

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WARREN

In the Matter of

THE LAKE GEORGE ASSOCIATION,
THE LAKE GEORGE WATERKEEPER,
THE TOWN OF HAGUE, THE TOWN
OF DRESDEN, DELPHINE KNIGHT
BROWN, ELIZABETH HILDEBRANDT
HELENA G. RICE, JILLIAN AND
MICHAEL MAGINNIS, AND SCOTT
ENGLER,

**VERIFIED PETITION
AND COMPLAINT**

Petitioners-Plaintiffs,

Index No.:

- against –

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

Respondents-Defendants,

For a Judgment Pursuant to Article 78 of the New York Civil
Practice Law and Rules

Petitioners-Plaintiffs, the Lake George Association, the Lake George Waterkeeper, the Town of Hague, the Town of Dresden, Delphine Knight Brown, Elizabeth Hildebrandt, Helena G. Rice, Jillian and Michael Maginnis, and Scott Engler (“Petitioners”), by and through their attorneys, Whiteman Osterman & Hanna, LLP, as and for their Verified Petition and Complaint allege as follows:

PRELIMINARY STATEMENT

1. This is a hybrid CPLR Article 78 proceeding and declaratory judgment action against Respondents-Defendants, the New York State Department of Environmental Conservation (“DEC”), the Adirondack Park Agency (“APA”), and the Lake George Park Commission

(“LGPC”) to enjoin and annul their arbitrary, capricious and illegal determination, made in violation of lawful procedure, to allow the experimental application of the aquatic herbicide ProcellaCOR EC (“ProcellaCOR”) in Lake George.

2. Claiming that an emergency exists, the LGPC again seeks to experimentally apply—for the first time—an aquatic pesticide, ProcellaCOR, in two open bays on the Lake’s eastern shore for the purpose of controlling the invasive plant Eurasian watermilfoil. LGPC tried to apply the aquatic pesticide in 2022, but was prevented from doing so by temporary relief on account of the failure of APA to hold a public hearing on LGPC’s application to the APA for the proposed application of ProcellaCOR to a freshwater wetland, as required by the New York Freshwater Wetlands Act, Environmental Conservation Law (“ECL”), Article 24, which temporary relief was ultimately annulled by the Supreme Court, Appellate Division.

3. In this hybrid Article 78 proceeding and action for a declaratory judgment, Petitioners-Plaintiffs challenge the decision of DEC to issue a permit under ECL 15-0313 authorizing the application of ProcellaCOR in Lake George on the grounds that (i) DEC utterly failed to comply with the New York State Environmental Quality Review Act (“SEQRA”), ECL Article 8; (ii) DEC ignored its own regulations and written guidelines for consideration of applications for permits to apply aquatic herbicides (Policy DSHM-PES-05-05, herein, the “DEC Aquatic Pesticide Policy”) which require it to identify all water intakes within the area, notify all riparian owners in the area to be affected, and provide such owners with an opportunity to formally object, in writing, to the application of aquatic herbicides affecting their riparian property and be afforded the opportunity to participate in a public hearing regarding such objections; (iii) DEC lacked the authority under the ECL to authorize the violation of the vested riparian rights of the riparian owners that filed objections to the LGPC application; and (iv) the application of

ProcellaCOR in Lake George will result in a violation of the DEC promulgated, and United States Environmental Protection Agency (“EPA”) approved, water quality standards for Lake George—a Class AA-Special water body, the highest and most restrictive classification under New York law, in direct violation of ECL § 17-0501. Notably, the DEC permitting issues were not part of the earlier litigation regarding ProcellaCOR and were not addressed in the temporary relief granted two years ago, nor the annulment of that relief by the Appellate Division—Third Department.

4. In this hybrid proceeding, Petitioners-Plaintiffs also challenge the issuance of the DEC and APA permits, as well as the proposed application of ProcellaCOR in Lake George by the LGPC, as violations of the so-called Environmental Rights Amendment or Green Amendment to the New York State Constitution, Section I, Article 19 of the New York State Constitution. The Green Amendment creates a basic right of all New Yorkers to “clean water, clean air and a healthful environment.” The application of a pesticide to a source of water supply in New York therefore violates the riparian owners’ rights to “clean water” as a right enshrined in the New York Constitution.

5. Finally, the riparian owners that are individual petitioners and the other riparian owners that are members of the petitioner organization, the Lake George Association (“Riparian Petitioners”), also challenge the decision of DEC and APA to authorize the application of ProcellaCOR in Lake George, and the proposed application of ProcellaCOR by LGPC, as an interference with and deprivation of vested riparian property rights without compensation, in violation of both the New York State and United States Constitution.

6. Accordingly, Respondents-Defendants must be enjoined from proceeding with the application of ProcellaCOR in Lake George, the impacts of which are irreversible.

PARTIES

7. Petitioner, the Lake George Association (“LGA”) is a not-for-profit corporation organized under the laws of the State of New York which maintains an office at 2392 State Route 9N, Lake George, New York. LGA is the preeminent Lake-protection entity dedicated to safeguarding Lake George and its principal purpose is: “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. The LGA has nearly 1,250 individual supporting members, nearly all of whom reside or own property in the Lake George basin and/or utilize Lake George as a drinking water supply and/or for recreational purposes. Many of the LGA’s members are residents and landowners in the Towns of Hague and Dresden. Other members do not own property on Lake George, but recreate on Lake George, including in the areas proposed for treatment. Accordingly, the LGA acts on behalf of and for the benefit of its members to safeguard Lake George from improper application of the State laws, rules and regulations in place to protect it.

8. Petitioner, the Lake George Waterkeeper (the “Waterkeeper”) is a program affiliated with the LGA which also maintains an office at 2392 State Route 9N, Lake George, New York. The Waterkeeper’s mission is: “to defend the natural resources of Lake George and its watershed by promoting compliance with existing laws, supporting scientific research, and upholding sound engineering principles that provide for the continuing protection of the Lake and the common good of the community.” In furtherance of its mission, the Waterkeeper documents changes in water quality throughout the Lake George watershed by monitoring chemical, physical, and biological conditions, and studying underwater changes. The Waterkeeper program is led by Christopher Navitsky PE, a New York State licensed professional engineer. Copies of LGA and

the Waterkeeper's joint comment letters to DEC and APA are attached as **Exhibits A and B**, respectively and are incorporated by reference herein.

9. The Town of Hague is a municipal corporation located in Warren County, New York, with a principal office located at 9793 Graphite Mountain Road, Hague, NY 12836. The Town of Hague's municipal boundary extends to the eastern shore of Lake George and includes Blairs Bay and Sheep Meadow Bay. The Town Board of the Town of Hague adopted a Resolution opposing approval of the two applications for the use of ProcellaCOR in Lake George.

10. The Town of Dresden is a municipal corporation located in Washington County, New York with a principal office location at Clemons Center Road in Clemons, New York 12819. The shoreline of Sheep Meadow Bay and its adjacent property is located in the Town of Dresden. The Town of Dresden has formally objected to the proposed application of ProcellaCOR in the waters of Lake George at Sheep Meadow Bay.

11. Petitioner Delphine Knight Brown is an individual with a summer residence at 5201 Bluff Head Road in Huletts Landing, New York. Her property contains 565 feet of lakefront situated within Sheep Meadow Bay. Ms. Knight Brown did **not** receive a Letter of Notification from LGPC containing prior actual notice of the proposed date of treatment and water use restrictions, as required by 6 NYCRR 327.4(c)(2) and the DEC Aquatic Pesticide Policy. Ms. Knight Brown is strongly opposed to the application of ProcellaCOR in Sheep Meadow Bay and, as a riparian owner with vested property rights in the use of Lake George waters, submitted objections to DEC indicating her opposition (a copy of her comment letter is attached as **Exhibit C** and incorporated by reference herein). Ms. Knight Brown and her family draw water from Sheep Meadow Bay for drinking, cooking, and bathing. In addition, they use their lakefront for swimming, watersports, and fishing. Ms. Knight Brown's family includes individuals with pre-

existing health conditions, young children, and women of child-bearing age, for whom exposure to chemicals is especially concerning. Ms. Knight Brown relies on summer rental income to offset her property taxes and fund maintenance and repairs to the property, and fears that the application of ProcellaCOR in such close proximity to her home will cause cancellations or a lack of interest in renting and result in financial hardship for her family. Ms. Knight Brown cannot see any evidence of Eurasian watermilfoil from her dock, nor does it impact her family's ability to recreate and swim.

12. Petitioner Elizabeth Hildebrandt is an individual with a summer residence at 7131 Meadow Point Way in Huletts Landing, New York. Her property spans 10 acres and contains 5 individual homes which use untreated water pumped directly from Sheep Meadow Bay. Ms. Hildebrandt is strongly opposed to the application of ProcellaCOR in Sheep Meadow Bay and, as a riparian owner of property with vested rights in the use of Lake George water, submitted objections to DEC raising substantive and significant issues with the proposed application (a copy of her letter is attached as **Exhibit D** and incorporated by reference herein). Ms. Hildebrandt draws water from Sheep Meadow Bay for potable uses specifically limited by the ProcellaCOR EPA label, including irrigation of her lawn and garden. In addition, Ms. Hildebrandt rents her property to numerous tenants throughout the summer to help pay her property taxes. Her tenants have an expectation that the water in Sheep Meadow Bay will be safe for them and their pets. Ms. Hildebrandt does not view the Eurasian watermilfoil in Sheep Meadow Bay as an issue that warrants rushed efforts to apply a chemical treatment like ProcellaCOR.

13. Petitioner Helena G. Rice is an individual with a summer residence at 5235 Bluff Head Road in Huletts Landing, New York. Her property contains 2200 feet of lakefront situated within Sheep Meadow Bay. Ms. Rice is strongly opposed to the application of ProcellaCOR in

Sheep Meadow Bay and, on behalf of her family, as riparian owners of property with vested rights in the use of Lake George waters, submitted objections to DEC and comments to APA indicating her opposition (copies of her letters are attached as **Exhibit E** and incorporated by reference herein). Ms. Rice and her family draw water from Sheep Meadow Bay for bathing and other potable purposes, including irrigation of their garden and landscaping, and water for their pets—uses specifically limited by the ProcellaCOR EPA label regarding the limitations on the use of water treated with ProcellaCOR. Ms. Rice is concerned that enhanced die off from milfoil and other nontarget species in the early part of the summer from the proposed treatment will wash up and decay on their beach. In addition, she and her family use the beach located on their property for swimming and recreation. Ms. Rice’s family includes young children for whom exposure to chemicals is especially concerning. Finally, Ms. Rice and her family rely on summer rental income to maintain their property, and she fears that the application of ProcellaCOR in such close proximity to the house will cause cancellations or a lack of interest in renting and result in financial hardship for her family.

14. Petitioners Michael and Jillian Maginnis are individuals with a summer residence at 5199 Bluff Head Road in Huletts Landing, New York. Their property contains 450 feet of lakefront situated within Sheep Meadow Bay. Mr. and Mrs. Maginnis did *not* receive a Letter of Notification from LGPC containing prior actual notice of the proposed date of treatment and water use restrictions, as required by 6 NYCRR 327.4(c)(2) and the DEC Aquatic Pesticide Policy. Mr. and Mrs. Maginnis are strongly opposed to the application of ProcellaCOR in Sheep Meadow Bay and, as riparian owners of property with vested rights in the use of Lake George waters, submitted objections to DEC and comments to APA indicating their opposition (copies of the letters are attached as **Exhibit F** and incorporated by reference herein). Mr. and Mrs. Maginnis and their

family draw water from Sheep Meadow Bay potable purposes, including irrigation of their organic vegetable garden and landscaping—uses limited by the EPA label for ProcellaCOR treated waters. They also use the lakefront to swim, recreate, and fish, and for their pets to swim and drink from. Each summer the Maginnis family rents their home to the same family in early July; however, this year the renters have indicated they will cancel their reservation if the ProcellaCOR application moves forward. As a result, the Maginnis family will lose much-needed rental income. The Maginnis family does not view the Eurasian watermilfoil in Sheep Meadow Bay as an impairment to navigation or recreation.

15. Petitioner Scott Engler is an individual with a summer residence at 3031 Lake George Way, Putnam Station, New York. His property contains 110 feet of lakefront situated within Blairs Bay, within 400 yards of the proposed application site. Mr. Engler is strongly opposed to the application of ProcellaCOR in Blairs Bay and submitted objections to DEC stating his objections as a riparian owner with vested rights to the waters of Lake George (a copy of his objection letter is attached as **Exhibit G** and incorporated by reference herein). Mr. Engler and his family draw water from Blairs Bay for drinking, cooking, and bathing. In addition, they use their lakefront for swimming and recreating. Mr. Engler has two young children for whom exposure to chemicals is especially concerning. Mr. Engler does not believe that the Eurasian water milfoil present in Blairs Bay poses any emergency; nor does it rise to the level of gross infestation that ProcellaCOR was designed to treat.

16. Respondent-Defendant DEC is a governmental agency created and existing under the laws of the State of New York with a principal office at 625 Broadway, Albany, NY 12233. DEC's mission is to “conserve, improve and protect New York's natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety

and welfare of the people of the state and their overall economic and social well-being.” DEC either has issued or is about to issue the Aquatic Pesticide Permits for the two ProcellaCOR applications that are the subject of this proceeding.

17. Respondent-Defendant APA is a governmental agency created and existing under the laws of the State of New York with a principal office at 1133 NYS Route 86 Ray Brook, NY 12977. The APA is charged with protection of the public and private resources of the Adirondack Park. APA approved and issued the Wetland Permits for the two ProcellaCOR applications that this proceeding seeks to enjoin and annul.

18. Respondent-Defendant LGPC is the applicant before APA and DEC that was granted Permit approvals for application of ProcellaCOR in Blairs Bay and Sheep Meadow Bay for the eradication of Eurasian milfoil. LGPC is an independent governmental agency created and existing under the laws of the State of New York with a principal office at 75 Fort George Road, Lake George, New York 12845. LGPC is charged with carrying out programs aimed at protecting Lake George and the safety of the recreating public.

JURISDICTION AND VENUE

19. This Court has subject matter jurisdiction pursuant to CPLR 301, 3001, and 7801. Venue for this proceeding is proper in Warren County pursuant to CPLR 506(b) and 7804(b).

FACTUAL BACKGROUND

20. Lake George is a 32-mile long, oligotrophic lake situated within the southeast corner of the Adirondack Park. It is classified by Respondent DEC as Class AA-Special—the highest water quality classification in New York State—and is legally protected by that water quality classification for use as a source of drinking, bathing, fishing, and other forms of water recreation.

21. Blairs Bay and Sheep Meadow Bay (now known as Jellfrie-Knight Bay), the two bays which are the target of LGPC's applications, contain APA-regulated deep-water marsh wetlands with a value rating of 1 and 3, respectively.

22. ProcellaCOR's label indicates it is intended for use in "slow moving/quiescent waters with little or no continuous outflow" and the only studies conducted on the impacts of ProcellaCOR have been by the manufacturer itself.

23. Lake George's waters, however, are in constant movement due to its horizontal and vertical currents that cause continuous and highly variable circulation.

24. In fact, detailed, verified, and peer-reviewed computer circulation models reveal that, due to the Lake's constant circulation and movement of water, any site-specific application of ProcellaCOR would, within several hours, spread outside of the treatment and dilution zones and within 48 hours, spread miles outside of the chosen test sites extending the herbicide's impact far beyond the area intended.

25. To date, no herbicide has ever been permitted in Lake George to manage Eurasian watermilfoil; hand harvesting, on the other hand, remains a proven and effective method for removing the invasive species—one which LGA offered to fund for the 2024 season.¹

ENVIRONMENTAL IMPACTS ASSOCIATED WITH PROCELLACOR

26. ProcellaCOR is a relatively new herbicide—registered by Respondent DEC in 2019—consisting of a synthetic "auxin" which regulates growth and development in plants.

27. Nearly all studies on the chemical's efficacy and impacts were conducted by the manufacturer: according to the results of a Freedom of Information Act request filed by Petitioner

¹ On June 11, 2024 LGPC formally declined LGA's offer to fund hand harvesting in the proposed treatment bays for the 2024 season.

Waterkeeper, and a subsequent meeting with EPA staff on March 16, 2024, 95% of the 364 studies submitted to the EPA are unpublished industry studies performed in small vessels under very controlled laboratory conditions; 133 (37%) of the studies are unpublished studies prepared by Dow Chemical Company (or Corteva); and 231 (63%) are unpublished studies prepared by other companies for Dow Chemical (*see* Exhibit B, pg. 8).

28. DEC, on the other hand, has never independently studied ProcellaCOR's impacts to verify its appropriateness for use in the State's protected freshwater resources.

29. Still, native plants and benthic species are documented as being susceptible to ProcellaCOR. The EPA Final Registration Decision for ProcellaCOR acknowledges "some level of toxicity to aquatic plants at environmentally relevant levels." *Environmental Fate and Ecological Effects Risk Assessment for the Registration of the New Herbicide for the Use on Rice and Aquatics Florpyrauxifren-benzyl*, EPA Office of Pesticides Program, April 11, 2017.

30. EPA's *Environmental Fate and Risk Assessment*, the ProcellaCOR label, and published studies identify numerous other known risks, unknown risks, and uncertainties such as: the potential for resistant biotypes to eventually dominate the weed population and become resistant to these products, inability to determine or preclude chronic risk to freshwater invertebrates; and the potential for chronic risk for mammals whose diet is largely composed of aquatic invertebrates. *Id.*; *see also* ProcellaCOR EC SLN & Primary Label, *available at* <https://lgpc.ny.gov/system/files/documents/2024/01/procellacor-ec-sln-primary-labels.pdf>.

31. ProcellaCOR's label also specifies that it is for use in slow-moving and quiescent waters to maintain the critical concentration-exposure-time for the herbicide to be effective. *Id.*

32. In addition, the New York State Department of Health has only reviewed the risks to human health from the use of ProcellaCOR in slow-moving, quiescent water bodies. *See*

ProcellaCOR EC DEC Registration Decision, February 22, 2019, pg. 6, available at <https://lgpc.ny.gov/system/files/documents/2022/03/procellacor-ec-dec-registration-decision.pdf>.

33. Lake George is simply not slow-moving and quiescent, due to its horizontal and vertical currents and susceptibility to weather/wind conditions.

34. Indeed, computer circulation models by The Jefferson Project², which have been verified by physical measurements, suggest that if applied in Blairs Bay and Sheep Meadow Bay, the ProcellaCOR will quickly migrate into non-targeted areas of the Lake, given the continuous outflows from those bays. *See* Exhibit A, pg. 8-9.

35. As a result, ProcellaCOR may affect other non-targeted species in the areas to which it migrates. *See Memorandum Re: Review of Benefits of the Registration of Florpyrauxifen-benzyl in Aquatic Use Sites*, EPA, June 16, 2017.

36. Perhaps most alarmingly, the Lake's hydrodynamic processes will create bulk water exchange and dispersal of the auxin growth hormone contained in ProcellaCOR, which could result in enhanced growth of milfoil in areas *outside* the treatment area, frustrating the entire purpose of the application. *See id.*, pg. 9.

37. This is particularly concerning given that DEC's Bureau of Ecosystem Health has expressed concerns regarding the potential for ProcellaCOR to impact ecosystem health if applied over large areas. *See* ProcellaCOR EC DEC Registration Decision, pg. 2.

38. Finally, new Jefferson Project data, collected by state-of-the-art technology in one of the proposed target bays, suggests that application of the herbicide in June is inappropriate, as

² The Jefferson Project is collaboration between Rensselaer Polytechnic Institute, IBM Research, and the Lake George Association that captures real-time water quality and weather data on Lake George using a network of sensors on land, in streams, and in the lake which measure a diverse array of variables related to weather, water runoff, water circulation, and water quality.

it would coincide with critical annual limnological events with a wide range of conditions including thermal stratification, which will impact the efficacy of treatment, algal growth, and zooplankton. *See Exhibit A, pg. 14-15.*

DEC'S PERMIT REVIEW PROCESS

39. Respondent LGPC filed applications with DEC on March 11, 2024 seeking two Aquatic Pesticide Permits for the following activities:

Application of ProcellaCOR to a 4 acre area within Blairs Bay between May 17, 2024 and June 30, 2024, at a dosage rate of 7.72 ppb; and

Application of ProcellaCOR to a 3.6 acre area within Sheep Meadow Bay between May 17, 2024 and June 30, 2024, at a dosage rate of 7.72 ppb.

40. Upon information and belief, DEC received dozens of public comments detailing extensive opposition to the proposed application of ProcellaCOR.

41. Petitioners LGA and the Waterkeeper filed a joint comment letter on the applications raising substantive and significant issues with the proposed applications of ProcellaCOR. *See Exhibit B.*

42. Riparian Petitioners also filed objection letters with DEC, in which they objected to the proposed applications of ProcellaCOR and raised numerous substantive and significant issues related to the potential impacts of ProcellaCOR on their riparian rights and uses. *See Exhibits C through G.*

43. The DEC Aquatic Pesticide Policy provides that (a) all riparian property owners and users in the area that would be affected by the application of an aquatic pesticide receive written notice of the permit application and that the permit application include an identification of each “water intake” in the affected area; and (b) written objections from riparian owners and users must be reviewed to determine whether the issues raised in any written objections “would provide

a basis for referral of the Permit application to the Office of Hearings. In order for objections to be considered substantive and significant, thus requiring a hearing referral, objections must be in writing, must explain the basis of the objection and must identify the specific impacts which the objector asserts would significantly adversely affect the nonconsenting owner/user or the environment. A hearing referral is required on the basis of an objection only if the Department staff determine that the objection constitutes grounds to propose to deny or impose significant conditions on the Permit.”

44. Moreover, DEC’s promulgated regulations at 6 NYCRR 327.1(b) provide that “no [aquatic pesticide permit] shall be issued except where the applicant has certified that the affected riparian users have agreed to temporary curtailment of their uses incidental to treatment or unless the applicant demonstrates to the satisfaction of the commissioner that any nonconsenting riparian users will not be significantly adversely affected by the use of the chemicals subject to such limitations as are set forth in the permit.”

45. 6 NYCRR 327.4(c)(2) specifies that “Permits shall require and be issued upon the condition that prior actual notice of date or dates of treatment and water-use restrictions be given to all affected riparian users and known users.”

46. Upon information and belief, the LGPC’s aquatic pesticide permit applications failed to identify all the “water intakes” in the areas to be affected and LGPC failed to provide written notification to all the affected riparian owners and users, all as expressly required by the DEC Aquatic Pesticide Policy. These defects were brought to the attention of the DEC in the comments filed by the LGA/Waterkeeper, which were adopted by reference by many of the affected riparian owners; however, upon information and belief, the defects were not or will not be corrected prior to issuance of the challenged permits.

47. Despite these failures on the part of LGPC to comply with the DEC Aquatic Pesticide Policy, dozens of riparian owners and users filed objections to the permit application and documented numerous scientific and other bases that would warrant permit denial.

48. DEC either has issued or is about to issue the two Aquatic Pesticide Permits notwithstanding the outcry of public opposition to the applications, including the significant bases for opposition and adverse impacts raised in public comments.

49. DEC did so or will do so without conducting a public hearing and, upon information and belief, without doing a detailed environmental review of the proposed action as required by SEQRA.

APA'S PERMIT REVIEW PROCESS

50. On May 6, 2024, LGPC requested that its applications previously filed with APA seeking two Wetlands Permits for the same application of ProcellaCOR in Blairs Bay and Sheep Meadow Bay be reopened/unsuspended.

51. The APA determined the applications were jurisdictional on the basis that the proposed application sites for the herbicide are regulated freshwater wetlands pursuant to 9 NYCRR Part 578.

52. The standards for approval of activities involving wetlands depend on the value rating, with stricter standards for activities in high value wetlands. 9 NYCRR §578.10

53. Blairs Bay is a deep-water marsh wetland located in the Town of Hague in Warren County, New York and has a value rating of “1.”

54. Value 1 wetlands are the most protected category of wetlands and have the most stringent standards for approval due to their unique characteristics and ecological value. 9 NYCRR 578.10

55. Sheep Meadow Bay is also a deep-water marsh wetland located in the Town of Hague in Warren County and has value rating of “3.”

56. APA issued a determination of completion for both applications on May 7, 2024 and accepted public comments on the applications until May 30, 2024.

57. Petitioners LGA and the Waterkeeper filed a joint comment letter on the applications setting forth significant objections. *See* Exhibit A.

58. Riparian Petitioners also filed comment letters with APA, in which they raised numerous concerns about the potential impacts of ProcellaCOR on their riparian rights and uses. *See* Exhibits E and F.

59. ECL § 24-0801 provides that the APA “shall...determine prior to the granting of any permit that the proposed activity will be consistent with the Adirondack Park 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 park, taking into account the economic and social or other benefits to be derived from the activity.”

60. In accordance with 9 NYCRR 578.9, “[i]n its review of wetlands projects pursuant to this Part [APA] will consider the relative values of wetlands set forth in section 578.5 of this Part, as well as any economic, social or other benefits to be derived from the activity proposed. Such benefits may compel a departure from the general guidelines of this Part, *in which case [APA] shall document the specific benefits compelling such departure*” (emphasis supplied).

61. 9 NYCRR 578.10 further provides:

“Unless the economic, social and other benefits to be derived from the activity proposed compel a departure from [the below] guidelines, [APA] shall not issue a permit for regulated wetlands unless the findings set forth below are made:

[For a value 1 wetland] “The 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....and

[For a value 3 wetland] “The 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.”

62. Prior to the issuance of the two Wetlands Permits by the APA, the LGA made a written offer to the LGPC to pay for the treatment of the two areas targeted by the aquatic herbicide with the most current technology available for hand harvesting, demonstrating that the APA could not conclude that the proposed treatments comply with the wetlands regulations because a non-chemical alternative exists that is at no cost to the LGPC.

63. On June 20, 2024 APA issued the two Wetlands Permits, without holding a public hearing and notwithstanding the significant degree of public opposition to the applications; such opposition includes Petitioners’ objection letters documenting significant issues that warranted further consideration.

64. The APA’s Conclusions of Law that there will be no undue adverse impact and no alternatives are not supported by any findings as required by ECL § 24-0801.

65. Further, the APA made no findings that the project will be consistent with the Adirondack Park land use and development plan in accordance with ECL § 24-0801 and.

66. Finally, the Wetlands Permits contain no findings pursuant to 9 NYCRR 578.9 which would support APA’s departure from the general guidelines.

AS AND FOR A FIRST CAUSE OF ACTION
(DEC Failed to Comply with SEQRA in its Issuance of the Aquatic Pesticide Permits)

67. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

68. Pursuant to DEC’s regulations implementing SEQRA, an “action” subject to SEQRA includes “projects or physical activities...that may affect the environment by changing the use, appearance or condition of any natural resource or structure, that...require one or more new or modified approvals from an agency or agencies” (6 NYCRR 617(b)(1)).

69. Actions that require SEQRA review are further classified as either Type I, Type II, or Unlisted. *See* 6 NYCRR 617.2(b), (aj), (ak), (al).

70. Type I actions are more likely to have a significant adverse environmental impact (as identified in § 617.2); Type II actions are exempt from review under SEQRA (*see id.* at § 617.5); and Unlisted actions are those actions that are neither Type I or nor Type II (*see id.* at § 617.2(al)).

71. The action before DEC—the applications for two Aquatic Pesticide Permits to apply ProcettaCOR in two bays on Lake George—is not exempt from SEQRA pursuant to ECL § 8-0111(5)(c) or 6 NYCRR 617(c)(45) because APA’s jurisdiction over this matter is pursuant to the Federal Wetlands Act, not Executive Law 807, 808 and 809.

72. For Type I and Unlisted actions, at the determination of significance phase, the lead agency must: “(1) consider the action as defined in sections 617.2(b) and 617.3(g) of this Part; (2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern; (3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and (4) set forth its determination of significance in written form containing a reasoned elaboration and providing reference to any supporting documentation.” *See* 6 NYCRR § 617.7(b).

73. The DEC Aquatic Pesticide Policy also mandates compliance with SEQRA, including preparation and attachment of an EAF and Positive or Negative Declaration to the permit application.

74. A review of the application materials made available by DEC in connection with the issuance of the Aquatic Pesticide Permits reveals no examination of potential adverse environmental impacts whatsoever.

75. Upon information and belief, DEC utterly failed at the initial determination phase to identify relevant areas of environmental concern related to the proposed application of ProcellaCOR, as required by SEQRA.

76. Upon information and belief, DEC did not complete an environmental assessment form to evaluate whether the proposed application of ProcellaCOR has potentially significant adverse impacts.

77. Upon information and belief, DEC did not prepare a Positive or Negative Declaration, and thus made no determination of significance for the application of ProcellaCOR in a written form containing a reasoned elaboration and providing reference to any supporting documentation, as required by SEQRA and the DEC Aquatic Pesticide Policy.

78. Even if DEC prepared and issued an EAF, the conclusion that there are no adverse impacts is substantively flawed based upon the many adverse impacts that were identified by riparian owners.

79. In short, even though the application of ProcellaCOR in Lake George constitutes an “action” within the plain meaning of DEC’s own SEQRA regulations, upon information and belief, Respondents did not comply with any of SEQRA’s procedural or substantive mandates.

80. Furthermore, any negative declaration issued by DEC would have been unsupported by any identification of relevant environmental impacts, any hard look, or any reasoned elaboration as required by SEQRA since no Environmental Impact Statement was prepared.

81. LGPC should therefore be enjoined from applying ProcellaCOR until such time as an Environmental Impact Statement is completed in accordance with SEQRA. Petitioners will suffer environmental impacts in a manner different in kind and degree from the public at large by DEC's failure to comply with SEQRA because they are riparian owners and users of the proposed application areas.

AS AND FOR A SECOND CAUSE OF ACTION
(DEC's Issuance of the Aquatic Pesticide Permits Despite LGPC's Failure to Follow Proper Notification Procedures was Arbitrary, Capricious, and a Violation of Lawful Procedure)

82. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

83. LGPC failed to provide written notification of its application to apply an aquatic pesticide in Lake George to all riparian owners and users within the affected area of Lake George and also failed to identify all the "water intakes" used by such riparian owners and users, among others, all as required by the DEC Aquatic Pesticide Policy.

84. As a result of such failure by LGPC, DEC was required to deny the application of LGPC on account of its failure to comply with its obligations to provide written notification and to identify all "water intakes" in the area to be affected and its failure to do so was arbitrary, capricious, and a violation of lawful procedure.

AS AND FOR A THIRD CAUSE OF ACTION
(DEC's Failure to Hold a Public Hearing on Issuance of the Aquatic Pesticide Permits was Arbitrary, Capricious, and a Violation of Lawful Procedure)

85. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

86. The DEC Aquatic Pesticide Policy provides that objections from riparian owners and users must be reviewed to determine whether the issues raised “would provide a basis for referral of the Permit application to the Office of Hearings. In order for objections to be considered substantive and significant, thus requiring a hearing referral, objections must be in writing, must explain the basis of the objection and must identify the specific impacts which the objector asserts would significantly adversely affect the nonconsenting owner/user or the environment. A hearing referral is required on the basis of an objection only if the Department staff determine that the objection constitutes grounds to propose to deny or impose significant conditions on the Permit.”

87. Riparian Petitioners filed numerous written objections which set forth the factual and scientific basis for their objections in sufficient detail and identified with specificity the anticipated adverse impacts to themselves, their families, and other users of their riparian property and the environment.

88. DEC’s decision not to hold a public hearing notwithstanding Petitioners’ objections outlining substantive and significant issues was arbitrary and capricious, contrary to its own policy and in violation of lawful procedure.

AS AND FOR A FOURTH CAUSE OF ACTION

(DEC’s Decision to Issue the Aquatic Pesticide Permits Notwithstanding the Impacts on Riparian Owners and Users Arbitrary, Capricious, and a Violation of Lawful Procedure)

89. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

90. The DEC Aquatic Pesticide Policy provides that “if there are no adverse impacts identified by any reviewing unit, and no recommendations have been made for the Permit denial, a determination can be made that a Permit will be issued.”

91. The proposed application of ProcellaCOR will interfere with Riparian Petitioners’ deeded property rights, including their right to take and use untreated water from Lake George for drinking water, for their gardens, and for bathing and recreating.

92. No provision of the ECL or any other law or regulation gives DEC the right to abrogate the rights of Riparian Owners and Users.

93. DEC’s determination to issue the Aquatic Pesticide Permits, despite the numerous potential adverse impacts raised by Petitioners and notwithstanding the interference with riparian rights, was arbitrary and capricious and affected by error of law.

AS AND FOR A FIFTH CAUSE OF ACTION
(APA’s Decision to Issue the Wetlands Permits was Arbitrary, Capricious, and a Violation of Lawful Procedure)

94. The APA “shall...determine prior to the granting of any permit that the proposed activity will be consistent with the Adirondack Park 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 park, taking into account the economic and social or other benefits to be derived from the activity.” ECL § 24-0801.

95. “In its review of wetlands projects pursuant to this Part [APA] will consider the relative values of wetlands set forth in section 578.5 of this Part, as well as any economic, social or other benefits to be derived from the activity proposed. Such benefits may compel a departure from the general guidelines of this Part, in which case [APA] shall document the specific benefits compelling such departure.” 9 NYCRR 578.9 (emphasis supplied).

96. “Unless the economic, social and other benefits to be derived from the activity proposed compel a departure from [the below] guidelines, [APA] shall not issue a permit for regulated wetlands unless the findings set forth below are made: [For a value 1 wetland] “The 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....and [For a value 3 wetland] “The 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.” 9 NYCRR 578.10.

97. APA’s determination that issuance of the Wetlands Permits would have no undue adverse impact was unsupported by any findings as required by ECL § 24-0801 and therefore arbitrary and capricious and contrary to law.

98. APA’s determination to issue the Wetlands Permits lacked any findings of consistency with the Adirondack Park Land Use Plan as required by ECL § 24-0801 and, therefore was arbitrary and capricious and contrary to law.

99. APA’s failure to make findings pursuant to 9 NYCRR 578.9 which would support APA’s departure from the general guidelines in issuing the Wetlands Permits was arbitrary and capricious and contrary to law.

100. APA’s determination to issue the Wetlands Permit for Blairs Bay notwithstanding the evidence before it that the application of ProcellaCOR could be incompatible with preservation of the entire wetland and could result in degradation or loss of part of the wetland or its associated values was arbitrary and capricious and affected by error of law.

101. APA's determination to issue the Wetlands Permit for Sheep Meadow Bay notwithstanding the evidence before it that the application of ProcellaCOR would not result in the minimum possible degradation or destruction of any part of the wetland or its associated values and that hand harvesting remains a perfectly viable alternative that can reasonably accomplish LGPC's objectives was arbitrary and capricious and affected by error of law.

AS AND FOR A SIXTH CAUSE OF ACTION
(The Proposed Application of ProcellaCOR Violates Article I §19 of the New York State Constitution)

102. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

103. The Green Amendment guarantees "[e]ach person shall have a right to clean air and water, and a healthful environment" and is enforceable against the State.

104. The application of aquatic pesticides and disturbances to wetlands within the Adirondack Park are highly controlled and regulated by the State.

105. DEC has the authority and discretion to deny aquatic pesticide permits pursuant to 6 NYCRR 327.1(b) where the affected riparian users have disagreed with the temporary curtailment of their uses incidental to treatment.

106. By failing to exercise its authority and discretion to deny LGPC's application for an aquatic pesticide permit for ProcellaCOR in the face of mounting opposition from riparian users and significant unknown risks, DEC has deprived Petitioners of their constitutional right to clean water and a healthful environment.

107. Pursuant to 9 NYCRR 578.10, APA has authority and discretion to deny activities that impact wetlands unless the economic, social and other benefits to be derived from the proposed activity proposed compel a departure from guidelines.

108. By failing to exercise its authority and discretion to deny the proposed application of ProcellaCOR despite its unknown impacts on public health and welfare, and despite the availability of alternative methods such as hand harvesting, APA has deprived Petitioners of their constitutional right to clean water and a healthful environment.

109. LGPC is a State agency charged with with protecting Lake George for the safety of the recreating public; by proceeding with the experimental application of an herbicide which has not been widely studied, and which may have significant impacts on human health, LGPC has violated Petitioners' rights guaranteed by the Green Amendment.

110. By reason of this constitutional violation, Petitioners seek a declaratory judgment that DEC's and APA's actions and failure to act violate Petitioners' rights under the Green Amendment. In addition, this Court should enjoin LGPC from going forward with the proposed application of ProcellaCOR pursuant to the issued or soon-to-be issued Aquatic Pesticide Permits, and the Wetland Permits.

AS AND FOR A SEVENTH CAUSE OF ACTION
(The Application of ProcellaCOR Would Constitute a Violation of the DEC Promulgated
Water Quality Standards for Lake George)

111. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

112. The Class AA-Special water quality standard of Lake George promulgated by DEC under ECL § 17-0301 and approved by the EPA under the Clean Water Act, 33 U.S. Code 1313, provides that Class AA-Special waters are “**best used as a source of water supply for drinking, culinary or food processing purposes**; primary and secondary contact recreation; and fishing. The waters shall be suitable for fish, shellfish, and wildlife propagation and survival. These waters shall contain no floating solids, settleable solids, oil, sludge deposits, toxic wastes, deleterious

substances, colored or other wastes or heated liquids attributable to sewage, industrial wastes or other wastes” (emphasis supplied).

113. The application of ProcellaCOR in Lake George would introduce a “deleterious substance” making such waters unfit and unsuitable for one or more of the protected best uses of Lake George, all as prohibited by ECL § 17-0501 which provides that “[i]t shall be unlawful for any person, directly or indirectly, to throw, run, drain or otherwise discharge into such waters organic or inorganic matter that shall cause or contribute to a condition or contravention of the standards adopted by the department pursuant to section 17-0301.”

AS AND FOR AN EIGHTH CAUSE OF ACTION
(DEC’s and APA’s Authorization and LGPC’s Application of ProcellaCOR Constitutes an Unconstitutional Taking Without Just Compensation)

114. Petitioners repeat and reallege each of the preceding allegations as if set forth in full herein.

115. LGPC’s application of ProcellaCOR in Blairs Bay and Sheep Meadow Bay will prevent Petitioners [riparian owners] from their respective deeded rights as riparian owners to using the lake as they currently do: to drink from, cook, bathe, recreate, or irrigate their lawns and gardens.

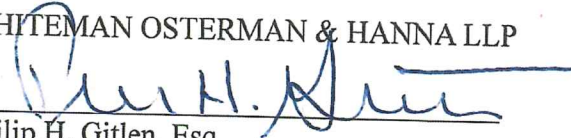
116. Accordingly, DEC’s and APA’s regulatory actions authorizing the use of ProcellaCOR and LPGA’s actions applying ProcellaCor in its regulatory capacity regarding Lake George will constitute an uncompensated taking of the riparian owners’ deeded property rights for which fair compensation is owed.

117. By reason of this deprivation of property, Petitioners seek a declaratory judgment that LGPC’s actions constitute a governmental taking without just compensation, in violation of the Section 7 Article I of the New York State Constitution and the United States Constitution.

WHEREFORE, Petitioners respectfully request that this Court issue and order and judgment pursuant to Article 78: (1) annulling DEC's Aquatic Pesticide Permits approving the application of ProcellaCOR in Blairs Bay and Sheep Meadow Bay; (2) annulling APA's June 20, 2024 Wetlands Permits approving the application of ProcellaCOR in Blairs Bay and Sheep Meadow Bay; (3) Declaring that DEC, APA, and LGPC are violating Petitioners' constitutional rights under the Green Amendment; and (4) Declaration that LGPC's actions constitute an unconstitutional governmental taking for which compensation is owed.

Dated: June 20, 2024

WHITEMAN OSTERMAN & HANNA LLP

BY: 

Philip H. Gitlen, Esq.

Robert S. Rosborough, Esq.

Molly D. Parlin, Esq.

Attorneys for Petitioners-Plaintiffs

One Commerce Plaza

Albany, New York 12260

Telephone: (518) 487-7600

VERIFICATION

STATE OF NEW YORK :

:

COUNTY OF ALBANY :

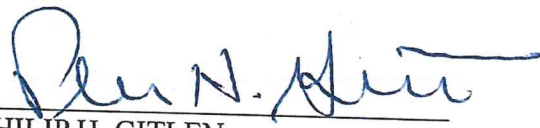
PHILIP H. GITLEN, being duly sworn, deposes and says as follows:

1. I am senior counsel for Whiteman Osterman & Hanna LLP, attorneys for Petitioners-Plaintiffs in this matter.
2. I have read the foregoing Verified Petition and Complaint and the same is true to my own knowledge, except those matters state to be upon information and belief, and as to those matters, I believe them to be true. The source of my belief is my review of the pertinent documents and information provided by my clients.
3. The reason why this verification is made by me and not Petitioners-Plaintiffs is that Petitioners-Plaintiffs do not reside within the County of Albany.



Sworn to before me this
20th day of June, 2024

PATRICIA A. CHRISTIAN
Notary Public, State of New York
Qualified in Rensselaer County
No. 01CH4887803
Commission Expires March 23, 2027


PHILIP H. GITLEN