Club from retired DEC fisheries biologist Rich Preal (docC).

The LA Group subsequently (October 31, 2014) sent a letter to the Town rebutting Ray Curran's letter (docD, page 109). In this rebuttal they said, among other things, that the area within mean high water did not count as a high value characteristic because of the definition of "wetland associated with open water" in §578.3(r). This argument was without merit.

On December 22, 2014 Deputy Director Rick Weber sent a letter to the applicants and their consultants advising them that the actual value of the wetland was 1 (docE). He listed three of the four high value characteristics but did not include "between 2 and 20 acres" because this issue was contested and we already had the three we needed. This last was left out at the urging of Legal. Mistake #1 is that we should have advised them of all four high value characteristics. Although not counted as one of the high value characteristics, he did include the information that there were 10.4 acres of wetland within the mean high water of Lower Saranac Lake.

The applicants requested a Declaratory Ruling, specifically questioning the "unusual species abundance or diversity" characteristic. We issued the Declaratory Ruling on May 8, 2015 (docF), maintaining that this characteristic was valid and the wetland had a value of 1.

The applicants, thinking there were only three high value characteristics, commissioned a fish sampling study to show that there was not an "unusual species abundance or diversity." We knew they were going to do this before they hired the consultant, so Mistake #2 was that we again should have advised them of all four high value characteristics before they spent the money on a fisheries consultant.

The data collected by the consultant showed that there probably was not an "unusual species abundance or diversity." The applicants then asked for a second Declaratory Ruling on the value of the wetland. We issued the ruling on December 18, 2015 (docG), saying the wetland had a value of 2. This ruling was in error (Mistake #3) because it failed to take into account the "between 2 and 20 acres" high value characteristic. Council may have felt (mistakenly) that there was some merit to the LA Group's original rebuttal, but I, and likely other RASS staff, pointed out that this rebuttal was without merit and the wetland has a value of 1 according to our regulations.

We subsequently received a letter from adjoining landowners (docH) pointing out that the Declaratory Ruling was in error and implying that the issue would be brought to light in the public hearing.

At this point we could acknowledge our mistakes and move on. However, we seem to be moving towards denying the mistakes and trying to get around our regulations.

Project 2015-0193 involved a wetland that apparently had a value of 1 because there were three high value characteristics. This value was documented by Mary O'Dell in a memo (docI, missing from our electronic files) and subsequently verified and the value rating approved by Ed Snizek. We had a meeting on March 31, 2016, where RASS staff maintained that it was a value 1 wetland but the ED and Legal staff determined that we would consider this a value 2. The reason may have been concern that the determination of this wetland for this permit would be brought up during the public hearing for LS marina. The permit was issued on April 1 finding that the wetland has a value of 2 (docJ).

We are now in the position of disregarding our regulations in order to justify our mistakes rather than just making mistakes. I doubt that I will be able to testify in public hearing about the value rating at the LS marina Annex site.