To be argued by:
Lucas C. McNamara
10 minutes requested

# Supreme Court of the State of New York
# Appellate Division – Fourth Department

In the Matter of the Application of

**No. CA 22-01964**

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

*Petitioners-Appellants*,

v.

ADIRONDACK PARK AGENCY and RED ROCK QUARRY ASSOCIATES, LLC.,

*Respondents-Respondents,*

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules.

## BRIEF FOR RESPONDENT NEW YORK STATE ADIRONDACK PARK AGENCY


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## PRELIMINARY STATEMENT

In this C.P.L.R. article 78 proceeding, petitioners Adirondack White Lake Association and Protect the Adirondacks! Inc. seek to annul a mining permit issued by respondent Adirondack Park Agency (APA). The permit allows granite mining on 5.2 acres at a previously mined site located at the southwestern corner of the Adirondack Park. Petitioners claim that APA erred by issuing the permit without holding an adjudicatory hearing. Supreme Court, Oneida County (Clark, J.), dismissed the petition and confirmed APA's issuance of the permit.

This Court should affirm. As Supreme Court held, APA rationally determined that there were no substantive and significant issues or other circumstances requiring an adjudicatory hearing. It was petitioners' burden to identify an issue that, if substantiated, might reasonably lead to major project changes, the imposition of substantial conditions, or outright permit denial. Petitioners failed to meet that burden. In particular, petitioners failed to furnish evidence undermining APA's determination that the small-scale granite mine would not unduly impact either noise levels at nearby residences or groundwater resources. APA therefore rationally concluded that the issues petitioners raised did

not warrant exploration at a trial-like hearing, and properly exercised its discretion in declining to order such a hearing.

Petitioners' remaining arguments are unpreserved and meritless. For the first time on appeal, petitioners argue that the APA board's decision to forego a hearing was flawed because it was based on a misleading and biased presentation by APA staff members. Contrary to petitioners' contentions, however, the record reflects that the APA board considered the correct statutory and regulatory criteria in determining whether to hold a hearing, and properly exercised its independent judgment in deciding that no such hearing was required. Because APA's determination was rational and lawful in all respects, the judgment should be affirmed.

## QUESTION PRESENTED

Whether Supreme Court correctly held that APA rationally issued the mining permit without holding an adjudicatory hearing.

## STATEMENT OF THE CASE

### A. Mining Permits in the Adirondack Park

APA is responsible for reviewing and approving mining permits in

the Adirondack Park. *See* Executive Law § 809(1). The Adirondack Park has historically hosted a number of mining operations for rock, sand and gravel and continues to do so today. (Appendix [A.] 525 [January 13, 2022 Board Meeting (J13)] at 1:34:00-1:34:20.)[1] Under the Adirondack Park Agency Act (APA Act), lands classified as Moderate Intensity Use and Rural Use both generally contemplate residential, agricultural, commercial, industrial, and mineral extraction as "compatible uses." *See generally* Executive Law § 805(3)(d)(4), (f)(4). Mineral extraction activities in the Park typically require at least two state permits, one from APA and one from non-party New York State Department of Environmental Conservation (DEC). *See generally* Environmental Conservation Law (ECL) Title 27. The two agencies often coordinate their review of mining project proposals, as they did here. (A. 393-94; J13 1:21:30-1:24:39.) Since its creation in 1971, APA has issued more than 200 permits for mining operations within the Park, including the granite-

[1] Video recordings of APA board meetings, such as the one referenced here, are archived on APA's website at http://nysapa.granicus.com/ViewPublisher.php?view_id=2. The meeting transcripts petitioners cite are unsworn, unsigned documents that they created for this litigation. (A. 63-92, 289-313.)

mining permit challenged in this proceeding. (J13 at 2:25:50-2:26:50.)

Before issuing a permit, APA must find that a

> project would not have an undue adverse impact upon the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the park or upon the ability of the public to provide supporting facilities and services made necessary by the project, taking into account the commercial, industrial, residential, recreational or other benefits that might be derived from the project.

Executive Law § 809(9). In conducting this analysis, APA considers 37 specific criteria, including impacts on water, land, air quality, noise levels, fish and wildlife, site factors, the ability of government to provide facilities and services, and conformance with other governmental controls. Executive Law §§ 805(4), 809(10)(e).

Once a permit application is complete, APA must decide whether the application implicates significant problems that should be adjudicated. Under the APA Act, "the determination of whether or not to hold a public hearing on an application" is

> based on whether the agency's evaluation or comments of the review board, local officials or the public on a project raise *substantive and significant issues* relating to any findings or determinations the agency is required to make pursuant to [section 809 of the Act], 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.

Executive Law § 809(3)(d) (emphasis added). APA also "consider[s] the general level of public interest in a project." *Id.* APA cannot deny a permit without first providing the applicant a public, *i.e.*, adjudicatory, hearing. *See id.*; 9 N.Y.C.R.R. part 580. And if APA fails to act on a permit application within 60 days, the agency waives its ability to deny the application. *Id.*

APA's regulations set forth more specific criteria to consider when determining whether to conduct an adjudicatory hearing. Specifically, APA considers: (1) "the size and/or complexity of the project"; (2) "the degree of public interest"; (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"; and (8) "the statutory finding required by section 814(2) of the Adirondack Park

Agency Act in the case of State agency projects reviewed thereunder." 9 N.Y.C.R.R. § 580.2(a)(1)-(8).

### B. The Mining Permit Application

The permit at issue here relates to a site in the Town of Forestport in Oneida County that was historically used for granite mining before extractions were abandoned in the 1930s. (J13 25:38-25:48.) An initial application to revive mining at that site was filed with APA in 2000 but was incomplete and was withdrawn before any APA decision was rendered. (A. 599-600.)

In April 2021, Red Rock Quarry Associates, LLC (the applicant) filed an initial permit application for mining granite at the site. (R. 1105-1311.) Within two days of receipt of the initial application, APA notified adjoining landowners of the proposal and began accepting public comments. (R. 1102-1103.) On April 20, 2021, APA determined the application was incomplete and requested additional information on a number of topics. (R. 1054-1056.) APA deemed the revised application complete on July 7, 2021. (R733-735.)

The completed application described the applicant's plan to excavate dimensional granite from a 5.2-acre area within a 56-acre parcel

spanning Moderate Intensity Use and Rural Use areas, where mining is classified as a compatible use. (A. 484, 486, 610, 674.) Unlike other types of mines that use explosives for production blasting, a technique for maximally fragmenting large rock formations, the applicant's proposal to mine dimensional granite, *i.e.*, large, undamaged granite blocks, would use explosives only for microblasting, a technique that typically uses 150 to 700 times less of the explosive agent. (A. 182, 245, 397.) The closest residence to the excavation area would be at least 570 feet away, on the other side of an intervening ridgeline that separates the project site from nearby residences. (A. 396, 401, 559, 730, 739, 759.)

APA accepted public comments on the project for more than nine months before the APA board took up the application at a two-day open meeting on January 13 and 14, 2022. APA received over 3,000 comments that questioned or opposed the project. (R. 1379-7884; J13 1:29:30-1:31:45.) Petitioners—the Adirondack White Lake Association (a local homeowners' group) and Protect the Adirondacks! Inc. (a not-for-profit organization)—filed a report they described as a "detailed engineering assessment" that challenged the adequacy of the permit application. (A. 94.) While petitioners employed a prestigious engineering firm to

author the report, no engineer signed it. (A. 115-174.) The sole author, who disclosed no engineering credentials, questioned the adequacy of the noise-impact analysis and the groundwater protection measures set forth in the application. (A. 115-174.) The report did not include a noise-impact or groundwater study of its own or provide an opinion, let alone a supported opinion, of any undue adverse impact from the proposed project. (A. 115-174.)

The other commenters challenging the application took the same approach, questioning the application without submitting any affirmative proof that at least one undue adverse impact would result from the project. (R. 1379-7884.) And although many comments demanded that APA send the matter to an adjudicatory hearing, none stated a plan to introduce additional evidence at any such hearing. (R. 1379-7884.)

At the January 13 APA board meeting, APA staff provided an interactive presentation to the APA board in which it recommended that a draft permit with conditions be approved. (A. 526-595; J13 25:30-2:34:30.) Board members expressed certain concerns with staff's proposed permit and recommended specific revisions to more clearly limit

blasting to microblasting, to require that certain machinery be operated at the lowest elevation of the mine floor to limit noise impacts, and to further limit hours of operation. (J13 1:47:35-2:17:00.) The applicant acquiesced to these revisions and, after it took up the application again the next day, the board unanimously approved the revised permit with conditions. (A. 507-513; 522 [January 14 Board Meeting (J14)] 1:03:40-1:07:25, 1:44:00-1:45:22.)

Less than two weeks later, DEC issued a Mined Land Reclamation permit to the applicant. (A. 474.) DEC's permit contains a water table testing requirement that requires monthly tests of water table levels for two years, during which time the applicant's mining activity must remain at least 30 feet above the estimated mean annual high water table. (*See* A. 476, 515; J14 57:30-1:00:24; J13 1:21:30-1:24:39.)

### C. The Litigation

Petitioners thereafter commenced this C.P.L.R. article 78 proceeding to annul the permit. (A. 22-53.) Their single cause of action alleges that APA erred by granting the permit rather than holding an adjudicatory hearing. (A. 46-51.) Petitioners relied on the same report that they had provided to APA during the comment period and cited a

number of general studies regarding noise that they had not referenced during the comment period. (A. 22-52.)

After APA answered, Supreme Court (Clark, J.) dismissed the petition. The Court found that APA "conducted a diligent review of th[e] permit application" and agreed with APA that the application "did not present any unique or unfamiliar issues which would require an adjudicatory hearing." (A. 19-20.) The Court concluded that petitioners "failed to meet their burden" of demonstrating entitlement to a hearing and that, given the proposed project's small size, relative simplicity, and lack of undue adverse impacts on the environment and nearby residents, APA's determination to grant the permit without first holding a hearing was not "an abuse of discretion, arbitrary[] or capricious[,] or contrary to law." (A. 19-21.) Petitioners now appeal. (A. 1.)

## ARGUMENT

### APA RATIONALLY ISSUED THE PERMIT WITHOUT HOLDING AN ADJUDICATORY HEARING

As Supreme Court held, APA reasonably determined that no adjudicatory hearing was required before granting the permit. (A. 20.) Whether a permit application warrants an adjudicatory hearing is reserved to an agency's sound discretion, *see* *Matter of Town of Ellery v.*

*New York State Dept. of Envtl. Conservation*, 159 A.D.3d 1516, 1517 (4th Dep't 2018), and the determination to issue a permit without holding a hearing "will not be disturbed absent a showing that it is predicated upon an error of law, is arbitrary or capricious, or represents an abuse of discretion," *Matter of Gracie Point Community Council v. New York State Dept. of Envtl. Conservation*, 92 A.D.3d 123, 129 (3d Dep't 2011) (internal quotation marks and citations omitted), *lv. denied* 19 N.Y.3d 807 (2012). "The ultimate burden" of establishing entitlement to an adjudicatory hearing rests on the party seeking the hearing. *Matter of Riverkeeper, Inc. v. New York State Dept. of Envtl. Conservation*, 152 A.D.3d 1016, 1018 (3d Dep't 2017). A party fails to meet this burden where its comments "fail to substantiate . . . concerns with evidentiary support." *Matter of Eastern Niagara Project Power Alliance v. New York State Dept. of Envtl. Conservation*, 42 A.D.3d 857, 861 (3d Dep't 2007).

### A. APA Rationally Issued the Mining Permit.

Preliminarily, APA's determination to issue the mining permit was amply supported by the record. Indeed, petitioners do not argue otherwise. APA reasonably determined, based on this record, that the project would not have an undue adverse impact on environmental and

other resources in the Adirondack Park. *See* Executive Law § 809(9). And because the agency's determination "involve[d] factual evaluations in the area of the agency's expertise," its "judgment must be accorded great weight and judicial deference." *Matter of Catskill Heritage Alliance, Inc. v. New York State Dept. of Envtl. Conservation*, 161 A.D.3d 11, 19 (3d Dep't 2018).

The record shows that the proposed project was small, simple and would not produce any undue adverse impacts. Excavation would only take place on 5.2 acres of a site that had historically been used for mining, and the site itself would host no buildings and store no hazardous waste or toxic chemicals. (A. 192.) An elevated vegetated ridgeline separates nearby homes from the site and will provide a natural sound and visual barrier. (A. 559, 562-563.) The location of the site, less than two miles from the Park's southwestern border, ensures minimal traffic impacts to the Park from trucks traveling to and from the site. (A. 406-408.) The project would not impact wetlands or threatened or endangered species. (A. 214, 227.) The proposed operation, seasonal and employing three to five people, is not costly. (A. 244, 569.) Local municipalities lodged no complaints or concerns regarding the application, (A. 461), and APA's

review confirmed the project would not impact any local cultural or historic resources. (A. 225, 227, 493.)

Additionally, unlike mines that use production blasting, the application only contemplated using microblasting to separate dimensional granite at the site. (A. 182, 245, 397.) The applicant submitted a noise study showing that any mine noise at nearby residences would be considered "quiet" due to attenuation from the intervening ridgeline and distance from the site and would also be less than the ambient noise caused by traffic from nearby New York Route 28, a heavily trafficked thoroughfare. (A. 401-403, 406-407, 601-602, 729-730, 754-761, 912, 931; J13 32:52-33:30.) The applicant also committed to keep all excavation activities at least five feet above the water table. (A. 598-599.)

APA's permit added conditions further ensuring no undue adverse impacts would result from this small-scale mining project. These conditions included requiring that any new land use not described in the approved mine plan be subject to new permitting approval from APA; limiting the months, days, and hours of permissible operations; ensuring that blasting was limited to microblasting and that explosives were only

used under the supervision of a licensed blaster; limiting truck trips to and from the site; and requiring the submission of quarterly well-water data from water-table testing required by DEC. (A 510-511.) APA thus had a rational basis for issuing the permit with conditions, which satisfied all legal criteria under the APA Act and related regulations.

### B. APA Reasonably Concluded that Petitioners Failed to Prove any Substantive and Significant Issues Requiring an Adjudicatory Hearing.

Petitioners do not challenge the rationality of APA's determination on the merits, but argue only that APA should not have rendered a determination on the merits without first convening an adjudicatory hearing. As explained, however, petitioners bore the burden to raise any "substantive and significant issues" requiring an adjudicatory hearing before APA issued the mining permit. Executive Law § 809(3)(d); *see also Matter of Riverkeeper*, 152 A.D.3d at 1018. Petitioners failed to meet that burden. In particular, petitioners failed to substantiate their concerns

about noise and groundwater impact with evidentiary support. *See Matter of Eastern Niagara*, 42 A.D.3d at 861.

**i. APA reasonably concluded that petitioners failed to raise a substantive and significant issue regarding noise.**

Petitioners offered no evidence to support their claim that a hearing was necessary to adjudicate the project's impact on noise levels. (*See* Br. at 23-28.) Rather, petitioners merely challenge the methodology APA used to analyze the project's noise impact—DEC's "2000 Program Policy of Assessing and Mitigating Noise Impacts" (the DEC noise policy). Petitioners' challenge to the DEC noise policy and its application here is meritless.

APA rationally used the DEC noise policy in evaluating the project's impact on noise levels. While petitioners argue in favor of a "common experience" approach to predicting noise impacts (Br. at 24), their preference for that approach does not establish that APA's use of the DEC noise policy was irrational. *See Ward v. City of Long Beach*, 20 N.Y.3d 1042, 1043 (2013) ("If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable."). Moreover, APA and DEC have issued hundreds of permits over the last

two decades in reliance on DEC's noise policy. And petitioners can point to no instance in which the use of the policy led to a permitted project that went on to create undue adverse noise impacts. In the absence of any proof to support its broadside attack on DEC's noise policy, APA reasonably chose to continue to apply a rigorous, science-based noise policy rather than a nonscientific "common experience" approach.

Nor do petitioners point to any actual inconsistent application of the DEC noise policy on which APA has relied for approximately two decades. While APA did not use the policy for purposes of initial analysis of an application for mining at the same site submitted more than two decades ago, the policy had not yet been issued at that time. (A. 913.)

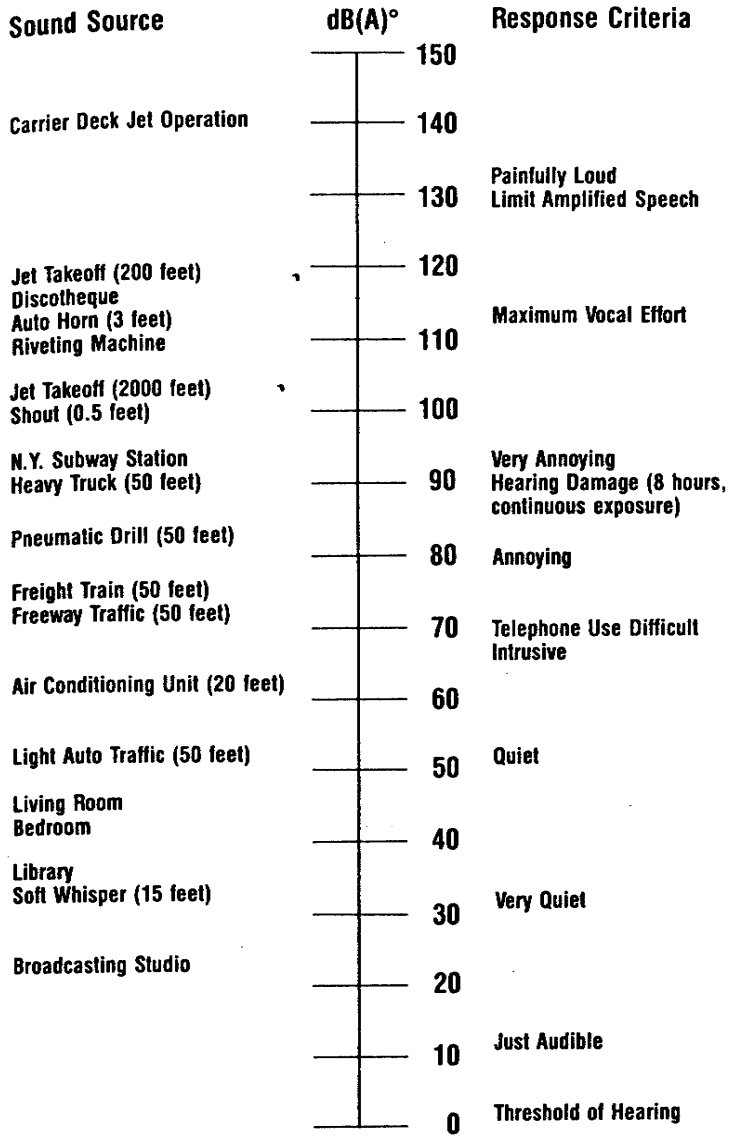
Using the DEC noise policy in its analysis, APA reasonably concluded that the applicant's noise analysis did not reveal any substantive and significant issues.

Indeed, the noise analysis erred on the side of caution by repeatedly assuming facts that assured that noise impacts from proposed operations were if anything *overestimated* and nonetheless concluded that day-to-day mining operations would not raise sound levels at even the residence nearest to the mine (A. 401-403, 601-602, 729-730, 754-761.) This

overestimation of noise impacts included assuming that: (a) every piece of mining equipment was running simultaneously, which is logistically and practically unlikely (A. 401-403, 601-602, 729-730, 754-761), (b) the mine wall or natural ridgeline between the mine and nearby residences rose only 15 feet above the sound source of mining equipment, even though the plan contemplated mine walls rising 60 feet above the mine floor (A. 757-58; J13 1:09:25-1:09:35), (c) the atmosphere provided no noise attenuation (A. 729, 921-22), and (d) "530 feet of mature forest" between the mine and the nearest residence provided no noise attenuation, even though the DEC noise policy suggested that the vegetation would reduce noise impacts by approximately 20 decibels (A. 758-759).

Even with these conservative assumptions, the analysis concluded that day-to-day operations of the mine would create 53.2-decibel noise at the closest residence (A. 401, 759.) Noise levels in this range are considered "quiet," equivalent to "light" automobile traffic (A. 401, 931), as shown in the diagram reproduced from the record below.

**DEC Noise Policy Noises from Common Sources:**




(A. 931.) Had the applicant relied on the 20-decibel attenuation from intervening vegetation, the 33.2-decibel impact would be considered "[v]ery quiet." (A. 931-33.)

APA's comparison of the proposed noise impacts to ambient noise levels also confirmed that no undue adverse noise impacts would occur. The nearest residences to the mine are all directly adjacent to New York State Route 28. (A. 606.) The applicant estimated that the ambient noise level from Route 28 was 58 decibels. (A. 755.) As a result, the noise analysis concluded that mining activities would not raise noise levels, even at the residence closest to the mine. (A. 759.) APA reasonably concluded, on this record, that petitioners failed to meet their burden of establishing a substantive and significant noise issue.

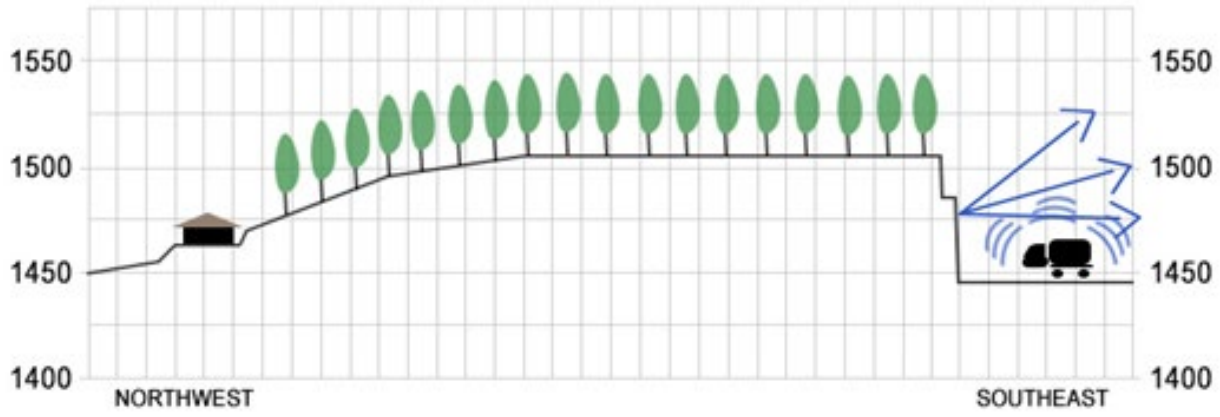
Petitioners now argue that the applicant contravened DEC's noise policy by estimating ambient noise levels from Route 28 traffic "us[ing] an average sound level midway between 'light [auto traffic]' and 'freeway [traffic]' levels." (Br. at 25; A. 755.) Initially, because petitioners failed to raise this issue before the trial court, it is unpreserved. *See* EFCA2022-000556 NYSCEF Doc 21 Tr. Ct. Br. at 1-31 (never using the term "average," "light," or "freeway"); *MLB Constr. Servs., LLC v. Lake Ave. Plaza, LLC*, 156 A.D.3d 983, 985 (3d Dep't 2017).

In any event, the distinction petitioners draw would be immaterial even if accurate. Had the applicant simply used the quieter estimate for

ambient noise from light auto traffic, noise impacts from day-to-day mining would have been calculated to raise noise levels 3.2 decibels at the closest residence. (A. 759.) DEC's noise policy explains that an increase of less than 5 decibels is "[u]nnotic[able] to tolerable," and a 3.2-decibel increase is well within APA precedent for not causing an undue adverse impact (A. 402-03, 423 [APA permit granted even with noise analysis showing greater than 5-decibel increase at some noise receptors]). Moreover, this hypothetical analysis ignores the numerous conservative assumptions used in the applicant's noise analysis. For example, vegetation will further drop noise impacts from day-to-day mining by approximately 20 decibels (A. 758-759.) Accounting for this additional attenuation factor alone would more than offset a reduced ambient noise estimate that was based on light auto traffic.

Petitioners additionally argue (Br. at 24) that APA ignored the DEC's noise policy guidance on how mine walls reflect sound. They are mistaken. While the DEC noise policy explains that mine walls reflect sound, petitioners ignore that the mine wall in question is situated *between* the mining activity and the nearby residences, and therefore serves to *attenuate* noise by reflecting noise away from those residences

and back across the mine and into the unpopulated forests to the east. (A. 601-602.) The demonstrative illustration below uses mine plan data from the record to show how the proposed mine walls will attenuate noise impacts by reflecting noise away from nearby residences.




(A. 562, R. 649-650 [data from Cross-Section A-A'].) On this record, APA reasonably concluded that petitioners did not show a substantive and significant noise issue requiring adjudication.

### ii. APA reasonably concluded that petitioners failed to raise a substantive and significant issue regarding groundwater.

Petitioners likewise failed to put forth evidence demonstrating a substantive and significant issue regarding the project's impact on groundwater. Petitioners argue that it was irrational for APA to issue a permit strictly forbidding excavation below the water table (or within five

feet of it) rather than holding a hearing to determine the water table's elevation. (Br. 28.) According to petitioners, the "only way" APA will discover if the water table is higher than estimated "will be for the mining operation to breach the aquifer." (Br. 30-31.) These claims lack merit in light of APA's strict prohibition on excavation below the water table, and because DEC's permit requires testing to determine the level of the water table.

APA rationally issued a permit that did not allow *any* mining below the water table (or within five feet of it). (A. 484.) Petitioners do not contest this prohibition, which is consistent with APA permit precedent. (A. 409, 413.) Petitioners instead argue that a hearing was necessary to address a future compliance issue, *i.e.,* the likelihood that the applicant will violate the permit and intrude on the water table. (Br. 29-30.) Petitioners' future-compliance speculation cannot satisfy the statutory criteria for holding an adjudicatory hearing, which may be held only in regard to "findings or determinations [APA] is required to make."

Executive Law § 809 (3)(d). The APA Act does not require APA to speculate about whether an applicant will violate a proposed permit.

The same reasoning applies to petitioners' argument, improperly raised for the first time on appeal, that a hearing was necessary because the applicant did not conduct testing that revealed groundwater *flow direction*. (A. 22-53 [verified petition never mentioning groundwater flow direction]; Tr. Ct. Br. at 1-31 [same]). *See MLB Constr. Servs.*, 156 A.D.3d at 985. As staff accurately explained during its presentation, it is not necessary to determine groundwater flow direction when the proposed mining activity does not intrude on groundwater and therefore will not impact it at all. (J13 1:18:00-1:19:05, 1:38:45-1:40:00.)

Moreover, the difference between the impacts of excavation above and below the water table reveals the flaws in petitioners' comparison to APA staff testing requirements for the earlier mining proposal at the same site (*see* Br. at 28). In contrast to the 2021 application at issue here, when a project proposes excavation activity below the water table, the direction the *impacted* groundwater will flow may matter for APA's undue impact analysis. The 2000 mining proposal expressly contemplated excavation below the water table, and so an APA staff

member reasonably inquired into groundwater flow direction as a result of the specific facts of that proposal. (A. 599-600; J13 25:50-26:35, 1:32:35-1:33:37.) Groundwater flow direction was immaterial to the mining proposed here, because that mining will take place above the water table. APA thus rationally determined that an adjudicatory hearing was not necessary to address any such flow-direction issue.

Setting aside the fact that the activity petitioners fear—intrusion into groundwater—is already strictly prohibited, petitioners' factual claims regarding an absence of testing requirements are wrong. APA conducted a coordinated application review with DEC, and DEC's permit requires 24 monthly groundwater tests starting at the outset of operations. (A. 476.) Throughout that testing period, under DEC's permit, the applicant must maintain a mine floor 30 feet above the estimated annual mean high-water table. (A. 476, 515.) The five-foot clearance rule in APA's permit comes into play only after the more restrictive 30-foot clearance rule becomes inoperative once the testing requirement is satisfied. Indeed, APA repeatedly discussed this testing requirement at its January meetings. (*See* J14 57:30-1:00:24; J13 1:21:30-1:24:39.) Thus, APA rationally determined that it did not need to

hold a hearing so that petitioners could advocate for testing that was already required under another state permit.

In sum, APA reasonably concluded that petitioners had failed to meet their burden of showing a substantive and significant issue regarding noise or groundwater impacts that would warrant an adjudicatory hearing.

### C. The APA's Analysis of the Regulatory Criteria Did Not Require a Different Result.

Petitioners failed to show that APA's decision not to convene an adjudicatory hearing was nonetheless arbitrary and capricious in light of the regulatory criteria APA considers when deciding whether such a hearing is warranted. *See* 9 N.Y.C.R.R. § 580.2(a)(1)-(8). Nearly all the regulatory criteria weighed against holding an adjudicatory hearing here.

First, the limited size and complexity of the project weighed against a hearing. As previously explained (*see supra*, Point A.), the record before APA showed that, "whether measured by cost, area, effect upon municipalities, or uniqueness of resources likely to be affected[,]" the project was small and relatively simple. 9 N.Y.C.R.R. § 580.2(a)(1).

Petitioners now contend (Br. at 32-33) that APA had to find the project large and complex because the project is a Class A regional project. That contention is unpreserved because it was not raised before the trial court, and it has no basis in the language of § 580.2(a)(1) in any event. APA does not treat projects as large or complex merely by dint of class label, and its reasonable interpretation of § 580.2(a)(1), its own regulation, is entitled to deference. *See Matter of Campion v. New York State Adirondack Park Agency*, 188 A.D.2d 877, 878 (1992).

Second, APA reasonably found that the extensive opportunities for public involvement counterbalanced the degree of public interest in the application. *See* 9 N.Y.C.R.R. §580.2(a)(2), (6). While the APA Act and its implementing regulations contemplate a public comment period of only 15 days, *see* 9 N.Y.C.R.R. 572.8(b), APA significantly expanded the public's opportunity to engage with the application here through two discretionary steps. APA secured three months for public comments on the initial application by notifying nearby landowners of its receipt and immediately accepting public comments on the initial application. (Record [R.] 1102-1103.) And APA also secured more than five additional months for public comments on the completed application by securing a

waiver of the decision-making time frames from the applicant. (R. 656-658).

During the comment period, the applicant held an informational meeting for the public at the proposed site. (R. 738.) Members of the public also used monthly APA meetings to directly address the board about the proposal. (J13 1:30:55-1:31:05.) Notably, none of the public comments before APA at the time the permit was issued argued that an adjudicatory hearing was necessary as a result of any insufficient time or opportunity for the public to present proof in opposition to the proposed project. (R. 1379-7884.) On this record, APA reasonably determined that the "extent of public involvement" APA achieved by "other means" than an adjudicatory hearing, § 580.2(a)(6), counterbalanced the "degree of public interest" in the project, § 580.2(a)(2).

Third, because there were no problems with the application or permit conditions regarding noise or groundwater (*see supra*, Point B. i., ii.), there was no "significant issue[] relating to the criteria for approval of the project" or "possibility that the project can only be approved if

major modifications are made or substantial conditions are imposed" that weighed in favor of a hearing. *See* 9 N.Y.C.R.R. §§ 580.2 (a)(3), (4).

Nor did petitioners show what information they would "present" at a hearing that would "assist[]" APA in its review. 9 N.Y.C.R.R. § 580.2(a)(5). Petitioners claim to satisfy this criterion by pointing to the report they submitted during the public comment period and other materials in the administrative record (Br. 26-33), but that argument makes no sense. The materials are in the administrative record because APA already had them. (A. 115-174.) Moreover, the record before APA showed that commenters opposed to the project had ample time to produce any proof they wished to submit and had no plans to present any new information at a hearing, let alone plans supported by a reasonable excuse for withholding the information during the nine-month comment period. APA rationally found that the absence of any new, material proof to be presented at hearing weighed against holding one. *See Matter of Concerned Citizens Against Crossgates v. Flacke*, 89 A.D.2d 759, 761 (3d Dep't 1982) ("even in this proceeding, petitioners have made no attempt to show the utility of further hearings, except to allege that cross-

examinations might have exposed some weakness in [an applicant's] submissions"), *aff'd for reasons stated below* 58 N.Y.2d 919 (1983).

Finally, APA reasonably concluded that the fact that it did not complete a State Environmental Quality Review Act (SEQRA) environmental impact statement, *see* 9 N.Y.C.R.R. § 580.2(a)(7), did not offer significant support for holding an adjudicatory hearing. The Legislature exempted from SEQRA all projects requiring permits under the APA Act. *See* ECL 8-0111(5)(c); 6 N.Y.C.R.R. § 617.5(c)(45). As a result, APA never makes a permit determination under the APA Act that requires an environmental impact statement. (A. 469.) The reason for the APA's SEQRA exemption is that the APA Act's substantive environmental protections are "more protective of the environment" than SEQRA's. *Matter of Association for the Protection of the Adirondacks, Inc. v. Town Bd. of Town of Tupper Lake*, 64 A.D.3d 825, 827 (3d Dep't 2009). Noise and groundwater, the two substantive environmental issues that petitioners raise on this appeal, are issues that fall directly within the scope of APA's more robust environmental review. Therefore, APA

reasonably concluded that the absence of a SEQRA environmental impact statement did not require an adjudicatory hearing.[2]

As courts have repeatedly held when addressing similar instances, the record establishes that APA rationally issued a permit for this small-scale mining project without holding an adjudicatory hearing. *See Matter of Town of Waterford v. New York State Dept. of Envtl. Conservation*, 187 A.D.3d 1437, 1441-442 (3d Dep't 2020); *Matter of Catskill Heritage*, 161 A.D.3d at 19-21; *Matter of Town of Ellery*, 159 A.D.3d at 1517-1518; *Matter of Gracie Point*, 92 A.D.3d at 129; *Matter of Riverkeeper*, 152 A.D.3d at 1018-1019; *Matter of Eastern Niagara*, 42 A.D.3d at 861; *Matter of Dudley Rd. Assn. v. Adirondack Park Agency*, 214 A.D.2d 274, 280 (3d Dep't 1995), *lv. dismissed* 87 N.Y.2d 952 (1995); *Matter of Citizens for Clean Air v. New York State Dept. of Envtl. Conservation*, 135 A.D.2d 256, 260-261 (3d Dep't 1988), *lv. dismissed* 72 N.Y.2d 853 (1988); *Citizens Against Crossgates v. Flacke*, 89 A.D.2d at 761.

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[2] As petitioners note (Br. at 13), the eighth regulatory criterion—concerning state-proposed projects, *see* § 580.2(a)(8)—does not apply here.

### D. Petitioners' Remaining Arguments Are Unpreserved and Meritless.

Petitioners additionally contend that the APA board's decision to forego an adjudicatory hearing was fundamentally flawed because it was based on a staff presentation that provided allegedly insufficient and misleading information. Specifically, petitioners claim that staff mischaracterized the applicable regulatory criteria for deciding whether to convene an adjudicatory hearing (*see* Br. Point I) and also gave the board a "biased and one-sided" presentation of the facts that prevented the board from making a reasoned decision to forego an adjudicatory hearing (*see* Br. Point II).

These arguments are unpreserved because they were neither presented in the petition nor otherwise raised below. Petitioners' sole contention in Supreme Court was that APA incorrectly determined not to convene an adjudicatory hearing, not that the process by which the APA board made that determination was flawed. (A. 22-53; Tr. Ct. Br. at 1-31.) Moreover, petitioners' lack of preservation prejudiced APA by depriving it of the opportunity to file affidavits with its return countering petitioners' speculation about the propriety of the board's decision-making process. *See* C.P.L.R. 7804(e); *see e.g. Matter of Uncle Sam*

*Garages, LLC v. Capital Dist. Transp. Auth.*, 171 A.D.3d 1260, 1261 (3d Dep't 2019), *lv. denied* 33 N.Y.3d 912 (2019); *Matter of Perryman v. Village of Saranac Lake*, 64 A.D.3d 830, 832 (3d Dep't 2009). Thus, this unpreserved challenge should not be considered. *See Bingham v. New York City Transit Auth.*, 99 N.Y.2d 355, 359 (2003); *Matter of U.S. Energy Dev. Corp. v. New York State Dept. of Envtl. Conservation*, 118 A.D.3d 1381, 1383 (4th Dep't 2014).

In any event, "actions undertaken by an administrative entity are cloaked with a presumption of regularity . . . and are presumed to be valid unless proven otherwise." *Matter of Entergy Nuclear Indian Point 2, LLC v. New York State Dept. of Envtl. Conservation*, 23 A.D.3d 811, 814 (3d Dep't 2005), *lv. dismissed*, *lv. denied* 6 N.Y.3d 802 (2006). An administrative determination "will not be disturbed" absent "a clear revelation that the administrative body made no independent appraisal and reached no independent conclusion." *Matter of Taub v. Pirnie*, 3 N.Y.2d 188, 195 (1957) (internal quotation marks and citations omitted); *see Matter of Gurin v. Utica Mun. Hous. Auth.*, 208 A.D.3d 1591, 1592 (4th Dep't 2022). "[I]n ascertaining whether an informed decision has been made, the courts accord the decision the presumption of regularity

to which it is entitled . . . and refrain from probing the mental processes of the decisionmaker." *Matter of Taub v. Pirnie*, 3 N.Y.2d at 195 (internal quotation marks and citations omitted).

Petitioners' arguments run directly contrary to the presumption of regularity. Petitioners principally attack APA staff, rather than the entity that issued the permit, the APA board. (*See* Br. at 11-22.) In so doing, petitioners ask the Court to assume, without evidence, that each board member agreed with the staff statements that petitioners criticize and failed to make an independent evaluation of either the regulatory criteria or the facts. The presumption of regularity does not allow such judicial speculation on the mental processes of administrative decisionmakers. *See Matter of Taub*, 3 N.Y.2d at 195; *see also Matter of Nehorayoff v. Fernandez*, 191 A.D.2d 833, 835 (3d Dep't 1993) (attacks on a board rejected where there was no evidence the board "was actually influenced" by claims made by others).

Moreover, the APA's deputy director of regulatory affairs did not state, as petitioners claim (Br. 19-20), that the APA board would "rubber stamp" staff's recommendation. The deputy director stated the opposite. He said that he "thought the board should have the opportunity to make

its own evaluation" of the application. (A. 463.) Thus, each of petitioners' attacks on staff's presentation fails because it reveals nothing about the board members' decision-making process. *See Matter of Gurin*, 208 A.D.3d at 1591 (rejecting the unsupported contention that an administrative authority "merely accepted the recommendation of its executive director").

Similarly, APA staff did not, as petitioners claim (Br. at 13), "conceal" or "fabricate" the regulatory criteria regarding adjudicatory hearings. Despite having no legal obligation to make any presentation to the Board, *see Matter of New York Pub. Interest Research Group Straphangers Campaign v. Metropolitan Transp. Auth.*, 309 A.D.2d 127, 138-139 (1st Dep't 2003), *lvs. denied* 100 N.Y.2d 513 (2003), staff gave a presentation to the board in December 2021, less than a month before the January 2022 meetings, that reviewed the regulatory criteria regarding adjudicatory hearings. (A. 596 [APA Board Meeting, December 16, 2021] 1:18:45-1:19:42; *see also* J14 49:30-51:00.) The board did not adopt staff's summary of the regulations as its own generic interpretation, and petitioners have not shown that staff's presentation of the criteria affected the board's determination. And insofar as petitioners criticize

one comment from the board chair (*see* Br. at 16), their criticism is misplaced for two independent reasons. First, the chair accurately applied 9 N.Y.C.R.R. § 580.2(a)(5) when he explained that an adjudicatory hearing would not produce relevant new information for the board because commentors opposing the project had already "raise[d] their points" and had no plans to present any additional proof. (J14 51:00-51:50.) Second, for a permit granted by nine unanimous votes, one board member's comment, even if mistaken, would provide an insufficient basis to establish that any "outcome flowed" from any such mistake. *See Matter of Bruso v. Clinton County*, 139 A.D.3d 1169, 1170-71 (3d Dep't 2016); *Matter of Cuppuccino v. Harper*, 187 A.D.3d 1679, 1680 (4th Dep't 2020). *See generally Matter of Kilgus v. Board of Estimate of City of N.Y.* 308 N.Y. 620, 622 (1955) (recognizing that a lack of independence must be demonstrated by "a majority of the votes" of the city-board decisionmaker). Petitioners thus fail to overcome the presumption of regularity with respect to their argument that APA staff mischaracterized the relevant regulatory criteria for determining whether to hold an adjudicatory hearing.

Likewise, there is no support for petitioners' argument that staff's "biased and one-sided" presentation of the facts prevented the board from independently deciding whether to hold a hearing. Petitioners misrepresent the record in claiming (Br. at 21) that a staff member falsely advised that the APA Act does not regulate residences. In response to public comments arguing that the local area should be reserved for residential and tourist uses, the staff member explained that the APA Act does not have a "residential zoning" category, *i.e.* a land use category exclusively for residences. (J13 1:33:40-1:34:20.) That explanation was correct. *See* Executive Law § 805 (no land use category exclusively for residences); *see also Seggio v. Town of W. Seneca*, 145 A.D.2d 956, 956 (4th Dep't 1988) (using "residential zoning" to mean land reserved "for residential use").

Nor is there record support for petitioners' claims about the board's alleged failure to consider public comments. (*See* Br. at 18.) The board

had independent access to all of the public comments,[3] and the January meetings are replete with statements by board members establishing their knowledge of the concerns set forth in public comments. Additionally, the staff accurately summarized the public comments at the January 13 meeting. (*See* J13 1:29:30-1:44:40.) And contrary to petitioners' baseless claim of non-attendance (Br. at 18-19), every board member who voted on the application was present for that staff summary. (*See* R. 517, J13 00:10-01:50.) Petitioners' "naked assertion" that the board was unaware of the record before it "is not sufficient to overcome the presumption of regularity." *Matter of Bruso*, 139 A.D.3d at 1171; *see Matter of Nehorayoff*, 191 A.D.2d at 835.

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[3] APA staff post public comments on the APA's website in advance of APA board meetings. *See* APA Website, Regulatory Programs Monthly Mailing Documents January 2022, https://apa.ny.gov/Mailing/2022/01/regulatory.htm (posting public comments on the permit application).

## CONCLUSION

Supreme Court's judgment should be affirmed.

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Albany, New York

Respectfully submitted,

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