To Be Argued By:
Christopher Amato, Esq.
Time Requested: 10 min.

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION – FOURTH DEPARTMENT

In the Matter of the Application of

ADIRONDACK WHITE LAKE ASSOCIATION and PROTECT THE ADIRONDACKS! INC.,

Petitioners-Appellants,

v.

NEW YORK STATE ADIRONDACK PARK AGENCY, et al.,

Respondents-Respondents,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules.

CA 22-01964

Sup. Ct. Index No.
EFCA2022-000556

BRIEF OF APPELLANTS

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Questions Presented

1. Did the determination by the Adirondack Park Agency (APA) not to hold an adjudicatory hearing on an application to locate a new mining operation adjacent to a residential community have a rational basis when in reaching that determination the APA failed to consider or apply its regulatory criteria for holding adjudicatory hearings?

Supreme Court found the APA had acted rationally in not considering or applying the regulatory criteria when determining not to hold an adjudicatory hearing.

2. Did the APA's determination not to hold an adjudicatory hearing have a rational basis even though it was based on a biased and one-sided presentation by the APA staff that mischaracterized both the factual record and the standards for holding an adjudicatory hearing?

Supreme Court did not directly consider whether the presentation by the APA staff was biased and one-sided but found that the APA had acted rationally.

3. Did the APA's determination not to hold an adjudicatory hearing have a rational basis when the APA's regulatory criteria were met by Appellants' submission of a report from an environmental consulting firm raising significant

noise and water quality issues and the submission of more than 3,000 public comments opposing the application?

Supreme Court concluded that the issues raised by Appellants did not warrant an adjudicatory hearing and did not consider the public opposition to the proposed project.

Preliminary Statement

Petitioners-Appellants Adirondack White Lake Association and Protect the Adirondacks! Inc. (hereinafter collectively, "Appellants") submit this brief in support of their appeal of the Decision and Order dated September 19, 2022 by Supreme Court, Oneida County (Clark, J.) dismissing Appellants' CPLR Article 78 petition ("Petition").

The Petition challenges the determination by Respondent Adirondack Park Agency ("APA" or "Agency") not to hold an adjudicatory hearing prior to granting Red Rock Quarry Associates, LLC ("Red Rock" or "Applicant") a permit to establish a new granite mining operation in the residential community of White Lake in the Adirondack Park. APA's determination not to hold an adjudicatory hearing was: (i) made without considering or applying the Agency's own regulatory criteria for holding an adjudicatory hearing; (ii) based on a one-sided, factually and legally incorrect presentation by APA staff; (iii) made despite Appellants' submission of a detailed report from an environmental consulting firm demonstrating significant flaws in the Applicant's noise impact and water quality analysis; and (iv) made despite the submission of over 3,000 public comments opposing the mining project and the raising by Appellants and other commenters of substantive and significant issues concerning the project's impacts.

For all these reasons, the Agency's failure to hold an adjudicatory hearing on the application was arbitrary, capricious and contrary to law, and Supreme Court's decision must be reversed and the Petition granted.

Statement of the Case

I. Factual Background

On April 5, 2021, Red Rock submitted a permit application to the APA seeking approval for a major granite mining project on a 56.5-acre parcel of land located on Stone Quarry Road in the Town of Forestport, Oneida County in the Adirondack Park. Strategic Mining Solutions, LLC, White Lake Mining Quarry Mined Land Use Plan (April 2021) at 1, Exhibit G to Petition (Appendix Volume 1 p. 179).[1] The project site is a forested parcel of land lying directly adjacent to the White Lake residential community, which is comprised of both year-round and seasonal residents, including approximately 445 homeowners who are members of the White Lake community. Numerous residences are in close proximity to the mine site, with approximately 20 homes located within one quarter mile. Ltr. From The LA Group to Devan Korn, Adirondack Park Agency (July 28, 2021) ("LA Group Report"), Exhibit F to Petition, Figure 2, White Lake Quarry Review, Nearby Parcels Land Use Classifications, Vol. 1, A.124; Adirondack Park Agency, Supplemental Information Request (undated), Vol. 1, A.246.

[1] Hereinafter, citations to the Appendix will be to "Vol. [volume number] A.[page numbers]."

The proposed mining operation will involve drilling, blasting, on-site crushing of rock, and up to twenty heavy-duty truck trips per day entering and leaving the site. Strategic Mining Solutions, White Lake Granite Quarry Mined Land Use Plan (April 2021) ("Mined Land Use Plan"), Exhibit G tot Petition, Vol 1, A.181. Mining operations will occur from April 1 through October 31, Monday through Friday, commencing at 7:00 AM and concluding at 6:00 PM, and on Saturdays commencing at 7:00 AM and concluding at noon. APA Permit 2021-0075 (Jan. 14, 2022) ("APA Permit"), Vol. 2, A.510. Drilling will occur Monday through Friday, from 8:00 a.m. until 5:00 p.m., and blasting will be allowed twice a day, Monday through Friday, between the hours of 9:00 AM and 3:00 PM. *Id*., A.510-511. These mining activities are proposed to occur for the next 25 years over approximately 26 acres. Mined Land Use Plan, Vol. 1, A.201.

The APA determined the mining application complete on July 7, 2021 and announced that public comments on the proposed project would be accepted until July 29, 2021. APA Permit, Vol. 2, A.521. More than 3,000 public comments opposing the proposed mining project were received by the APA, including more than 300 individual comments, 1,432 form letters, and 1,400 petition signatures. *Id.*

Appellants submitted a 60-page report prepared by The LA Group, an environmental consulting firm with extensive experience reviewing complex

environmental engineering projects.[2] LA Group Report, Vol. 1, A.115-174. The report identified significant deficiencies in Red Rock's application, including the failure by the applicant to comply with key aspects of the Department of Environmental Conservation ("DEC") Program Policy, Assessing and Mitigating Noise Impacts (Oct. 6, 2000) ("DEC Noise Policy"), Vol. 3, A.913-940, in assessing the project's noise impacts on the neighboring residential community; the failure to provide crucial baseline information on existing ambient noise levels at and near the site; misrepresentations of the project's noise impacts on the neighboring residential community; the failure to accurately identify the location of the principal drinking water aquifer underlying the project site; the failure to substantiate the separation between the lowest proposed mine floor elevation and the aquifer; and the failure to determine the direction of groundwater flow. Ltr. From the LA Group to Devan Korn, Adirondack Park Agency (July 28, 2021), Exhibit F to Petition, Vol 1, A.115-174.

Appellants informed the Agency that these serious deficiencies, coupled with the substantial public opposition to the project, were sufficient to mandate an adjudicatory hearing under the APA's hearing regulations. Ltr. From Todd Ommen, Esq., Pace Environmental Litigation Clinic, to John Ernst, Chair, Adirondack Park

[2] *Portfolio,* The LA Group, https://www.thelagroup.com/portfolio/ (last visited April 26, 2023). Among these projects are a 20-year stormwater management plan for the United States Army at West Point, a $65-million facility upgrade for the Niagara Falls State Park, and a nationwide quality assurance review for projects conducted for the National Park Service. *Id.*

Agency (Jan. 12, 2022) ("PELC Letter"), Exhibit D to Petition, Vol. 1, A.093-111. Appellants also pointed out that failure to resolve these issues would preclude the Agency from making the statutory finding that is a prerequisite to granting a permit under the Adirondack Park Agency Act ("APA Act"): namely, that the project would "not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park." *Id*.; Executive Law § 809(10)(e).

The Red Rock application was considered by the APA Board at its meeting on January 13 and 14, 2022.[3] Despite the fact that the APA Board needed to determine whether to hold an adjudicatory hearing on the application, at no time during their presentation to the Board did the Agency staff present, discuss, or analyze the Agency's regulatory criteria for holding an adjudicatory hearing. *See* APA Staff Power Point Presentation (Jan. 12, 2022) ("APA Staff Presentation"), Vol. 2, A.526-595. Instead, Agency staff repeatedly alluded to a fabricated criteria that does not appear in either the APA Act or the Agency's regulations. Both the APA Project Review Officer and the APA Counsel incorrectly stated to the Board that an adjudicatory hearing is only required where there are "unclear facts" – a

[3] The APA Board consists of eleven members, three of which are representatives from the Departments of Environmental Conservation, State and Economic Development, and eight of which are appointed by the Governor with the advice and consent of the Senate. Executive Law § 803. One of the functions of the APA Board is to determine whether to hold an adjudicatory hearing on a pending permit application. *Id*. § 809.

standard that simply does not exist and reduces the eight-factor regulatory test to a single (erroneous) criterion. Transcript of APA Regulatory Affairs Committee Meeting (Jan. 13, 2022) ("Reg. Affairs Comm. Tr."), Exhibit C to Petition, Vol. 1, A.081; Transcript of APA Board Meeting (Jan. 14, 2022) ("APA Board Tr."), Exhibit J to Petition, Vol. 1, A.301.

Moreover, the Agency staff's presentation was biased and one-sided, because it failed to inform the APA Board of the full extent of public opposition to the project; mischaracterized the project's impacts on the neighboring residential community; deprived the Board of a full and fair presentation of issues for adjudication because (as Agency staff acknowledged in an affidavit submitted as part of Respondent's answering papers) the staff had already decided that there would be no adjudicatory hearing; and concealed and mischaracterized the APA's regulatory criteria for holding an adjudicatory hearing. As a result, the APA staff supplanted the APA Board's decision-making authority on the critical issue of whether an adjudicatory hearing would be held on the Red Rock application.

On January 14, 2022, the APA Board determined not to hold an adjudicatory hearing on the Red Rock application and voted to issue the mining permit. The permit was issued that same day.

II. Procedural History

On March 15, 2022, Appellants timely filed an Article 78 petition challenging the APA's determination not to hold an adjudicatory hearing on the Red Rock application. Petition, Vol. 1, A.022-379. Appellants sought vacatur of the permit and a remand to the Agency to hold an adjudicatory hearing as required by the APA Act and the Agency's implementing regulations.[4] *Id*., A.052.

Supreme Court concluded that Appellants had failed to show a "substantial or significant factual issue with regard to increased noise pollution . . . that would require an adjudicatory hearing to resolve" and dismissed the Petition. Decision and Order (Clark, J.) (Sept. 19, 2022), Vol. 1, A.019-020. Supreme Court reached this conclusion without considering–or even mentioning–the more than 3,000 public comments opposing the proposed project and without considering or discussing the Agency's eight regulatory criteria for holding an adjudicatory hearing. *Id*., A.012-020. Instead, the Court applied a hearing standard – that Appellants had not raised "unique or unfamiliar issues" – that does not exist in law or regulation. *Id*., A.020.

Appellants now appeal from Supreme Court's legally flawed dismissal of their Petition.

[4] Contrary to Supreme Court's assertion that Appellants "concede that it was not an option to question the validity of the permit," Decision and Order (Clark, J.) (Sept. 19, 2022), Vol. 1, A.012, the Petition seeks declaratory relief that APA's issuance of the permit was arbitrary, capricious and contrary to law and seeks an order vacating the permit.

III. Statutory Framework

"The Adirondack Park currently encompasses approximately six million acres of public and private lands." *Protect the Adirondacks! Inc. v. New York State Dep't of Env't Conservation*, 37 NY3d 73, 77 (2021). In 1971, the New York State legislature passed the APA Act with the express intent of providing for the "optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack park." Executive Law § 801. The Act recognizes that "[t]he wild forest, water, wildlife and aesthetic resources of the park, and its open space character, provide an outdoor recreational experience of national and international significance," but notes that "[g]rowing population, advancing technology and an expanding economy are focusing ever-increasing pressures on these priceless resources." *Id*.

The APA is the state agency responsible for ensuring protection of the natural resources, aesthetic qualities, and wilderness characteristics of the Adirondack Park so that current and future generations can enjoy these "world-renowned treasure in our own backyard." *Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack Park Agency*, 34 NY3d 184, 187 (2019). The APA regulates private lands in the Adirondack Park by administering and enforcing the Adirondack Park land use and development plan, which is the regional zoning plan

for private lands in the Park. Executive Law § 805. Before it can approve a permit application for a proposed land use or development on private land, the Agency must make a finding that the proposed project will not "have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park." *Id*. § 809(10)(e).

The APA may require an adjudicatory hearing on a permit application if it determines that there are "substantive and significant issues" relating to the application. *Id*. § 809(3)(d). The APA's implementing regulations elaborate on the statutory standard by requiring the Agency to consider eight criteria, discussed in detail below, in determining whether to hold an adjudicatory hearing on an application.

ARGUMENT

I. THE APA'S FAILURE TO CONSIDER OR APPLY THE AGENCY'S REGULATORY HEARING CRITERIA WHEN DETERMINING NOT TO HOLD AN ADJUDICATORY HEARING WAS ARBITRARY AND CAPRICIOUS

The APA Act requires that, in determining whether to hold an adjudicatory hearing on a permit application, the Agency must consider "whether the agency's evaluation or comments of the review board, local officials or the public on a project raise substantive and significant issues." Executive Law § 809(3)(d). Substantive and significant issues warranting a hearing may pertain to "any findings or determinations the agency is required to make . . . 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." *Id.* The Act further mandates that in evaluating whether to hold an adjudicatory hearing, the APA "shall also consider the general level of public interest in a project." *Id.*

The APA Act's standards are refined in the Agency's regulations, which specify eight criteria the Agency must consider in determining whether to hold an adjudicatory hearing:

> (1) the size and/or complexity of the project as 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;
>
> (7) whether an environmental impact statement will be prepared pursuant to the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law Article 8; and

(8) the statutory finding required by section 814(2) of the APA Act (relating to review of State agency projects).[5]

9 NYCRR § 580.2(a).

Respondent claims that "Agency staff regularly provide presentations [to the APA Board] to explain . . . the various procedural and substantive requirements of the APA Act." Affidavit of Robert J. Lore, Adirondack Park Agency Deputy Director, Regulatory Programs (May 4, 2022) ("Lore Aff."), Vol. 2, A.451. But the record makes clear that Agency staff failed to inform the Board of the eight regulatory criteria for holding an adjudicatory hearing during its presentation of the Red Rock application at the APA's January 13 and 14, 2022 meeting. APA Staff Presentation, Vol. 2, A.526-595. Thus, the APA Board's determination not to hold an adjudicatory hearing was made without considering or applying the applicable statutory and regulatory criteria – the very definition of arbitrary and capricious agency action. APA Board Tr., Vol.1, A.298-313.

The concealment by Agency staff of the regulatory criteria was compounded by substituting their own fabricated version of the criteria. For example, during consideration of the Red Rock application by the APA Board's Regulatory Affairs Committee on January 13, 2022, the APA Project Review Officer erroneously

[5] APA Act § 814 applies when a "state agency . . . intends to undertake any new land use or development within the Adirondack Park, other than land use or development by the department of environmental conservation pursuant to the master plan for management of state lands." Executive Law § 814(1). Because the Red Rock project is being undertaken by a private entity, not a State agency, the eighth regulatory criterion does not apply in this case.

informed the Committee that an adjudicatory hearing is required only when there are "unclear facts" – a standard that does not exist in either statute or regulation:

> Regarding adjudicatory hearing. Hearings must be held *when unclear facts* prohibit the agency from determining whether a project is approvable and before an application can be denied.

Reg. Affairs Comm. Tr., Vol. 1, A.081. This inaccurate standard was incorporated in the staff's Power Point presentation on the proposed project, which stated that "[h]earings must be held when unclear facts prohibit the Agency from determining whether a project is approvable." APA Staff Presentation, Vol. 2, A.591. Thus, the Regulatory Affairs Committee members were misled to believe that a single criterion – the staff's fabricated "unclear facts" standard – was the sole linchpin for determining whether an adjudicatory hearing was required.

The same uninformed scenario played out when the full APA Board met the next day to consider the Red Rock application. At that meeting, the APA Counsel made a passing reference to "factors laid out in the regs" but failed to identify, much less discuss or explain, those factors for the APA Board:

> . . . [T]here are factors laid out in the regs. *No one of those factors is dispositive, so it's not like if you have one factor that seems to come into play that automatically means you have to go to the adjudicatory hearing*. The hearing must be held before an application can be denied *or if there are unclear facts* that prevent the agency [from making a decision].

APA Board Tr., Vol. 1, A.301 (emphasis added).

Thus, the APA Counsel incorrectly informed the APA Board that an adjudicatory hearing was required in only two instances: if there are "unclear facts" or if the permit is going to be denied. This claim boils down the eight regulatory criteria to a single (erroneous) criterion for holding a hearing.

The APA Counsel's additional claim that no single criterion in the regulations can trigger an adjudicatory hearing is simply wrong; the APA regulations do not require that more than one of the eight listed criteria must be met before an adjudicatory hearing can be held. Indeed, several of the criteria, standing alone, would clearly warrant an adjudicatory hearing. *See, e.g.*, 9 NYCRR §§ 580.2(a)(1) ("the size and/or complexity of the project"); 580.2(a)(2) ("the degree of public interest in the project"); 580.2(a)(3) ("the presence of significant issues relating to the criteria for approval of the project"); 580.2(a)(4) ("the possibility that the project can only be approved if major modifications are made or substantial conditions are imposed"). This is not the first time that the APA Counsel has provided incorrect information to the APA Board. *See Matter of Lake George Assn.,* 2023 N.Y. Misc. LEXIS 936, *35 (describing the Counsel's statement to the APA Board concerning the deadline for deciding whether to hold an adjudicatory hearing as "not entirely accurate.").

The APA Counsel's incorrect and misleading statement of the criteria for holding an adjudicatory hearing was then repeated by the APA Chair, thus cementing the erroneous standard in the minds of the APA Board members who made the decision not to hold a hearing:

> So it's only really if the board determines that the staff has not developed enough factual information for them to make a reasonable determination that you go to the broader hearing where they bring in outside experts presumably and dive in more deeply. *There's nothing about the hearing itself that develops facts*.

APA Board Tr., Vol. 1, A.301; (emphasis added). The APA Board's utter lack of familiarity with the regulatory criteria is underscored by the Chair's comment that "[t]here's nothing about the hearing itself that develops facts." In fact, one of the criteria is "the possibility that information presented at a public hearing would be of assistance to the agency in its review," a clear reference to the development of a factual record at the hearing. 9 NYCRR § 580.2(a)(5).

The APA is legally bound to consider and apply the appropriate statutory and regulatory criteria in determining whether to hold an adjudicatory hearing. The Agency's failure to do so in this case is a textbook example of arbitrary agency action. It is black letter law that "[a]gencies are required to abide by their own regulations." *Gilman v. N.Y. State Div. of Hous. & Cmyt. Renewal*, 99 NY2d 144, 151 (2002). As this Court has previously held, agency actions "are 'purely arbitrary' . . . to the extent that they . . . violate the agency's own regulations." *Legg v. Eastman*

Kodak Co., 248 AD2d 936, 938 (4th Dept. 1998); *see also Frick v. Bahou*, 56 NY2d 777, 778 (1982) (the "rules of an administrative agency, duly promulgated, are binding upon the agency."); *Matter of Jorling v. Adirondack Park Agency*, 214 AD3d 98 (3d Dept. 2023) (holding that APA's failure to correctly apply its own regulations resulted in an arbitrary and capricious decision).

Respondent cannot credibly claim that its application of the fabricated "unclear facts" standard was an interpretation of its hearing regulations that is entitled to deference. The invented standard does not appear in either statute or regulation and, by replacing eight regulatory criteria with a single criterion, eliminates crucial standards for mandating a hearing. As this Court has held, "an agency's interpretation of its own regulations . . . will be upheld *so long as it is not irrational or unreasonable*." *Flacke v. Onondaga Landfill Systems, Inc*., 113 AD2d 440, 444 (4th Dept. 1985) (emphasis added), *aff'd* 69 NY2d 355 (1987); *see also Matter of Jorling*, 214 AD3d at 103 ("An agency's interpretation of its own regulations is ordinarily entitled to deference, but this rule does not apply when the agency's interpretation contradicts the plain language of the regulations or is irrational or unreasonable"); *Matter of Heinlein v. NYS Off. of Children & Family Servs.*, 60 AD3d 1472, 1473 (4th Dept. 2009) ("Although it is true that an agency's interpretation of its own regulation is generally entitled to deference, courts are not required to embrace a regulatory construction that conflicts with the plain meaning

of the promulgated language," citing *Matter of Visiting Nurse Serv. of N.Y. Home Care v. New York State Dept. of Health,* 5 NY3d 499, 506 (2005).

Supreme Court also erred by applying an incorrect legal standard in upholding APA's decision not to hold an adjudicatory hearing. Ignoring the ample record evidence that the Agency had failed to consider or apply its own regulatory criteria, Supreme Court sustained APA's action on the ground that "this permit application *did not present any unique or unfamiliar issues that would require an adjudicatory hearing*." Vol 1, A.020; (emphasis added). Thus, Supreme Court impermissibly substituted its own criteria of "unique or unfamiliar issues" for the statutory and regulatory criteria that govern Agency decisions on whether to hold an adjudicatory hearing. Its decision upholding the Agency's determination is therefore fatally flawed and should be reversed.

II. THE AGENCY STAFF'S PRESENTATION TO THE BOARD ON WHETHER TO HOLD AN ADJUDICATORY HEARING WAS BIASED AND ONE-SIDED, AND DEPRIVED THE APA BOARD OF THE OPPORTUNITY TO MAKE AN INDEPENDENT, RATIONAL DECISION

In addition to failing to provide the APA Board with the governing statutory and regulatory criteria for holding an adjudicatory hearing, the APA staff's presentation to the Board on this issue was biased and one-sided, thereby ensuring an arbitrary and capricious result. Importantly, the Agency staff's presentation to the APA Board on January 14, 2022 did not include the key facts that over 3,000

public comments were submitted to the Agency in opposition to the proposed project. APA Board Tr., Vol. 1, A.298-313. *Compare Matter of Lake George Assn. v. NYS Adirondack Park Agency*, 2023 N.Y. Misc. LEXIS 936,*28-29 (Sup. Ct. Warren County) (concluding "that APA staff failed to accurately summarize the substance of the [public] comments in opposition to the application."). This significant omission is, by itself, sufficient to overturn the Board's determination not to hold an adjudicatory hearing as arbitrary and capricious because "the degree of public interest in the project" is one of the criterion triggering a hearing requirement. Executive Law § 809(3)(d); 9 NYCRR § 580.2(a)(2). Because the full APA Board was not informed of the significant public opposition to the Red Rock application, it could not have had a rational basis for concluding that a hearing was not necessary. *Matter of Lake George Assn*., 2023 NY Misc. LEXIS 936, *30-31 (Overturning the APA's issuance of a permit where Agency staff failed to inform the Board of 325 public comments in opposition to the project).

The APA staff's bias against holding an adjudicatory hearing on the Red Rock application is made crystal clear in the affidavit submitted to Supreme Court by APA staff member Robert Lore. To begin with, Mr. Lore plainly believed that the determination of whether to hold an adjudicatory hearing was *his* to make and that the APA Board's role was to simply rubber stamp his determination rather than to make an independent and objective determination as to whether a hearing was

warranted. For example, Mr. Lore states, "[i]n reaching *my conclusion that an adjudicatory hearing . . . was unwarranted,* I considered the criteria established in Agency's regulations . . . ." Lore Aff. ¶ 56, Vol. 2, A.464; *see id*. ¶ 58, A.464-465 (*"I determined* that this project was neither large nor complex") (emphasis added); *id*. ¶ 62, A.466 (*"I determined* that there were no issues raised in the public comments that would require the presentation of additional facts or evidence in an adjudicatory hearing") (emphasis added); *id*. ¶ 64, A.466-467 (*"I determined* that there were no significant issues relating to the criteria for approval of the project") (emphasis added); *id*. ¶ 68, A.467-468 (*I determined* that there were no outstanding issues for which the information provided at a public hearing would be of assistance") (emphasis added).

Mr. Lore's affidavit makes clear that he had already unilaterally determined that an adjudicatory public hearing was unnecessary *before* the Agency staff's presentation to the Board, thus ensuring that staff's presentation on this point would be skewed. Further evidence of the biased nature of the staff's presentation is that although Mr. Lore claims in his affidavit that he considered each of the Agency's eight regulatory hearing criteria, neither he nor any other staff presented or discussed those criteria during the presentation to the APA Board on the Red Rock application. By concealing the regulatory criteria from the Board, the Agency staff ensured that the Board would not – and could not – independently consider and apply them.

The Agency staff's bias was further evidenced during the presentation to the Regulatory Affairs Committee by its failure to address the key issue of the appropriateness of siting a mining operation in proximity to a residential community. The APA Act specifies that a mineral extraction operation in an area classified Moderate Intensity Use is a secondary compatible use, which is defined as "generally compatible with such area *depending on [the] particular location and impact upon nearby uses* . . . ." Executive Law §§ 805(3)(a), 805(3)(d)(4); (emphasis added). The Agency staff acknowledged that "the area surrounding the project site is characterized by private and State-owned forestland, residential development, and the community of White Lake." Reg. Affairs Comm. Tr., Vol. 1, A.065-066. The staff further noted that in the public comments received by the Agency, "many references are made to the area being primarily residential and frequented by tourists." *Id.*, Vol. 1, A.079.

However, rather than assisting the committee in evaluating the appropriateness of siting a new mining operation next to a residential community, APA staff simply dismissed this key fact—and the concerns raised by over 3,000 members of the public—by claiming that "there is no residential zoning under the APA Act." APA Staff Presentation, Vol. 2, A.580. Apart from being wrong on the law (the land use and development plan includes numerous provisions for residential development), staff's erroneous and biased interpretation of the APA Act did not

absolve them of the statutory duty to determine whether "the particular location and impact on nearby uses" of the Red Rock project is appropriate. Executive Law § 805(3)(d)(4). This issue alone is sufficient to warrant an adjudicatory hearing. 9 NYCRR §§ 580.2(a)(2) (the degree of public interest in the project), 580.2(a)((3) (the presence of significant issues relating to the criteria for approval of the project).

APA's decision not to hold an adjudicatory hearing, which was based on the Agency staff's biased and one-sided presentation, must be annulled because "a determination based not on a dispassionate review of facts but on a body's prejudgment or biased evaluation must be set aside." *Warder v. Board of Regents,* 53 NY2d 186, 197 (1981); *Matter of Lake George Assn*., 2023 N.Y. Misc. LEXIS 936, *30-31 (annulling APA permit because Agency staff's presentation to the APA Board "was largely one-sided," failed to comply with requirement that "presentations . . . be balanced and impartial," and thus "the [APA] board members could not adequately evaluate the project using their expertise.").

III. APPELLANTS' EVIDENTIARY SUBMISSIONS AND THE SIGNIFICANT PUBLIC OPPOSITION TO THE PROJECT MEET THE REGULATORY CRITERIA FOR REQUIRING AN ADJUDICATORY HEARING

Had the APA considered and applied the governing statutory and regulatory criteria – which it did not – the Agency would have been legally bound to order an adjudicatory hearing on the Red Rock application for the simple reason that several of the hearing-triggering criteria were met.

A. The Agency's Conclusion That the New Industrial Mining Operation Will Not Increase Noise Levels is Patently Irrational and Appellants' Submissions Identifying Deficiencies in the Applicant's Noise Analysis Raised a Substantive and Significant Issue Warranting a Hearing

The Agency's regulations require that an adjudicatory hearing be held if there are "significant issues relating to the criteria for approval of the project;" the project "can only be approved if major modifications are made or substantial conditions are imposed;" or there is "the possibility that information presented at a public hearing would be of assistance to the agency in its review." 9 NYCRR §§ 580.2(a)(3), (4), (5). The issues raised by Appellants regarding the Applicant's patently inadequate and inaccurate noise impact analysis meet all three of these criteria.

The Red Rock mine site has been dormant for nearly one hundred years. APA Staff Presentation, Vol. 2, A.529. During that time, a substantial residential community has grown up, attracted by the peaceful ambience of White Lake and its associated uplands. LA Group Report, Vol. 1, A.124. The new mining operation will involve on-site drilling, blasting and crushing, as well as up to 20 heavy duty truck trips per day – all within a few hundred feet of White Lake residences. *Id.*, Vol 1, A.116-174.

The DEC Noise Policy specifies that "[i]n determining the potential for an adverse noise impact, consider not only the ambient noise levels, *but also the existing land use, and whether or not an increased noise level or the introduction of*

a discernable sound, that is out of character with existing sounds, will be considered annoying or obtrusive." DEC Noise Policy, Vol. 3, A.932 (emphasis added). The DEC Noise Policy also recognizes that mining operations, in particular, may have considerably amplified noise impacts:

> In certain circumstances, sound levels can be accentuated or focused by certain features to cause adverse noise impacts at specified locations. At a hard rock mine, curved quarry walls may have the potential to cause an amphitheater effect while straight cliffs and quarry walls may cause an echo.

DEC Noise Policy, Vol. 3, A.922.

Remarkably, the APA concluded that despite the introduction of this significant level of new industrial activity to a heavily residential area, "there will be little to no change in the existing ambient sound levels at the nearest receptors during normal quarry operating hours." Reg. Affairs Comm. Tr., Vol. 1, A.073. This conclusion flies in the face of common experience – as evidenced by the remarks of APA Board members (discussed below) – and is fatally flawed because neither the Applicant nor the Agency measured ambient noise levels and failed to comply with the DEC Noise Policy's mandate that compatibility with existing uses be incorporated in the noise impact analysis.

Appellants challenged the Applicant's noise assessment as deficient because it was not based on actual on-site monitoring of existing ambient noise levels at the site and at the closest residential receptors, which is necessary for a basic noise

impact analysis. LA Group Report, Vol 1, A. A.123-126. For example, the Applicant acknowledged that neither of the sound levels for road traffic ("light auto traffic" and "freeway traffic") set forth in the DEC Noise Policy apply to Route 28, the two-lane county road near the site. The DEC Noise Policy states that "[i]f there is any concern that levels based on performance values do not correctly reflect [sound pressure levels], field measurements should be undertaken to determine ambient [sound pressure levels.]" DEC Noise Policy, Vol. 3, A.932. However, rather than collect on-site ambient sound levels, the Applicant used an average sound level midway between "light" and "freeway" levels rather than collecting on-site ambient traffic sound data. Appellants pointed out that this approach failed to consider variations in noise impacts or ambient noise at residences located at different distances from Route 28 and thus inaccurately estimated noise impacts to residences closest to the mine site and farthest from the road. LA Group Report, Vol. 1, A.125-127. The Applicant's reliance on its arbitrary estimated noise values rather than utilizing on-site ambient noise data is contrary to the DEC Noise Policy and led directly to its preposterous conclusion that the mining operations would have no impact on noise levels at nearby residences.

The Agency's failure to require collection of on-site ambient noise data is also in stark contrast to the Agency's prior practice, when it required a mining applicant for the same site to prepare a noise impact study that "should include at a minimum

actual decibel readings of background/ambient noise levels from specific locations around the site in comparison to anticipated noise levels." Adirondack Park Agency, Notice of Incomplete Application (April 27, 2000), Vol. 1, A.165.

The remarks of Agency Board members made clear that they were deeply skeptical of the Applicant's claim – supported by the Agency staff – that the proposed mining operations will not increase noise levels in the community. For example, APA Board member Arthur Lussi directly challenged the Applicant's characterization of noise impacts from the on-site stone crushing operation:

> Lussi: . . . It's a big enough issue for me that I would consider denying if they don't change the hours of the crushing. I have a lot of experience with crushers. We had one, not we my family, but Lake Placid had one operating at our airport last summer, and it was far away from residences, yet it was heard from a long ways away.

Reg. Affairs Comm. Tr., Vol. 1, A.082.

APA Board member Lussi's statement, based on personal experience, that noise from a crushing operation "was heard from a long ways away" is directly at odds with the Applicant's conclusion that noise from its crushing operation will not be heard at residences a few hundred feet away from the mine.[6] Add to that the noise from drilling, blasting and truck traffic, and the untenability of the Applicant's

[6] Limiting the hours of operation of the crusher as suggested by APA Board member Lussi misses the point, which is that (as Appellants pointed out) the Applicant's analysis of noise impacts from the project is grossly inaccurate and the APA Board were not presented with reliable, accurate information concerning noise impacts. In any event, the DEC Noise Assessment Policy specifically states that "[i]mplementation of hours of operation does not reduce the [sound pressure level] emanating from a facility." Vol. 3, A.936.

conclusion that the project will have no noise impacts to nearby residents is crystal clear.

The same APA Board member recognized the inadequacy of the Applicant's noise analysis by requesting that APA staff visit the site *after the permit was issued* to ascertain how noisy the mining operation really was:

> I don't want to make it a condition but I would like DEC since they're going to be advised when the crushing operation begins, *I would like a staff member to go out during a crushing operation time to do their own personal noise analysis and report back to the board*. . . if all these studies that we've been hearing are saying there's no impact on the ambient noise, I'd just like to hear it [] and see if I agree.

Id., A.309 (emphasis added)**.** The Board member was clearly troubled by the lack of information on potential noise impacts and asked: "I have a question, on that point for example. If today six of us didn't feel we had enough information having to do with noise, we could vote to send this to hearing and if we got six members to agree to that then we could send this to hearing, is that fair?"[7] *Id.*, A.301.

These statements are clear evidence that the APA Board did not have sufficient information on noise impacts to make a rational determination on the permit, and that Appellants' submissions concerning the deficiencies in the Applicant's noise impact analysis raised a substantive and significant issue warranting an adjudicatory hearing.

[7] The Board member's question was not answered.

B. Appellants' Submissions Pointing Out That the Agency Lacked Critical Baseline Information on the Location of the Underlying Aquifer and the Direction of Groundwater Flow Raised a Substantive and Significant Issue Warranting an Adjudicatory Hearing

The White Lake mine sits atop an aquifer that has "the ability to supply [drinking water to] a minimum of approximately 5,000 and 10,000 people, or 500,000 to 1,000,000 gallons per day." Reg. Affairs Comm. Tr., Vol. 1, A.080. DEC has categorized this aquifer as a principal aquifer. *Id*.

The permit issued by APA allows Red Rock to mine and blast to a depth a mere five feet above the aquifer. APA Permit, Vol. 1, A.058. As if this were not risky enough, neither the Applicant nor the Agency has determined the elevation of the aquifer and thus have no idea how deep the mining operations can go before it hits the aquifer. Appellants' submissions to the Agency pointed out that the elevation of the aquifer is critical baseline information that must be available in order to protect it from intrusion by mining operations. LA Group Report, Vol. 1, A.118-121. Appellants also pointed out that the Agency had previously insisted that this information must be provided before an application could be deemed complete. *Id*.

The lack of data concerning the location of the aquifer was made clear during the Agency staff's presentation to the APA Regulatory Affairs Committee:

> APA Board Member Zoe Smith: Hey Devan. This is Zoe again. Can you go back to that slide? Can you tell me how that water table is measured, how you determine that?

> APA Project Review Officer Devan Korn: So in this location it was calculated to be at, at this depth, 1,014. I'm sorry, 1,400. They calculate, 45, is the terminal depth, and then 44, so 1,014, forty. *Again that's, that's anticipated. It hasn't been confirmed.* So it will be confirmed. And then that's, that would be that, they would stay 5 feet above it. So based on these calculations that'll be the depth that they're proposing of maximum termination there. So that would be 1,445 feet.

Reg. Affairs Comm. Tr., Vol. 1, A.071; (emphasis added).[8]

It is also clear that the Agency staff never required the Applicant to determine the direction of the groundwater flow—a significant flaw that was pointed out by Appellants. LA Group Report, Vol. 1, A.118-123. Remarkably, Agency staff stated that the reason they did not require the Applicant to provide this critical baseline information was because they thought it might be expensive:

> APA Staff Alicia Purzycki: This is Alicia. I want to emphasize. Just if I could just jump in here real quick. Ok, in this site specific instance, you know, typically groundwater follows the topography. So here it's presumed that it will flow towards the wetlands there and White Outlet Creek. *However no ground investigation was performed*. That's not typical, you know, it we would only require that, or it would be necessary, should there be excavation into the groundwater table but here because they're staying a minimum 5 feet above we didn't ask them to do that. *So we, it's a guesstimate as to the precise groundwater flow here on site*. To do that you would have to install minimum three wells and do pedimetric readings, *and you know, it's expensive to try and determine that*. So again, I just want to emphasize, it's estimated what the groundwater flow is here, but it's not calculated, and it's not necessary for this site specific proposal.

[8] When the APA staff stated that the location of the water table "will be confirmed," he did not mean that this information would be collected prior to the permit being issued; in fact, the permit was issued the next day without that information.

Id., Vol. 1, A.076; (emphasis added). So rather than have the Applicant actually determine the depth to groundwater at the site, the APA staff instead relied on "a guesstimate," thereby putting a valuable aquifer at risk, in order to spare the Applicant the expense of doing a groundwater test.

Another APA Board member pointed out the risk of allowing mining and blasting based on a "guesstimate" of the location of the water table:

> APA Board Member Arthur Lussi: While we're on this slide. This is Art. Is that water table, it was a question asked earlier and I want to follow up on it. *We've seen water tables fluctuate dramatically in the park in the past ten years* and so, do we have minimums, meaning their maximum depth for the mining is 1,445, even if the water table goes down?
>
> APA Project Review Officer Devan Korn: Yes, because that's what the mine plan is proposing. Now, if they do some investigative excavation and it's and it's determined that the water table is actually much lower than that then they could potentially go deeper. But they would need to come back as an amendment to their mine plan . . . *So, and again, and alternately, if they determine that the seasonal high groundwater is higher than that, then they would have to modify their plan to go, you know, to be more shallow as far as how far down they could go* so, you know, that's something that's that is there.

Id., Vol. 1, A.075-076; (emphasis added). This exchange makes clear that the only way that the Agency will find out that the water table is actually higher than they "guesstimated" will be for the mining operations to breach the aquifer.

Thus, Appellants' submissions pointing out that the project's potential impacts to groundwater cannot be rationally determined without baseline information concerning the location and directional flow of that groundwater raised

a substantive and significant issue warranting an adjudicatory hearing. 9 NYCRR §§ 580.2(a)(3), (4), (5).

C. Additional Criteria Triggering an Adjudicatory Hearing Have Been Met

Three additional criteria for holding an adjudicatory hearing have been met: (i) the "degree of public interest, as evidenced by communication from the general public;" (ii) "the size and/or complexity of the project;" and (iii) "whether an environmental impact statement will be prepared pursuant to the State Environmental Quality Review Act." 9 NYCRR §§ 580.2(a)(1), (2), (7).

1. Public Interest in the Project

The APA received more than 3,000 public comments on the Red Rock project, including 1,732 comment letters and a petition with approximately 1,400 signatures opposing the project. Vol. 1, A.010-011. Many of the public comments submitted to APA specifically requested an adjudicatory hearing. *Id*. This massive outpouring of public sentiment against the intrusion of an industrial operation into a residential neighborhood and demand for an adjudicatory hearing clearly meets the "public interest" criterion in the Agency's hearing regulations. Yet APA never acknowledged this basic fact and the Agency staff never informed the APA Board that this is one of the criteria for holding an adjudicatory hearing. Although Supreme Court acknowledged that the project "generated a substantial amount of public

concern and opposition," the Court also failed to consider this fact in the context of the Agency's regulatory criteria for holding an adjudicatory hearing. *Id*.

2. Complexity of the Project

The Red Rock mining operation is proposed to be located on lands classified as Moderate Intensity Use and Rural Use by the Adirondack Park Land Use and Development Plan and therefore qualifies as a "Class A regional project" under the APA Act. Executive Law §§ 810(b)(11), 810(d)(12) (classifying mineral extraction operations located in Moderate Intensity Use and Rural Use areas as Class A regional projects). In contrast to Class B regional projects, Class A regional projects are by definition major and complex projects that "must undergo a comprehensive environmental review . . . which is exhaustive and can exceed that required under [SEQRA]." *Matter of Assn. for Protection of the Adirondacks v. Town Bd. of Town of Tupper Lake*, 2007 NY Misc. LEXIS 7372, ***8 (Sup. Ct. Franklin County. 2007) *aff'd*, 64 AD3d 825 (3d Dept. 2009); *see also* Executive Law § 807 (allowing review of Class B regional projects to be delegated to local governments in the Adirondack Park under certain conditions but requiring APA maintain review authority over Class A regional projects).

As denoted by its Class A status, the proposed project is both large and complex. The proposed mining operations will occur on a 56.5-acre parcel of land located directly above a principal aquifer and will involve excavating within five

feet of the aquifer using drilling and blasting. Mined Land Use Plan, Vol. 1, A.179, 181-183. Quarried stone will be crushed on-site using a portable crusher. *Id*. Mineral extraction operations are proposed to occur seasonally April through October, Monday through Friday, 7:00 AM to 6:00 PM, and on Saturdays 7:00 AM to 12:00 PM. APA Permit, Vol. 1, A.058. Blasting will be allowed twice a day Monday through Friday between the hours of 9:00 AM and 3:00 PM. *Id*., A.058-059. In addition, up to twenty trucks per day will be entering and leaving the site and traveling on Stone Quarry Road, *id*., Vol. 1, A.059, which is used by the public for walking and traveling to adjoining properties beyond the quarry boundary. Affidavit of Steven J. Turczyn (March 14, 2022), ¶ 13, Vol. 1, A.336-337.

An area totaling approximately 26 acres will be excavated during the 25-year life of the mine, with approximately 9 acres being affected during the first 5-year mining phase. APA Permit, Vol. 1, A.056. Given the size of the project, the on-site drilling, blasting, and crushing operations, the truck traffic, and the project's location directly above a sensitive drinking water aquifer and adjacent to residential communities, it falls squarely within the size and complexity criterion in the Agency's hearing regulations. *See* 9 NYCRR § 580.2(a)(1). An adjudicatory hearing would have assisted the Agency in reviewing the complexities of the project and its impacts on the community and on the environment.

3. Lack of SEQRA Review

Because the Red Rock application is a Class A regional project, it is exempt from SEQRA review and thus no environmental impact statement ("EIS") was prepared for the project. Environmental Conservation Law § 8-0111(5)(c). The fact that an EIS was not prepared for the Red Rock project weighs in favor of holding an adjudicatory hearing. 9 NYCRR § 580.2(a)(7). An EIS must identify "the relevant areas of environmental concern," take a "hard look" at them, analyze alternatives, and include "a reasoned elaboration of the basis for [the] determination" whether or not to approve a proposed project. *Matter of Jackson v. New York state Urban Dev. Corp.*, 67 NY2d 400, 417 (1986). In this case, as discussed above, the Agency failed to take a "hard look" at all areas of environmental concern (such as potential noise and water quality impacts) and failed to offer a "reasoned elaboration" for its permit decision, all of which would have been required if an EIS had been prepared. Thus, the SEQRA criterion should have been applied in this case and an adjudicatory hearing should have been held in accordance with APA's regulations.

D. The Issues Raised by Appellants Are Both Substantive and Significant and Must be Resolved in an Adjudicatory Hearing

The issues raised by Appellants are both substantive and significant. An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry." *Matter of Beer v. New York State Dept. of Envtl.*

Conservation, 189 AD3d 1916, 1920 (3d Dept. 2020) (citations omitted). There is no doubt that a reasonable person would require further inquiry into the potential noise impacts of the Red Rock project on the White Lake residential community, particularly in light of the Applicant's wholly irrational conclusion that introduction of a new industrial operation – including drilling, blasting, crushing and truck traffic – within a few hundred feet of a residential neighborhood will not result in any increase in ambient noise levels. A reasonable person would also require further inquiry into the precise location and elevation of the aquifer underlying the mine site before allowing the Applicant to drill and blast within five feet of the Agency's "guesstimate" of the aquifer's location. Because the Agency decided to spare the Applicant the expense of confirming the aquifer's location, the only way that this critical information will be made available is when the mining operations intrude into the aquifer.

The lack of adequate information on these two issues, and the baseless "guesstimates" of both actual noise impacts and the location of the aquifer, cast serious doubt on the proposed project's ability to meet the statutory criteria of "no undue adverse impact" on the resources of the Adirondack Park. Executive Law § 809(10)(e). For the same reasons, these issues are significant because both have the "potential to result in the denial of a permit, a major modification to the proposed

project or the imposition of significant permit conditions in addition to those proposed in the draft permit." *Id*.

Moreover, Appellants detailed and exhaustive comments on these issues constitute the required "clear explanation" and go far beyond "merely mak[ing] obscure references to matters which should be considered." *Matter of Citizens for Clean Air v New York State Dep't of Env't Conservation*, 135 AD2d 256, 261 (3d Dept 1988), *appeal dismissed* 72 NY2d 853 (1988) (emphasis added). Nor can the LA Group Report submitted by Appellants be characterized as "[m]ere expressions of general opposition to a project;" Appellants' comments explained "the basis of [the] opposition and identif[ied] the specific grounds which could lead [the APA] to deny or impose significant conditions on the permit." *Matter of Eastern Niagara Project Power Alliance v. New York State Dept. of Envtl. Conservation*, 42 AD3d 857, 861 (3d Dept. 2007).

Thus, Appellants' submission to APA met the statutory criteria of raising substantive and significant issues and the Agency's regulatory hearing criteria, and APA's decision not to hold an adjudicatory hearing on the Red Rock application was therefore arbitrary, capricious and contrary to law.

Conclusion

For the foregoing reasons, Supreme Court's Decision and Order should be reversed, the Petition should be granted, and the permit should be annulled.

Respectfully submitted,

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