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October __, 2022

Barbara Rice
Executive Director
Adirondack Park Agency
P.O. Box 99
Ray Brook, NY 12977

RE: APA Project 2021-0223/ Jurisdictional Determination J2020-0480
Tax Map Parcel 154.15-5-28.000
Jon and Marcy Hausman
Land Use Area: Low Intensity Use
Town of Minerva, Essex County

Dear Ms. Rice:

By letter dated October 29, 2021, the Adirondack Park Agency ("Agency") determined that it does not have permit jurisdiction over a single family dwelling and on-site septic system proposed for the above property located at 59 Minerva Lake Road in the Town of Minerva, Essex County (the "Project Site"). The Project Site is located in an area classified as Low Intensity Use on the shoreline of Minerva Lake, contains regulated wetlands, and has an intermittent stream running through it. PROTECT has been working with neighboring landowners in evaluating the proposed project. We have reviewed the project file, conducted a site visit, and have reviewed photographs of the Project Site taken during all four seasons. Based on our review, we request that the Agency reconsider its nonjurisdictional determination because (i) the Agency incorrectly determined that an intermittent stream on the Project Site is a drainageway; and (ii) the portion of the Project Site where the septic system is proposed to be located is subject to periodic flooding and will therefore likely result in the discharge of septic waste to on-site wetlands and to Minerva Lake.

Intermittent Stream

The Agency's October 29, 2021 nonjurisdictional determination states that the on-site septic system "may not be located within 100 feet of any water body, *including intermittent or seasonal streams.*" Ltr. From John Burth, APA Environmental Program Specialist, to Brett Winchip,

Winchip Engineering (Oct. 29, 2021) (emphasis added). However, the October 27, 2021 site plan relied upon by the Agency shows that the existing intermittent stream flows within 100 feet of the proposed on-site septic system, in violation of Agency regulations. *See* 5 NYCRR 575.1(c), (e)(2) (applying the 100 foot setback requirement for on-site septic systems to intermittent streams).

The Agency's nonjurisdictional determination was apparently based on the erroneous conclusion that the intermittent stream on the Project Site is a "drainageway." However, the Agency's regulations do not include either a definition of "drainageway" or an exemption from the setback requirement for a "drainageway." In any event, the waterway flowing through the Project Site is an intermittent stream, not a drainageway.

The New York Natural Heritage Program defines an intermittent stream as follows:

Intermittent streams are ephemeral waterways that serve as conduits only during particularly wet and rainy times of year. They are typically the uppermost reaches of stream systems. During spring snow melt and heavy rains, intermittent streams fill with water, draining the surrounding watershed, and transporting nutrients to the lower stream reaches. As with other ephemeral aquatic communities such as vernal pools, flora and fauna that inhabit intermittent streams are specially adapted for a wide range of hydrologic conditions. These communities can transition from being a coursing stream, to having remnant ponded sections, and then to being completely dry during a single growing season.

N.Y. Natural Heritage Program, *Intermittent Stream Guide* (March 6, 2017) available at <https://guides.nynhp.org/intermittent-stream/#:~:text=Intermittent%20streams%20are%20ephemeral%20waterways,uppermost%20reaches%20of%20stream%20systems>.

The U.S. Environmental Protection Agency ("EPA") defines an intermittent stream as "surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts)." U.S. Environmental Protection Agency, *The Navigable Waters Protection Rule: Definition of "Waters of the United States"* (June 23, 2020), available at https://www.epa.gov/sites/default/files/2020-07/documents/200623_nwpr_tributariesditches_statestribes_508c.pdf.

Agency staff has stated that a definition of intermittent stream appearing in a Department of Environmental Conservation Powerpoint presentation, *Streams 101, Conservation and Land Use Webinar Series* (July 23, 2020) is utilized for jurisdictional determinations. That presentation states only that intermittent streams "flow seasonally."

In contrast, EPA defines a drainageway as "an open linear depression, whether constructed or natural, that functions for the collection and drainage of surface water." U.S. Environmental Protection Agency, General Construction Permit, App. A, Definitions and Acronyms (2022), 87 Fed. Reg. 3522 (Jan. 24, 2022).

The waterway flowing through the Project Site is an intermittent stream because it is a natural waterway that flows seasonally and thus meets the New York Natural Heritage Program, DEC and EPA definitions of an intermittent stream. It is not a drainageway because it is not man-made, and it does serve as a drainageway for an upstream development. Attached as Exhibit A are photographs taken on October 25, 2022 which show water flowing along the watercourse following a rainfall event. These photos also show that the waterway is similar to pictures of other waterways classified as intermittent streams. *See* N.Y. Natural Heritage Program, Photograph of Intermittent Stream at Camp Hero State Park, annexed as Exhibit B; N.Y. Natural Heritage Program, Photograph of Intermittent Stream at Camp Saratoga at Wilton Wildlife Preserve and Park, annexed as Exhibit C.

The Project Site is Subject to Seasonal Flooding

The Project Site, including the area where the on-site septic system is proposed to be located, is subject to seasonal flooding. The annexed photographs show flooding of the Project Site in the Spring (Exhibit D), Fall (Exhibit E) and Winter (Exhibit F). Because the septic system is proposed for a location that is subject to periodic flooding, it is likely that septic waste will be discharged to the intermittent stream, the on-site wetlands and Minerva Lake.

For the above reasons, we request that the Agency reconsider and reverse its non-jurisdictional determination.

Thank you for your attention to this matter.

Sincerely,

Christopher Amato
Conservation Director and Counsel
Protect the Adirondacks! Inc.
P.O. Box 48
North Creek, NY 12853
Office: (518) 251-2700
Cell: (518) 860-3696

Cc: Christopher Cooper, Esq.
John Burth

EXHIBIT A







EXHIBIT B



EXHIBIT C



EXHIBIT D





EXHIBIT E



NO
TRESPASSING

EXHIBIT F

