STATE OF NEW YORK
SUPREME COURT : WARREN COUNTY

THE LAKE GEORGE ASSOCIATION, THE LAKE GEORGE WATERKEEPER, THE TOWN OF HAGUE, and HELEN G. RICE,

Petitioners,

v

THE NEW YORK STATE ADIRONDACK PARK AGENCY, THE LAKE GEORGE PARK COMMISSION, and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

NOTICE OF APPEAL
Index No. EF2022-70178

PLEASE TAKE NOTICE that respondents the New York State Adirondack Park Agency and the Lake George Park Commission, by their attorney, Letitia James, Attorney General of the State of New York, appeal to the New York State Supreme Court, Appellate Division, Third Judicial Department from the decision and judgment of the Honorable Robert J. Muller, entered and served with notice of entry on March 3, 2023.

This appeal is taken from each and every part of said judgment on the ground that it erroneously applied the law and the facts. True and accurate copies of the decision and judgment and the notice of its entry are attached to this notice of appeal as exhibit A.

Dated: April 3, 2023
Albany, New York

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondents

By: _____

Joshua M. Tallent
Assistant Attorney General
New York State Office of the
Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224

Exhibit A

STATE OF NEW YORK
SUPREME COURT COUNTY OF WARREN

In the Matter of an Application of
THE LAKE GEORGE ASSOCIATION,
THE LAKE GEORGE WATERKEEPER,
THE TOWN OF HAGUE, and HELENA G. RICE

Petitioners,

-against-

THE NYS ADIRONDACK PARK AGENCY AND
THE LAKE GEORGE PARK COMMISSION,

Respondents,

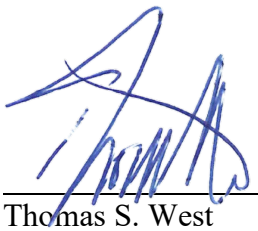
for a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules and Injunctive Relief.

NOTICE OF ENTRY

Index No. EF2022-70178
RJI No. 56-1-2022-0168

PLEASE TAKE NOTICE that the Decision and Judgment of the Hon. Robert J. Muller, Justice of the Supreme Court, dated March 3, 2023, a true copy of which is annexed hereto, was duly entered in the office of the Clerk of Warren County on March 3, 2023.

Dated: March 3, 2023
Albany, New York



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TO: All Counsel of Record (via NYSCEF)

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.

DECISION AND JUDGMENT

Index No. EF2022-70178
RJI No. 56-1-2022-0168

The West Firm, Albany (*Thomas S. West* of counsel), for petitioners.

Letitia James, Attorney General, Albany (*Joshua M. Tallent* of counsel), for respondents.[1]

Whiteman, Osterman & Hanna LLP, Albany (*Robert S. Rosborough IV* of counsel), for Adirondack Council, Inc., amicus curiae.

ROBERT J. MULLER, J.S.C.

Lake George – often referred to as "The Queen of American Lakes" – is roughly 32 miles in length and 28,000 acres in size. It is classified by the New York State Department of Environmental Conservation (hereinafter the DEC) as AA-Special (AA-S) for its fresh surface

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[1] *Bartlett, Pontiff, Stewart and Rhodes, P.C.*, Glens Falls (*Karla Williams Buettner*, of counsel), also appeared on behalf of respondent Lake George Park Commission.

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 because of plant fragments being transported on boats and trailers.

EWM is very difficult to eradicate once it is established, as 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. It also prevents sunlight from penetrating into the water column and chokes out other vegetation. Annual die-back of EWM can occur over a very short timeframe, which results in a significant amount of plant decay, potentially leading to algal blooms and other water quality impacts. Suffice it to say that all parties to this dispute agree that EWM is dangerous to the pristine waters of Lake George and must be eradicated.

In 2016, respondent NYS Adirondack Park Agency (hereinafter APA) issued a permit to respondent Lake George Park Commission (hereinafter 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 cleaner to transport harvested plants out of the water. Benthic matting involves the laying of mats over beds of EWM. Benthic matting is successful at eradicating the EWM beneath the mats, but it also kills all other plant species. Hand-harvesting has proven most successful at eradicating EWM in Lake George, but it is labor-intensive and expensive, requiring millions of dollars in funding over the years.

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" [Ziemann Affidavit, at ¶ 19]. It has also been reviewed by the New York State Department of Health (hereinafter DOH) to ensure no human health concerns. New Hampshire has used ProcellaCOR on 43 separate occasions to manage EWM in its lakes, and Vermont has used it on 18 occasions. In New York the herbicide has been used in Chautauqua Lake, Glen Lake, and Minerva Lake, among others.

On February 22, 2021, in response to a request from the LGPC, the APA opened a pre-application file relative to a draft proposal for the application of ProcellaCOR to eradicate EWM from Blairs Bay and Sheep Meadow Bay in Lake George – both of which include wetlands. In this regard, the Freshwater Wetlands Act requires a permit from the APA for the application of an herbicide in wetlands (*see* ECL 24-0801; 9 NYCRR 578.2, 578.3 [n] [2] [i]).

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. On May 24, 2021, staff members of the APA, LGPC, DEC, petitioner Lake George Association (hereinafter LGA) and SOLitude Lake Management (hereinafter SOLitude) – an aquatic herbicide applicator and consultant for the LGPC – met to discuss the proposal. Staff members of the APA, LGPC and LGA thereafter conducted a site visit 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).[2]

Applications for the use of ProcellaCOR in Blairs Bay and Sheep Meadow Bay were thereafter submitted to the APA on January 7, 2022. Specifically, in Blairs Bay the LGPC proposed 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 proposed to apply up to 4.77 gallons of ProcellaCOR 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.

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, and additional details of the proposed herbicide use, among other materials. The APA received all requested additional items on or about February 18, 2022 and, on March 3, 2022, all interested parties were advised that the applications had been deemed complete and written comments 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 a 15-page letter dated March 31, 2022 from the LGA and petitioner Lake George Waterkeeper. Their concerns included, *inter alia*, that the ProcellaCOR applications would spread beyond the Bays, lead to harmful algal

[2] 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). 1 is the highest value rating possible, and 4 is the lowest (*see* 9 NYCRR 578.6).

blooms, and unduly harm native plants and invertebrates. Hundreds of form letters were also submitted by "strong supporter[s] of the [LGA]" [*see e.g.* R1875-2575],[3] the majority of whom own homes on Lake George and supplemented their submissions with stories of their own personal use and enjoyment of the Lake. Additionally, an 11-page letter dated March 31, 2022 was submitted by Carol D. Collins, Ph.D., a liminologist who has "dedicated [her] professional life to studying and protecting Lake George" [R1923]. Collins expressed the following concerns:

> "The species richness of Lake George includes over 50 macrophyte species . . . , and hundreds of phytoplankton, fish zooplankton and benthic invertebrates. ProcellaCOR has not provided any findings on pre-and post-treatment for most macrophytes, algae, fish, benthic invertebrates or zooplankton native to Lake George. With only a limited number of peer-reviewed toxicology tests on a limited number of species, the fate and effect of florpyrauxifen-benzyl on plants and animals in the Lake George ecosystems is unpredictable and immeasurable" [R1926].[4]

Petitioner Town of Hague also submitted a resolution passed by its Town Board "opposing the application of ProcellaCOR in Lake George at this time" [R1176].

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. He then submitted a document to the APA on April 6, 2022 in response to the several comment letters received in opposition to the project. Wick stated, *inter alia*, that the particle model relied upon by the LGA and Lake George Waterkeeper in demonstrating that the ProcellaCOR will spread beyond the bays is "misleading and inaccurate" [R1166], as it fails to account for product dilution. Wick further stated that use of ProcellaCOR will in fact reduce the risk of harmful algal blooms, explaining as follows:

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[3] All references to the Administrative Return will be denoted as R followed by the page number.
[4] Florpyrauxifen-benzyl is the active ingredient in ProcellaCOR.

> "ProcellaCOR treatment occurs early in the growing season when the plant is at 10-20% of its total potential biomass, greatly reducing annual nutrient release associated with natural EWM senescence by 80-90% in the treatment year. Not only is the plant biomass die off considerably less following a ProcellaCOR treatment, but this die-off only happens one time in the weeks following treatments. Conversely, these milfoil beds if not treated would grow to their maximum extent, and then die off, with a much large nutrient release due to the larger biomass" [R1168].

Aaron Ziemann – a project analyst for forest resources for the APA – provided a presentation relative to 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.[5] He further recommended that the permits be issued without the necessity of a public hearing. 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. In this regard, anyone seeking to apply a pesticide to control or eliminate aquatic vegetation must obtain a permit from the DEC (*see* 6 NYCRR 327.1). Following review of the requisite issues – namely, the registration status of ProcellaCOR, that ProcellaCOR is labeled for use as proposed in the DEC permit applications, and that the pesticide application rates, dosage rates, and amounts specified in the DEC permit applications comply with the ProcellaCOR label – permits were issued on March 10, 2022, with the DEC authorizing the LGPC to use (1) up to 4.2 gallons of ProcellaCOR in up to 4 acres of Blairs Bay

[5] To the extent that petitioners question why the presentation was done by Ziemann, a review of the record makes clear that Leigh Walrath – a project analyst for fresh water resources – prepared the presentation. He retired, however, and Ziemann then stepped in.

at a dosage rate not to exceed 12.68 fluid ounces per acer foot; and (2) up to 4.78 gallons of ProcellaCOR in up to 3.6 acres of Sheep Meadow Bay at a dosage rate not to exceed 12.68 fluid ounces per acer foot.

On May 12, 2022, this CPLR article 78 proceeding was commenced by the LGA, Lake George Waterkeeper, Town of Hague and petitioner Helena 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) 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, 2022; and

(8) The APA should have held a public hearing before approving the permits, as provided under APA Act § 809 (3) (d).

Petitioners simultaneously moved by Order to Show Cause for a preliminary injunction barring the LGPC from undertaking any ProcellaCOR applications to Lake George pending the conclusion of the proceeding. This motion was granted by Decision and Order dated June 13, 2022, with petitioners directed to post an undertaking in the amount of $100,000.00 (76 Misc 3d 925 [Sup Ct, Warren County 2022]).[6] The matter is now fully submitted, with Adirondack Council, Inc. having been granted leave to appear as amicus curiae by Order dated January 13, 2023.

Briefly, the Court notes that petitioners have withdrawn their second, fourth, and seventh causes of action and, as such, these need not be addressed. Petitioner has further discontinued the proceeding as against the DEC.[7]

Before proceeding to the merits of the remaining causes of action, two preliminary issues raised by respondents must be addressed: (1) whether the issues raised in this proceeding are moot; and (2) whether petitioners have standing and legal capacity to sue.

Mootness Doctrine

Turning first to whether the issues raised in this proceeding are moot, it is undisputed that the permits – which required the ProcellaCOR applications to take place in the respective Bays prior to June 30, 2022 – have now expired. That being said, respondents contend that the Court should nonetheless consider the issues raised, a contention supported by petitioners.

[6] This undertaking was posted on June 17, 2022.
[7] To the extent that the permits issued by the DEC have not been challenged by petitioners, the Court is keenly aware that it may not consider those issues resolved in the course of the DEC's review of the project.

"As a general principle, courts are precluded 'from considering questions which, although once live, have become moot by passage of time or change in circumstances'" (*City of New York v Maul*, 14 NY3d 499, 507 [2010], quoting *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]). That being said, an exception to the mootness doctrine exists "where the issues are substantial or novel, likely to recur and capable of evading review" (*City of New York v Maul*, 14 NY3d at 507; *see Matter of Hearst Corp. v Clyne*, 50 NY2d at 715; *Matter of M.B.*, 6 NY3d 437, 447 [2006]; *Mental Hygiene Legal Servs. v Ford*, 92 NY2d 500, 506 [1998]).

Here, the issues raised by petitioners are not only substantial and novel – with neither ProcellaCOR nor any other herbicide having previously been used in Lake George – but they are also likely to recur. In this regard, respondents have submitted the affidavit of Wick, who states that "the [LGPC] plans to re-apply to [the] APA for permits to apply ProcellaCOR in Sheep Meadow Bay and Blairs Bay in 2023[, and] anticipates that the permit applications will be very similar to the 2022 permit applications" [Wick Affidavit, at ¶ 4]. With any future permits likely to impose a short window for application of the herbicide, the issues are capable of evading review as well. The Court therefore finds that the issues in this proceeding fall within the exception to the mootness doctrine and will proceed with consideration of the same (*see City of New York v Maul*, 14 NY3d at 507).

Standing/Capacity to Sue

Turning now to the issues of standing and legal capacity, respondents contend that the LGA and Rice are without standing to sue and, further, that the Lake George Waterkeeper and the Town of Hague lack legal capacity to sue. Each contention will be addressed *ad seriatim*.

Initially, respondents contend that the LGA has not submitted an affidavit from one of its members nor alleged in its petition that any individual member suffered a direct injury within the

zone of interests protected by the Freshwater Wetlands Act and, as such, it has failed to establish its standing. The Court, however, finds this contention to be without merit.

In *Society of Plastics Indus. v Suffolk* (77 NY2d 761 [1991]), it was held that "in land use matters . . . the plaintiff, for standing purposes, must show that it would suffer direct harm, injury that is in some way different from that of the public at large" (*id.* at 774). It was further held that "in cases involving environmental harm, the standing of an organization [can] be 'established by proof that agency action will directly harm association members in their use and enjoyment of the affected natural resources'" (*Matter of Save the Pine Bush, Inc. v Common Council of City of Albany*, 13 NY3d 297, 304-305 [2009], quoting *Society of Plastics Indus. v Suffolk*, 77 NY2d at 775).

Here, the petition alleges as follows:

> "[the LGA] is a not-for-profit corporation organized under the laws of the State of New York having as its principal purpose: 'world-class science and freshwater research, public and private partnerships, community education, public policy advocacy and direct investments in protection programs and activities to deliver unsurpassed level of care' for the protection of Lake George. As such, the LGA has the responsibility on behalf of its supporters to not only use science and research to guide solutions to safeguard Lake George and its basin, but also to assure the proper implementation of State laws, rules and regulations protecting this highly valuable resource and watershed. The LGA, founded in 1885 as the first lake conservation organization in the country, has [almost] 3,700 individual supporting members, nearly all of whom reside or own property in the Lake George basin and participate in the recreational activities offered in that region and many utilize Lake George as a drinking water supply. Many of the LGA's members are residents and landowners in the Towns of Hague, Putnam and Dresden" [Petition, at ¶ 4].

Indeed, these allegations are fully supported by the affidavits submitted in support of the petition as well as the record itself. The Court thus finds that petitioners have established that the permits issued by the APA may directly harm LGA members in their use and enjoyment of Lake George.

The Court further finds that the injuries alleged fall squarely within the zone of interests protected by the Freshwater Wetlands Act, with ECL 24-0801 (2) – which pertains to the review of applications for "[p]ermits for wetlands in the Adirondack Park" – providing as follows:

> "The [APA] shall review the application . . . , having due regard for the declaration of policy and statement of findings set forth in this article and for the considerations set forth in subdivision one of section 24-0705 of this article. The [APA] shall in addition determine prior to the granting of any permit that the proposed activity will be consistent with the Adirondack [P]ark land use and development plan and would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the [P]ark, taking into account the economic and social or other benefits to be derived from the activity."

ECL 24-0103 – entitled "Declaration of policy" – then provides:

> "It is declared to be the public policy of the state to preserve, protect and conserve freshwater wetlands and the benefits derived therefrom, to prevent the despoliation and destruction of freshwater wetlands, and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state."

ECL 24-0105 – entitled "Statement of Findings" – further provides, in pertinent part:

> "7. Any loss of freshwater wetlands deprives the people of the state of some or all of the many and multiple benefits to be derived from wetlands, to wit: . . .
>
> "(b) wildlife habitat by providing breeding, nesting and feeding grounds and cover for many forms of wildlife, wildfowl and shorebirds, including migratory wildfowl and rare, endangered or threatened species, fish, reptiles and amphibians, insects and other invertebrates;
>
> "(c) protection of subsurface water resources and provision for valuable watersheds and recharging ground water supplies;
>
> "(d) recreation by providing areas for hunting, fishing, boating, hiking, bird watching, photography, camping and other uses; . . .
>
> "(g) education and scientific research by providing readily

accessible outdoor bio-physical laboratories, living classrooms and vast training and education resources;

"(h) open space and aesthetic appreciation by providing often the only remaining open areas along crowded river fronts and coastal Great Lakes regions;

"(i) sources of nutrients in freshwater food cycles and nursery grounds and sanctuaries for freshwater fish;

"(j) preservation of plant species that are rare, endangered or threatened, or exploitably vulnerable as defined in section 9-1503 of this chapter; and

"(k) preservation of communities of plants and animals that are deemed by the commissioner to be rare in the state or in a region of the state.

"8. Regulation of freshwater wetlands, in accordance with the agricultural exemption established in title seven hereof, is consistent with the legitimate interests of farmers and other landowners to graze and water livestock, make reasonable use of water resources, harvest natural products of the wetlands, selectively cut timber and otherwise engage in the use of land for agricultural production."

Finally, ECL 24-0705 (1) provides that "[i]n granting, denying or limiting any permit, the local government or the commissioner shall consider the effect of the proposed activity with reference to the public health and welfare, fishing, flood, hurricane and storm dangers, and protection or enhancement of the several functions of the freshwater wetlands and the benefits derived therefrom . . . ."

Here, the injuries alleged include potential harm to the native plants and invertebrates present in the wetlands of Blairs Bay and Sheep Meadow Bay, as well as the potential for harmful algal blooms in these Bays – both of which could negatively impact the Lake George ecosystem. Under the circumstances, the LGA clearly has standing (*see Society of Plastics Indus. v Suffolk*, 77 NY2d at 775; *Matter of Save the Pine Bush, Inc. v Common Council of City*

of Albany, 13 NY3d at 304-305; *Matter of Jorling v Adirondack Park Agency*, ___ AD3d ___, 2023 WL 2315541, *2 [3d Dept March 2, 2023]).

Respondents next contend that Rice is without standing because the injury she alleges does not fall within the zone of interests protected by the Freshwater Wetlands Act. The Court finds that this contention is also without merit. Rice has submitted an affidavit stating as follows:

> "[My] property is located immediately adjacent to the treatment area . . . labeled by the APA and LGPC as 'Sheep Meadow Bay.' [I] have three water intakes that service [my] property that are located within the treatment area. The water drawn from Lake George is used for [my] gardens, irrigation, bathing, and potable water purposes. In addition, [I] have a beach that is adjacent to the treatment area and is used by young children for swimming and recreation. Finally, it is important to mention that [I] have a protected riparian area and a large stream that runs through [my] property and into Lake George. This stream provides significant flow into the bay that is likely to impact the proposed herbicide treatment.
>
> "I and my family members are very concerned that water drawn from the treatment area will adversely impact our gardens, our pets and all persons who utilize our property" [Rice Affidavit, at ¶¶ 3-4].

To the extent that Rice's injuries arise from the alleged failure to "preserve, protect and conserve freshwater wetlands and . . . to prevent the despoliation and destruction of freshwater wetlands" (ECL 24-0103), they too fall within the zone of interests protected by the Freshwater Wetlands Act. These injuries also fall within the purview of ECL 24-0105 (7) (d) and (8), which speak to the use of wetlands for recreation as well as landowners' reasonable use of water resources in wetlands for irrigation. Finally, while respondents contend that any concerns with respect to potable water are not properly raised in the context of this proceeding, ECL 24-0705 (1) expressly includes consideration of the effect of the proposed activity on "public health and welfare" and surely, the safety of potable water constitutes a public health concern.

Briefly, the Court must also note that, as an adjoining landowner, Rice was entitled to and did in fact receive notice of the LGPC's applications to the APA (*see* 9 NYCRR 572.8 [a]). While not dispositive of the issue – as this is not a zoning case – such factor certainly militates in favor of her standing to proceed in this matter (*cf. Matter of Sun-Brite Car Wash v Board of Zoning & Appeals of Town of N. Hempstead*, 69 NY2d 406, 413-414 [1987]; *Matter of Wittenberg Sportsmen's Club, Inc. v Town of Woodstock Planning Bd.*, 16 AD3d 991, 992 [2005]).

Respondents next contend that, because the Lake George Waterkeeper is a program within the LGA – as opposed to an independent not-for-profit corporation – it does not have legal capacity to sue. The Court, however, finds this contention to be without merit. While the Lake George Waterkeeper is a program within the LGA, it is licensed by the Waterkeeper Alliance, Inc. – an international environmental advocacy organization which has been and continues to be a party to many State and Federal lawsuits (*see e.g. Matter of Riverkeeper, Inc. v Seggos*, 60 Misc 3d 462 [Sup Ct, Albany County 2018]; *Waterkeeper Alliance, Inc. v United States Envtl. Protection Agency*, 399 F 3d 486 [2d Cir 2005]). In any event, even if the Court did find the Lake George Waterkeeper without capacity to sue, such finding would be of little consequence given that the LGA remains a petitioner.

Finally, respondents contend that the Town of Hague lacks capacity to sue the State of New York or its executive agencies. Indeed, "[a]s municipalities are political subdivisions of the State, they ordinarily lack the capacity to contest state decisions that 'affect[] them in their governmental capacity or as representatives of their inhabitants'" (*Matter of Town of Verona v Cuomo*, 136 AD3d 36, 41 [3d Dept 2105], *lv denied* 27 NY3d 908 [2016], quoting *Matter of County of Nassau v State of New York*, 100 AD3d 1052, 1055 [2012] [internal quotation marks

and citation omitted], *lv dismissed and denied* 20 NY3d 1092 [2013]; *see Matter of County of Oswego v Travis*, 16 AD3d 733, 735 [2005]). This general rule has exceptions, however, one of which is codified in the Freshwater Wetlands Act. Specifically, ECL 24-0801 (2) provides that "[a]ny person may seek review of a ruling made solely pursuant to the provisions of this article by the [APA] pursuant to the provisions of article [78] of the [CPLR]," with ECL 24-0107 (6) then providing that a "'person' means any corporation, firm, partnership, association, trust, estate, one or more individuals, and any unit of government or agency or subdivision thereof, including the state." The Court thus finds that the Town of Hague has capacity to sue.

Turning now to the merits of the petition, the standard of review in a 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, 142 [3d Dept 2022]). As explained in *Matter of Adirondack Wild: Friends of the Forest Preserve v New York State Adirondack Park Agency* (161 AD3d 169 [3d Dept 2018], *affd* 34 NY2d 184 [2019]),

> "[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" (*id.* at 176, quoting *Matter of Fuller v New York State Dept. of Health*, 127 AD3d 1447, 1448 [3d Dept 2015] [internal quotation marks, brackets and citation omitted]).

Each remaining cause of action will be addressed *ad seriatim*.

First Cause of Action

Beginning with that aspect of petitioners' first cause of action alleging that APA staff failed to provide board members with the number of comments actually received, the APA concedes that several e-mails received during the public comment period were erroneously

diverted to a spam folder. Respondents, however, have submitted an affidavit from Ziemann expressly stating that – prior to the April 14, 2022 meeting – "[a]gency staff reviewed every public comment received, . . . including all comments automatically directed to the Agency's spam email folder" [Ziemann Affidavit, at ¶ 44]. Indeed, a review of the record confirms this statement. While the slide included by Ziemann in his presentation fails to include the emails diverted to the spam folder, he stated as followed when presenting the slide:

> "We received notice that this project was also victim of the technological snafu that occurred with comment letters, so up to this morning we had received 183 total comment letters, 134 opposed that were generated by the [LGA] letter writing campaign, 24 others independently opposed, and 18 in support, but since we recognized the issue with the missed emails going to the junk mail folders, we now indicate that we've got 325 total letters, 300 in opposition in total and 22 in support in total, and the opposition letters – the newly received ones that have just come to our attention – are all very much in line with the comments and themes that we've seen in the previously received letters" (Video of April 14, 2022 meeting, available online at http://nysapa.granicus.com/MediaPlayer.php?view_id=2&clip_id=583 [last accessed Feb. 28, 2023], at 3:43:45).

By stipulation of the parties, the comments diverted to the APA's spam email folder were identified separately in the record and are, as indicated, in line with the earlier comments made in opposition to the project. Under the circumstances, the Court finds that APA staff provided board members with the number of public comments actually received.

That being said, it is unclear whether APA staff provided all of these public comments to the board for review. In this regard, Navitsky apparently sent an email inquiring whether additional comments could be submitted in response to the APA's April 7, 2022 submission. Ziemann responded by email dated April 8, 2022, advising as follows:

> "[W]e do accept written comments up until noon the day before the meeting, and these will be provided to the Board. This can include comments on an item up for

board action. Comments will also be provided to the applicant for a potential response" [Ziemann Email, attached as Exhibit "B" to Navitsky Reply Affidavit].[8]

Collins then submitted a 2-page supplemental letter in opposition on April 12, 2022, stating as follows: "The LGPC response letter . . . did not directly respond to most of my comments . . . so I am reaffirming the need to address my scientific analysis" [R1922]. The LGA and the Lake George Waterkeeper submitted an 11-page supplemental letter on April 13, 2022 at 10:48 A.M., similarly stating:

> "The public comments responded to were very selective. It appears that the comments provided by Carol D. Collins, Ph.D. (some 9 pages of comment and 2+ pages of references) were almost entirely ignored. Dr. Collins happens to be a limnologist and exceptionally familiar with the ecology that makes up Lake George. **QUESTIONS: Why were Dr. Collins comments largely (if not entirely) ignored? If they were not ignored, would the Applicant or APA Staff please identify to this Board and the public what responses in the LGPC's 4/6/22 'Response to Public Comments – ProcellaCOR' originated from Dr. Collins initial 3/31/22 filing?"** [R2095 (emphasis in original)].

Troublingly, upon receiving this submission from the LGA and the Lake George Waterkeeper, Wick sent the following email to Ziemann:

> "Good morning. Since I just received it myself, you may not have had the chance to peruse the new LGA opposition letter we both just received to the [LGPC's] ProcellaCOR applications. As you and I discussed several weeks ago, I shared my strong concerns that Navitsky and the LGA would send a last minute diatribe of legally and scientifically convoluted information intended to instill unfounded concerns to your [b]oard [m]embers. Unsurprisingly, here we are with that exact action coming to the APA, without any time for the [LGPC] to respond to the vast array of factual inaccuracies presented. This action clearly puts the [LGPC] at a distinct disadvantage if this document is to be presented formally to your [b]oard with the clear intent to both confuse and alarm. Even a delay is a denial, as the treatment itself must be conducted in June, and there would be no time to get an actual contract in place with a DEC Licensed Applicator. The LGA knows this very well. Indeed, it was purposeful.
>
> "This strategy was both predictable and well known in advance. I believe that the APA response regarding this potential issue was that you would not submit any

[8] The Court was unable to locate either Navitsky's original email nor this response in the administrative record.

> newly, unvetted information to your [b]oard this late in the review timeframe. As soon as you are able, please let me know if that understanding still stands. We sincerely hope it does" [R1956].

While Collins' April 12, 2022 supplemental letter and the LGA and the Lake George Waterkeeper's April 13, 2022 supplemental letter are included in the record amongst the public comments received by the APA, they are missing from the APA board meeting packet [R2576-3282].[9] The failure to include them in this packet appears to contradict Ziemann's statements to Navitsky on April 8, 2022, and certainly raises a question as to whether Wick exerted any undue influence over the permitting process.

Counsel for respondents indicated during oral argument that both the April 12, 2022 and April 13, 2022 supplemental letters were emailed to the board members the morning of the meeting. While there is no proof of any such email in the record, the Court notes that the Town of Hague's resolution – issued on April 12, 2022 – also was not among those documents in the APA board packet, but was apparently given to the board prior to the meeting because it was discussed at length. Giving counsel the benefit of the doubt and assuming that the supplemental letters were in fact emailed to the board that morning, the meeting started at 10:00 A.M. and continued for over five hours and as such, there was little if any time for the board members to review them. Indeed, in discussing the Town of Hague resolution during deliberations on the project, one member stated as follows:

> "[A]t the end of the day, I'm having a really, really hard time stepping over the unanimous resolution from the Town in which these applications are going to

[9] The Court must note that it is somewhat baffled by the contents of the APA board meeting packet. Specifically, Volume 6 of the Administrative Record is comprised of all public comments originally received by the APA and Volume 9 is comprised of those comments included in the APA board meeting packet. Curiously, Volume 9 includes some comments that do not appear in Volume 6 [*see e.g.* R2929-R2934, R2936-2937]. Incidentally, these comments do not appear in Volume 7 either, which is comprised of all public comments diverted to the APA's spam email folder.

> happen. I know their resolution is relatively sparse in language and was submitted sort of last minute, but I'm having a really hard time. They were unanimous in that decision. I don't know what informed their decision. I didn't get the resolution in time to go back and see what information they utilized, but . . . I'm having a hard time with that" (Video of April 14, 2022 meeting, available online at http://nysapa.granicus.com/MediaPlayer.php?view_id=2&clip_id=583 [last accessed Feb. 28, 2023], at 4:26:32).

This observation emphasizes the notion that – even if the supplemental letters were emailed to the board the morning of the meeting – there was little time for review. Incidentally, there was no discussion of the supplemental letters during the April 14, 2022 meeting.

This leads the Court to its next finding that APA staff failed to accurately summarize the substance of the comments in opposition to the application. In this regard, the following slide was presented by Ziemann relative to those appearing both in support of and in opposition to the applications:

"**Public Comment**

- Notable Supporters:
  Adirondack Park Invasive Species Prevention Program (APIPP)
  Town of Fort Ann/Washington County
  Warren County Soil and Water Conservation
  Brant Lake Association
  Loon Lake Park District Association
  Glen Lake Association
  Chateaugay Lake Association
  Friends Lake Association
  Luzerne Lake Town and Association
  Paradox Lake Association

- Notable Against:
  Adirondack Council
  Lake George Association/ Waterkeeper (Joint Letter)
  Protect the Adirondacks!" [R2694].

Interestingly, Ziemann failed to list Collins who, as stated above, has a doctoral degree in limnology and has spent the majority of her career studying Lake George. He never mentioned Collins once during the presentation. Further, while listing the several lake associations that

appeared in support of the applications, Ziemann failed to indicate that the Chautauqua Lake Association appeared in opposition to the applications, stating as follows: "ProcellaCOR has recently been utilized in Chautauqua Lake to treat [EWM]. We have not observed the success that the applicator and its protagonists have touted" [R1937]. Ziemann likewise failed to indicate that many local lake associations that appeared in support of the applications did so because they hope to glean more information about ProcellaCOR before applying it themselves. For example, the Paradox Lake Association stated as follows: "We fully support [this] trial and look forward to the results it will provide. The diligence and rigor which [the] LGPC will apply to the trial will provide beneficial observations that can be used by the Paradox Lake Association [and] other Adirondack lakes in the future" [R2023].

Although the Court was unable to find anything in writing with respect to the procedure whereby APA staff presents recommendations to the board on permit applications, presumably the APA requires these presentations to be balanced and impartial. Here, that simply was not the case. The presentation was largely one-sided and favored the LGPC, with such favoritism underscored by Wilk's April 13, 2022 email to Ziemann. Indeed, of the 110-page Power Point presentation, only 9 pages were devoted to the 325 public comments in opposition – with these comments minimized during the presentation itself. Without the benefit of all the public comments – and the necessary time to review them – the board members could not adequately evaluate the project using their expertise. While cognizant that the Court must give deference to the judgment of an agency, under these circumstances the Court finds that petitioners have succeeded in their first cause of action (*see Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 150 [2002]; *Matter of Hudson Health Extracts, LLC v*

Zucker, 206 AD3d 1515, 1519 [3d Dept 2022]; *Matter of Mid Is. Therapy Assoc., LLC v New York State Educ. Dept.*, 129 AD3d 1173, 1175-1176 [3d Dept 2015]).

Third Cause of Action

Turning now to that aspect of the third cause of action which alleges that the approval process was rushed, "wetlands projects shall be reviewed according to the procedures of section 809 of the [APA] Act and [the APA rules at 9 NYCRR part 572]" (9 NYCRR 572.1 [a]). To that end, 9 NYCRR 572.3 (a) provides that "[a]ny sponsor of a proposed large scale project may request preliminary consultations and an informal assessment of the proposed project and site by the agency staff." Once an application for a permit has been submitted relative to the project, the APA then has 15 days to "notify the project sponsor . . . whether or not the application is complete" (APA Act § 809 [2] [d]). When the application is deemed complete, the APA must immediately publish notice of the completed application in the environmental notice bulletin and mail copies of the notice to adjoining landowners (*see* APA Act § 809 [2] [a], [d]; 9 NYCRR 572.8 [a]). The notice "shall constitute an invitation to submit written advisory comments on the project" and must specify the date by which public comments are due (9 NYCRR 572.8 [b] [establishing default 15-day public comment period]; *see* APA Act § 809 [2] [d]). "If the agency determines to hold a public hearing on an application for a permit, the agency shall notify the project sponsor of its determination by certified mail on or before [60] days . . . after the agency notifies the project sponsor that the application is complete" (APA Act § 809 [3] [d]). "In the case of an application for a permit for which no public hearing has been held, the agency decision shall be mailed on or before [90] days . . . after the agency notifies the project sponsor that the application is complete . . . " (APA Act § 809 [3] [b]). It must also be noted that "[a]ny time period specified in section [section 809 of the APA Act] may be waived and extended for

good cause by written request of the project sponsor and consent of the agency, or by written request of the agency and consent of the project sponsor."

Here, the LGPC requested a preliminary consultation and informal assessment relative to the project in February 2021. The applications were then submitted on January 7, 2022 and – following the submission of additional materials – they were deemed complete on March 3, 2022. Notice of the applications was published and mailed, with the notice providing that public comments would be accepted through March 31, 2022 – although according to the APA, comments received up until the meeting on April 14, 2022 were accepted. The board then granted the applications at the April 14 meeting.

Respondents contend that under APA Act § 803 (3) (d), the "APA is required to determine whether to deny a permit or hold an adjudicatory hearing no later than 60 days from the date it deems a permit application complete" and, further, that "[b]ecause [the] APA deemed the . . . permit applications complete on March 3, 2022, it was statutorily obligated to decide whether to deny the applications or hold a hearing by May 2, 2022" [Tallent Memorandum of Law, at p 20]. This, however, is not entirely accurate. As set forth above, APA Act § 803 (3) (d) requires that the APA notify the project sponsor of whether is has determined to hold a public hearing no later than 60 days from the date the application is deemed complete; the decision on the application must then be issued no later than 90 days from the date of completion. To that end, the APA had until May 2, 2022 to advise the LGPC whether it planned to hold a public hearing – and until June 1, 2022 to issue a decision on the applications. Moreover, the APA had the ability to extend these deadlines, upon consent of the LGPC.

APA staff had the benefit of being involved with the project since February 2021, but the APA board did not – and some members clearly felt the need for more time to fully review the

record, as demonstrated when one member commented that she "didn't get the [Town of Hague] resolution in time to go back and see what information they utilized" (Video of April 14, 2022 meeting, available online at http://nysapa.granicus.com/MediaPlayer.php?view_id=2&clip_id=583 [last accessed Feb. 28, 2023], at 4:27:08). Indeed, another member expressly asked: "What's the rush? Can't we just think about this a little bit more carefully?" (*id.* at 4:07:59). In response, counsel for the APA advised as follows: "Generally, where we are, we have this time box and a decision has to be made and the option today, other than approval, would be identifying fact issues to send to an adjudicatory hearing. There is no other option there" (*id.* at 4:08:12). As explained above, this is not entirely accurate – the board had until May 2, 2022 to decide whether to hold a public hearing – and until June 1, 2022 to issue a decision. A decision did not have to be made "today." This sense of urgency is evident throughout the record – presumably because of the time constraints imposed by the applications, seemingly exacerbated by the presentation of APA staff. In this regard, the remaining aspect of the third cause of action alleges that the APA approval process was lacking in comparative analysis – in view of the discussion above, this does appear to be the case.

Under the circumstances, the Court finds that petitioners have succeeded in their third cause of action as well (*see Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d at 150; *Matter of Hudson Health Extracts, LLC v Zucker*, 206 AD3d at 1519; *Matter of Mid Is. Therapy Assoc., LLC v New York State Educ. Dept.*, 129 AD3d at 1175-1179 [3d Dept 2015]).

Fifth 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."

According to petitioners, the APA failed to recognize the current DASH management program for EWM in Lake George as an alternative to the application of ProcellaCOR in Sheep Meadow Bay, which has wetlands with a value rating of 3. In this regard, the record demonstrates that hand harvesting has been done in Sheep Meadow Bay, but a DASH management program – i.e., hand harvesting with the assistance of a vacuum-like device – has never been done there. Moreover, it has been more than eight years since there has been any EWM management in Sheep Meadow Bay.

In his presentation to the board, Ziemann discussed the DASH management program at length. Specifically, he discussed the success of the program in Upper Saranac Lake, while also highlighting its substantial cost. Ziemann presented two slides comparing the DASH management efforts to eradicate EWM in Lake George – which is 44 square miles in size – to Upper Saranac Lake – which is 8.25 square miles in size [R2608-2609]. While presenting the slides, he stated as follows:

> "Here's a slide comparing efforts in Upper Saranac Lake, which have been very successful, with those in Lake George. The axis to the left is the pounds of milfoil harvested, and to the right is the total annual cost of the program. In Upper Saranac Lake shown on the bottom the milfoil control project began in 2004 when it was discovered that the lake was significantly infested, and then a three-year intensive hand harvesting program succeeded in reducing the

> infestation level to manageable levels at a cost of $1.5 million. 20 tons of [EWM] were removed in 2004 alone. And with significant financial resources available, spending in excess of $75,000 annually, Upper Saranac Lake continues to keep pressure on the infestations, keeping them at manageable levels, but with diminishing levels of return, as beds become sparser. So staying on top of that infestation is kind of analogous to hand-picking individual dandelions from an overgrown golf course, with the added difficulty that all of it's underwater . . . .
>
> "Upper Saranac Lake continues spending resources to maintain the infestation at manageable levels, and as those infestations are controlled, it takes more efforts from a hand-harvesting perspective, to target what remains to avoid a bounce back in the population" (Video of April 14, 2022 meeting, available online at http://nysapa.granicus.com/MediaPlayer.php?view_id=2&clip_id=583 [last accessed Feb. 28, 2023], at 2:29:46).

Ziemann then proceeded to indicate that Lake George is much bigger than Upper Saranac Lake, so "it's essentially hand-picking dandelions from a much larger golf course" (*id.* at 2:31:05). He further stated that far more EWF is removed from Lake George each year because the Lake has not yet reached manageable levels like Upper Saranac Lake – so resources must be triaged. According to Ziemann, this is why there has been no EWM management in Sheep Meadow Bay the past several years.

Although the DASH management program is certainly an alternative for management of EWM in Lake George, there is no dispute that ProcellaCOR is far more cost effective – especially when considering a body of water as large as Lake George that must triage its resources. In this regard, the conclusion that ProcellaCOR is the only alternative reasonably able to accomplish the LGPC's objective – namely, the eradication of EWM at a lower cost – is not irrational. That being said, there remains the issue of the one-sided presentation by APA staff relative to the comments in opposition to the use of ProcellaCOR – which focused primarily on possible deleterious effects – which rendered the board unable to make an informed decision under 9 NYCRR 578.10 (a) (3), not only with respect to whether the DASH management

program is an alternative but also whether the ProcellaCOR application will result in the minimum possible degradation.

While the fifth cause of action does not expressly include respondents alleged violation of 9 NYCRR 578.10 (a) (1) with respect to Blairs Bay – which has a value rating of 1 – allegations in this regard are included elsewhere in the petition and as such, will be addressed. To that end, 9 NYCRR 578.10 (a) (1) 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 1[where t]he proposed activity:
>
> (i) would be compatible with preservation of the entire wetland; and
>
> (ii) would not result in degradation or loss of any part of the wetland or its associated values."

Again, in view of the one-sided nature of the presentation by APA staff at the April 14, 2022 meeting, it does not appear that the board had sufficient information upon which to make a determination under 9 NYCRR 578.10 (a) (1). The Court thus finds that petitioners have succeeded in their fifth cause of action (*see Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d at 150; *Matter of Hudson Health Extracts, LLC v Zucker*, 206 AD3d at 1519; *Matter of Mid Is. Therapy Assoc., LLC v New York State Educ. Dept.*, 129 AD3d at 1175-1179 [3d Dept 2015]).

Sixth Cause of Action

Insofar as the sixth cause of action is concerned, APA Act § 809 (6) (c) provides as follows:

> "At any time during the review of an application for a permit . . . , the agency may request additional information from the project sponsor . . . with regard to any matter contained in the application or request when such additional information is necessary for the agency to make any findings or determinations required by law.

Such a request shall not extend any time period for agency action contained in this section."

To the extent that APA Act § 809 (6) (c) does not extend any of the relevant time periods, it is difficult to imagine what additional meaningful information could have been provided prior to June 1, 2022 – especially given the complexities in this matter. Further, without the benefit of an impartial presentation, the board could not sufficiently ascertain whether additional information was necessary.

In any event, the Court finds it unnecessary to decide this cause of action in view of the discussion hereinbelow relative to the eighth cause of action.

Eighth Cause of Action

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

"The determination of whether . . . 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 [hereinafter SEQRA]."

Beginning with the first criterion, all parties to this proceeding appear to agree that Lake George – classified as AA-S for its fresh surface waters – offers a "uniqueness of resources" not found in other lakes, which resources will be affected by the ProcellaCOR application. With respect to the second criterion, the degree of public interest in the project cannot be disputed. There were 325 letters submitted, with 300 in opposition and 22 in support. While Ziemann discounted the majority of letters submitted in opposition as being part of the LGA's letter writing campaign, they nonetheless represent 300 people living on Lake George who are concerned about this project; 300 people who regularly recreate in Lake George and rely upon its waters for drinking and irrigation purposes. It must also be noted that the LGA represents 3,700 individual members, and the Town of Hague has approximately 731 residents (*see* Census Reporter, Town of Hague, Warren County, NY, https://censusreporter.org/profiles/06000US3611331335-hague-town-warren-county-ny [last accessed March 1, 2023]). Finally, of the 22 letters in support, many were submitted by lake associations interested in "expanding [their] knowledge base [with] this trial application" [R2213].

The Court further finds that the third criterion is met, with the significant issues relating to the approval of the project at the forefront in this litigation. The fourth criterion has not been

met, as there was no discussion of the project being approved with major modifications or substantial conditions.

Insofar as the fifth criterion is concerned, the information presented at a public hearing would likely be of assistance to the APA in its review of the applications – ensuring that the board members are provided with *all* relevant information both in support of and in opposition to the proposed applications of ProcellaCOR. With respect to the sixth criterion, the extent of public involvement achieved by other means was lacking, given the lack of clarity with respect to whether the board was provided with all public comments received. Finally, to the extent that the applications were subject to the APA's comprehensive jurisdiction, they are statutorily exempt from the requirements of SEQRA (*see* ECL 8-0111 [5] [c]; *Matter of Association for the Protection of the Adirondacks, Inc. v Town Bd. of Town of Tupper Lake*, 64 AD3d 825, 826 [3d Dept 2009]). The seventh criterion is therefore inapplicable.

In any event, given that five of the seven criteria have been met, the Court finds that the APA's issuance of the permits without first holding a public hearing was arbitrary and capricious (*see Matter of City of Long Beach v Flacke*, 77 AD2d 638, 639 [2d Dept 1980]; *Matter of Industrial Liaison Comm. of Niagara Falls Chamber of Commerce v Flacke*, 108 AD2d 1095, 1096 [3d Dept 1985]), again noting that perhaps the board would have chosen to hold a public hearing had it been presented with all information both for and against the proposed herbicide application. Petitioners have therefore succeeded in their eighth cause of action.

Briefly, amicus curiae Adirondack Council, Inc. – "a not-for-profit organization that advocates to ensure the ecological integrity and wild character of the Adirondack Park" [Janeway Affidavit, at ¶ 1] – has appeared in support of the requested relief. Adirondack Council contends that the two slides presented to the APA board comparing the DASH

management efforts undertaken in Upper Saranac Lake to eradicate in EWM with those undertaken in Lake George are misleading and fail to accurately reflect the successful management of EWM in Upper Saranac Lake. Adirondack Council further contends that – had there been a public hearing – it would have had an opportunity to explain the skewed data to the board. It is submitted, however, that these contentions are without merit. Notwithstanding whether the slides themselves were misleading, Ziemann's explanation to the board – as set forth above – adequately explained the success of DASH management efforts in Upper Saranac Lake.

Based upon the foregoing, the petition is granted in its entirety and the April 14, 2022 determination approving the application of ProcellaCOR on Blairs Bay and Sheep Meadow Bay, respectively, is vacated. The undertaking posted by petitioners is further discharged.

Therefore, having considered NYSCEF document Nos. 1 through 17, 90 through 112, 118, and 128 through 133, and having heard oral argument on February 17, 2023 with Thomas M. West, Esq. appearing on behalf of petitioners, Joshua M. Tallent, Esq. appearing on behalf of respondents, and Robert S. Rosborough IV, Esq. appearing on behalf of amicus curiae Adirondack Council, Inc., it is hereby

ORDERED AND ADJUDGED that the petition is granted in its entirety and the April 14, 2022 determination approving the application of ProcellaCOR on Blairs Bay and Sheep Meadow Bay, respectively, is vacated; and it is further

ORDERED AND ADJUDGED that the undertaking posted by petitioners on June 17, 2022 is discharged.

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

Dated: March 3, 2023
Lake George, New York

ROBERT J. MULLER, J.S.C.

ENTER: