



STATE OF NEW YORK
ADIRONDACK PARK AGENCY

In the Matter of the Application of

APA Project No. 2021-0276

UNCONVENTIONAL CONCEPTS, INC.
AND MICHAEL HOPMEIER

**APA HEARING STAFF REPLY TO
APPLICANT'S RESPONSE AND
CROSS MOTION**

Applicant's latest submission further supports the conclusion that the Applicant's failure to comply with the scheduling order is part of a broader disregard for the Agency's hearing process. The response and cross motion raise novel arguments concerning the intervening parties' right to participate in the proceedings and the Agency's review authority. Neither argument addresses the Applicant's failure to comply with the scheduling order or to submit pre-filed testimony. If the Applicant does not intend to present evidence, address the hearing issues identified by the Agency Board, and participate in good faith, the Application should be returned to the Board for a determination.

**I. Intervening parties' right to participate in the public hearing under
Agency §580.7 extends to the entire hearing process.**

The Applicant, by and through his attorney, argues that the intervening parties' right to participate in the proceedings is limited by the language in Agency regulations §580.7(a) which provides that "any person may seek to become a party in order to present evidence, cross-examine witnesses, and otherwise participate in a public hearing..." Applicant then argues that the pre-hearing proceedings and the public hearing are both distinct components of the larger adjudicatory proceeding and that §580.7(a) "expressly and plainly" states the intervenors "may only participate in a public hearing." (Norfolk Affirmation, 2). That is *not* what §580.7(a) says.

Agency regulation §580.7 governs petitions for party status. Part (a) of this section states that "any person may seek to become a party in order to present evidence, cross-examine witnesses, and otherwise participate in a public hearing..." The last clause is not a

limitation; it is a catchall. Once a person or organization is granted party status pursuant to this provision, they are a party to the hearing under §580.5(c). This is not an interpretation of the regulations; it is a definition. §580.5 provides that “in addition to the project sponsor and the persons named in section 809(3)(e) of the Adirondack Park Agency Act, the parties to the hearing shall be: (c) persons granted intervention pursuant to section 580.7 of this Part.” The intervenors are, by definition, parties to the hearing, which includes the pre-hearing process.

Contrary to the Applicant’s assertion that §580.9 “Pre-hearing conferences” best supports his position, this section highlights the intervenors right to participate in the pre-hearing proceedings. This section provides that “the hearing officer may direct the parties to appear for a conference...” This includes all parties to the hearing, if it were intended to exclude those granted party status under §580.7 it would say so.

While an adjudicatory proceeding may be made up of different phases, the pre-hearing process is necessarily part of the public hearing, as is reflected by Part 580 of the Agency’s regulations. Part 580 governs “public hearings held on all projects” (§580.1(a)) including the “determination to conduct a public hearing” (§580.2), “notice of hearing” (§580.4), “selection of hearing officer” (§580.8), and “pre-hearing conferences” (§580.9). Each of the aforementioned items are “pre-hearing” actions, but they are all part of and inextricable from the hearing.

The regulations also contemplate party participation in the “post-hearing” process in §580.14(h) and 580.18(a). This is further evidence that while structurally there may be “phases” to the hearing, they are all integral components of the hearing broadly. Limitation of the parties’ participation to the “public hearing” is contrary to any reasonable interpretation of the Agency regulations.

To accept the Applicant’s interpretation would create an absurd procedural vacuum where intervenors are recognized as full parties under § 580.5(c) yet barred from the very pre-hearing mechanisms designed to streamline the hearing including framing of the issues, scheduling, and pre-filed testimony. Party status is not an honorary title reserved solely for the day of testimony; it grants a meaningful right to shape the proceedings from inception.

II. Agency hearing staff agree with the intervenors assessment that the preemption and federal immunity argument are improperly raised and pre-mature.

We further agree that the cases cited by the Applicant are not on point and do not support his position. The intervenors properly summarized the flaws in Applicant's reliance on these cases. If the Applicant obtains a Federal Contract, Agency hearing staff reserve the right to make further arguments on this issue.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Grace Sullivan", with a long horizontal flourish extending to the right.

Grace Sullivan
APA Hearing Staff – Attorney