



In the Matter of the Application of

UNCONVENTIONAL CONCEPTS, Inc., and
MICHAEL HOPMEIER

RULING on MOTION
to DISMISS and APPLICANTS'
CROSS-MOTION

APA Project No. 2021-0276

I. Introduction and Proceedings

This ruling arises from the November 14, 2025, Adirondack Park Agency (APA or the Agency) Project Order No. 2021-0276 (Project Order) wherein the Agency ordered this matter to public hearing pursuant to Executive Law Section 809 and State regulations at 9 NYCRR 580.2. In November 2021 Unconventional Concepts, Inc. and Michael Hopmeier (the Applicants or Project Sponsors) submitted an application to undertake a Class B Regional Project in the Town of Lewis, Essex County, New York to the APA, which proposes to develop a weapons range for testing the internal ballistics of 155 mm howitzer cannon barrels over a 5-year period (the proposed "howitzer testing range") (Project Application or Proposed Project).

Four organizations submitted petitions for intervention and party status in December 2025 and I granted each organization party status in a ruling dated January 12, 2026. The four organizations are: (i) Sierra Club Atlantic Chapter (Sierra Club); (ii) Adirondack Wild: Friends of the Forest Preserve (Adirondack Wild); (iii) Adirondack Council, Inc. (Adirondack Council); and (iv) Protect the Adirondacks (collectively, Intervenor). The Project Sponsors appealed the ruling granting party status to Adirondack Wild to the Agency's Executive Director and a review of the transcript of the February 19, 2026 APA Board meeting reveals that the Agency voted to uphold the ruling granting party status to Adirondack Wild.

Additionally, on January 30, 2026, the Project Sponsors initiated a Civil Practice Law and Rules (CPLR) Article 78 proceeding in New York State Supreme Court seeking to vacate the determination of the Agency to conduct a public hearing on the Project Application and to vacate the determination of the Agency's Executive Director to deny the Project Sponsor's motion to disqualify this hearing officer from presiding over the public hearing on the Project Application (*Matter of Michael Hopmeier v. Bd. of New York State Adirondack Park Agency, et al*, Index. No. CV26-0063 [Sup. Ct. Essex Cnty]). At the time of this writing Supreme Court, Essex County has not issued a ruling or decision.

In the Project Order, the Agency directed three issues to be considered at the public hearing. An issues conference was conducted on February 4, 2026. On February 24, 2026, the intervenor Adirondack Council moved for an order revising the existing hearing issues.

Applicants cross-moved arguing, in part, that the issues order in the Project Order should not be modified. Protect the Adirondacks requested the addition of an issue for adjudication concerning whether the Applicant has contractual or other legal arrangements to test howitzers on the proposed range. These motions resulted in a March 24, 2026 Issues Ruling that revised the hearing issues for APA Project 2021-0278.

From the time of the initial Project Order to the March 24, 2026 Issues Ruling, the matter had been adjourned four times, typically by the consent of all the parties, with each adjournment resulting in a new date for the first day of the hearing. Additionally, the Project Sponsors had requested indefinite stays of the proceeding on January 20, 2026 and March 4, 2026. On April 29, 2026, at the request of all the parties, the hearing was adjourned a fifth time for roughly six months to October 28, 2026, to provide the litigants time to prepare for the evidentiary portion of the hearing.

On June 15, 2026, the parties conferred to consider revising dates in the hearing's existing scheduling order. A Third Revised Scheduling Order was issued on June 24, 2026, that contained agreed-upon times and dates for discovery, a site visit, and pre-filed direct testimony (Scheduling Order).

The site visit for APA Hearing Staff, intervening parties, and any retained experts contemplated for July 2026 did not occur. Based on the record before me, APA Hearing Staff and one or more experts attended a site visit at some portion of the Project Application location in July 2026 (*see* Appendix [the motion paper exhibits contain emails among the parties regarding the site visit]).

Pursuant to the Scheduling Order, the Applicants' pre-filed testimony was due on August 12, 2026. On August 11, 2026, counsel for the Applicants submitted a letter to this Hearing Officer requesting a 21-day extension to file and serve pre-filed testimony. In an email to the parties on August 12, 2026, the undersigned denied the request for an extension for the reasons stated therein (*see* Appendix, Affirmation in Support of Intervenor's Joint Motion to Dismiss This Hearing and Refer to APA Board for Final Action on the Application [Aff. in Support of Joint Motion], Ex. H). After denying Applicants' request for an extension, this Hearing Officer scheduled a conference call to discuss how to proceed in the matter to be held on August 19, 2026.

On August 17, 2026, the Intervenor's jointly submitted a motion to dismiss this hearing and refer the matter to the APA Board for final action on the Project Application (*see* Appendix, Notice of Joint Motion [Joint Motion to Dismiss]). At the videoconference held on August 19, 2026, the parties agreed to a schedule for responses to the Joint Motion to Dismiss and responses to any cross-motion that may be made (*see* Appendix). Additionally, it was conceded among the parties that further adherence to the dates and times for submission of pre-filed witness testimony contained in the Scheduling Order would be unworkable given the missing pre-filed testimony of the Applicants' witnesses and the pending Joint Motion to Dismiss (*id.*). It was also agreed among the parties to retain the October 28, 2026 date for the first hearing date of this matter (*id.*).

On August 28, 2026, APA Hearing Staff submitted the APA Hearing Staff Response to

Intervenors' Joint Motion to Dismiss (Appendix). Also on August 28, 2026, Applicants submitted a Notice of Cross-Motion dated August 28, 2026 (Cross-Motion), and an Attorney Affirmation in Opposition to the Intervenors' Joint Motion to Dismiss and in Support of Applicants' Cross-Motion to Bar the Intervenors from Participating in Pre-Hearing Proceedings (Aff. in Opposition to Joint Motion and Support of Cross-Motion) dated August 28, 2026 (*id.*). On September 3, 2026, Intervenors jointly submitted a Reply Affirmation in Support of Intervenors' Joint Motion and in Opposition to the Applicants' Cross-Motion dated September 3, 2026 (*id.*). On September 4, 2026, APA Hearing Staff submitted an APA Hearing Staff Reply to Applicant's Response and Cross-Motion (*id.*).

All of the motion papers at issue in this ruling were timely submitted and properly before me for consideration.

For the reasons stated below, the Joint Motion to Dismiss is granted in part. The Cross-Motion is denied.

II. Positions of the Parties

A. Intervenors

In the Joint Motion to Dismiss brought by the Intervenors, the Intervenors request an order dismissing this adjudicatory proceeding on the grounds that the Applicants have failed to comply with the Scheduling Order, including failing without justification or good cause to submit pre-filed testimony in support of the Project Application by the ordered deadline, and have therefore defaulted on their opportunity to submit additional information necessary for the Agency to make the statutorily required finding for permit issuance (*see* Joint Motion). The Intervenors additionally move for an order referring the pending Project Application to the APA Board for final action (*id.*).

With respect to the Applicants' failure to submit pre-filed testimony, the Intervenors assert that the Applicants were well aware of the deadline to submit the evidence and had "approximately nine months to prepare" testimonial evidence for the hearing (Aff. in Support of Joint Motion ¶ 10). Intervenors contend that the Applicants' request for an extension made on the eve of the initial due date was properly denied because the request was not submitted at least ten days prior to the filing deadline, and the Applicants made no effort to confer with the other parties prior to submitting it, in "direct violation" of the Scheduling Order (*id.* at ¶ 3). Additionally, the Applicants' request "provided no justification or good cause for the requested extension, stating only: 'I simply need more time' " (*id.* at ¶¶ 29-31).

Intervenors assert two further bases for dismissing the Project Application and referring the matter to the APA Board for final action. First, the Intervenors point to Applicants' refusal to acknowledge that the portion of the project site located at 87 Hale Hill Lane (hereinafter the missile silo site) is a part of the Project Application "even though that parcel, Lot 29, is specifically identified as part of the project site in the application and in the APA Board's November 14, 2025 hearing order" (Aff. in Support of Joint Motion ¶ 2). The Intervenors argue that Applicants' claim that the missile silo site is not a part of the Project Application, if allowed

to stand would "misrepresent the full scope of the proposed project and result in an incomplete record that precludes the APA Board's full review of all aspects of the proposed project" (*id.* at ¶ 6).

Second, and relatedly, the Applicants refused to allow the Intervenor to participate in the site visit "despite having agreed to a site visit for all parties, and despite that agreement having been memorialized in the [Scheduling] Order" (Aff. in Support of Joint Motion ¶¶ 24-25). The Intervenor argues that the Applicants' abrupt refusal to allow the Intervenor to participate in the site visit was unjustified and resulted in prejudice to the Intervenor's ability to present evidence to the Agency as a part of the hearing (*id.*; see Aff. in Support of Joint Motion, Ex. F).

In light of the above, the Intervenor opposes the issuance of a fourth revised scheduling order and asserts that it would nullify the prior ruling denying the Applicants' request for an extension, grant the relief that had been found unwarranted, reward the Applicants' disregard of the Scheduling Order and result in a failure to maintain "order and the efficient conduct of the hearing" as required by APA regulations at 9 NYCRR 580.14(a)(4)(xi) (Aff. in Support of Joint Motion ¶¶ 32-33).

The Intervenor contends that Applicants have had a "full and fair" opportunity to submit evidence to meet their burden of proof to show that the permit should be issued and, having "failed to avail themselves of the opportunity" to do so, the pending Project Application should be referred to the APA Board for "final action" (Aff. in Support of Joint Motion ¶¶ 40-46).

B. Applicants

In their opposition to the Intervenor's Joint Motion to Dismiss and their Cross-Motion to bar the Intervenor from participating in pre-hearing proceedings, the Applicants bring three primary arguments.

First, Applicants contend that the Intervenor does not have the legal right to participate in pre-hearing proceedings in this matter and, thus, lack the legal right to conduct a project site inspection or file their Joint Motion to Dismiss (Aff. in Opposition to Joint Motion and Support of Cross-Motion ¶¶ 2-23). Applicants contend that in the APA's hearing regulations and under the State Administrative Procedures Act (SAPA), there is a distinction between the "pre-hearing" phase of an adjudicatory proceeding and the "public hearing" itself and that the APA Act only grants intervening parties the right to participate in the later, or "public hearing" portion of the proceeding (*id.* at ¶ 2 *citing* 9 NYCRR 580.7[a]). Thus, intervenors have the right to present evidence and cross-examine witnesses but cannot participate in "pre-hearing proceedings" and lack the right to make a pre-hearing motion to dismiss or participate in a pre-hearing site inspection (*id.*).

Second, Applicants assert that the missile silo site is not a part of the Proposed Project site and, therefore, even if the Intervenor could participate in pre-hearing proceedings, they would have no legal right to inspect that lot (Aff. in Opposition to Joint Motion and Support of Cross-Motion ¶¶ 24-26). As proof that the missile silo site is not a part of the Project Application, Applicants point to numerous instances in the Project Application materials that

identify only 195 Hale Hill Lane as the Proposed Project site and further note that "Applicants did not provide the APA proof of consent by the owner of the lot located at 87 Hale Hill Lane . . . (commonly referred to the "Missile Silo Site") to the filing of the project application" (*id.* at ¶ 25).

Third, Applicants maintain that the proposed ballistic testing operation will be conducted under a federal government contract and, thus, is exempt from State and municipal land use laws, including the APA Act, making the Intervenor's Joint Motion to Dismiss moot (Aff. in Opposition to Joint Motion and Support of Cross-Motion ¶¶ 27-31). Applicants assert that under the Supremacy Clause of the United States Constitution (Clause 2) and the doctrine of intergovernmental immunity, federal government actions are "generally not subject to state or municipal regulations" (*id.* at ¶ 31). Accordingly, any "argument or proof submitted against the application is irrelevant . . . [t]he entire project is subject to federal regulations and only federal regulations . . . [t]he proposed project is immune to state regulation, including the APA Act" (*id.*).

Applicants request that the Joint Motion to Dismiss be denied in full and that the Applicants' Cross-Motion be granted in full.

C. APA Hearing Staff

In a response to the Intervenor's Joint Motion to Dismiss (APA Hearing Staff Response to Joint Motion), APA Hearing Staff requests an order from the Hearing Officer to "take whatever action he deems appropriate to move towards a final resolution of these proceedings" including "dismissal and reversion to the APA Board;" preclusion of pre-filed testimony and continuation of the proceeding; "conditional admission" of the pre-filed testimony should it be sought under a new procedure with failure to comply resulting in automatic default; or any other sanction (APA Hearing Staff Response to Joint Motion at pp. 1, 5).

APA Hearing Staff asserts that a Hearing Officer has the legal authority to manage the proceeding under both SAPA and Agency hearing regulations, including the power to "do all acts and take all measures necessary for the maintenance of order and the efficient conduct of the hearing" (APA Hearing Staff Response to Joint Motion at p. 3 *citing* 9 NYCRR 580.14[a][4][ix]). This authority extends to "admit or exclude evidence under Agency regulation §580.14(a)(4)(ix)" and to "dispose of an adjudicatory proceeding by default" (*id.* *citing* 9 NYCRR 580.10). Whether dismissal is an appropriate sanction in this instance is a matter to be determined by the hearing officer and in making the determination the hearing officer "might consider" whether the applicant's failure to comply with the scheduling order was "willful, contumacious, or in bad faith" (*id.* at p. 4 *citing* *Wingdale v. Tamacki*, 184 A.D. 3d 1178 [4th Dept. 2020] among other authority).

Although APA Hearing Staff does not advocate for any specific sanction, Staff relates that the Applicants' prior challenges to the hearing proceedings and failure to comply with the Scheduling Order and submit pre-filed testimony renders it "hard to separate this failure from what appears to be a larger strategy of avoidance" (APA Hearing Staff Response to Joint Motion at pp. 4-5). Staff states that the Agency cannot approve this Project Application without further

evidence demonstrating that the Proposed Project meets the required findings under 9 NYCRR 809(10), yet, the Agency can only provide the "opportunity for due process; it cannot compel participation. If [the Applicants do] not wish to move forward with the hearing process, they are not required to do so and may withdraw at any time" (*id.* at pp. 5-6).

D. Intervenor and Agency Hearing Staff Replies to Cross-Motion

In opposition to the Applicants' Cross-Motion, the Intervenor contends as follows (*see* Appendix, Reply Affirmation in Support of Intervenor's Joint Motion and in Opposition to the Applicants' Cross Motion [Reply Aff.]). Initially, Intervenor asserts that the bases for the Joint Motion to Dismiss have not been disturbed by Applicants' opposition to it (Reply Aff. ¶¶ 4-11). Specifically, Intervenor contends that the Applicants do not dispute that they have failed to meet their burden of proof in the proceeding and have failed to provide any justification for failing to comply with the timeline for pre-filed testimony and thus, the Scheduling Order (*id.*). Further, they contend that Applicants confirm that they have not submitted the required consent by the owner of the missile silo site to the Agency, which provides a separate ground for dismissal (*id.*). Intervenor asserts that the argument that a contract with the federal government would render the Proposed Project exempt from APA review or permitting process does not attach in this matter because there is no evidence here that such a contract presently exists (*id.*).

Intervenor also asserts that Applicants' Cross-Motion is barred by the doctrine of laches and is legally unsupported in that APA hearing regulations provide for Intervenor to participate in the hearing with full party status with the power to participate in pre-hearing conferences, the submission of pre-filed testimony, and other matters in the administrative hearing process (Reply Aff. ¶¶ 12-20 *citing* 9 NYCRR 580.5[c], 508.9, 580.14[f]). Intervenor argues that the Applicants' federal preemption argument is improperly raised and premature (*id.* at ¶¶ 21-24).

Lastly, the Intervenor joins APA Hearing Staff's arguments and concerns they raised, but do not support the alternative resolutions suggested by APA Hearing Staff and continue to request relief in the form of an order dismissing this proceeding and referring the matter to the "full APA Board for final action" (Reply Aff. ¶¶ 25-30).

In a reply to the Applicants' Cross-Motion, APA Hearing Staff asserts that the Applicants' "latest submission further supports the conclusion that Applicants' failure to comply with the scheduling order is part of a broader disregard for the Agency's hearing process" (*see* Appendix, APA Hearing Staff Reply to Applicants' Response and Cross-Motion [APA Hearing Staff Reply] at p. 1). APA Hearing Staff maintains that Applicants have raised "novel arguments concerning the intervening parties' right to participate . . . and the Agency's review authority" and have not addressed the failure to submit pre-filed testimony in compliance with the Scheduling Order (APA Hearing Staff Reply at p. 1). APA Hearing Staff has sharpened its view of the proper disposition of the Joint Motion to Dismiss, stating "[i]f 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" (*id.*).

Additionally, APA Hearing Staff sets out a cogent argument that intervening parties' right to participate in the public hearing under Agency regulations at 9 NYCRR 580.7 extends to the

entire hearing process and includes all normal pre-hearing procedures such as disclosure, pre-hearing conferences, framing of issues and scheduling (APA Hearing Staff Reply at pp. 1-2). APA Hearing Staff concurs with the Intervenor's assessment that the preemption and federal immunity arguments are improperly raised and premature and reserves the right for further argument in the event that the Applicants obtain a federal contract in the future.

III. Discussion

Because the Applicants' Cross-Motion requesting an order barring the Intervenor's from participating in pre-hearing proceedings in this proceeding could result in a determination that the Intervenor's do not have the power to move to dismiss the adjudicatory proceeding, I will address the merits of the Cross-Motion first.

A. Applicants' Cross-Motion and Opposition to the Joint Motion to Dismiss

In their opposition to the Joint Motion and support of their Cross-Motion, the Applicants assert that the Intervenor's cannot participate in the pre-hearing portion of the adjudicatory proceeding, that the missile silo site is not a part of the Project Application and, therefore, no one had a right to a site visit there in any case and that several concepts of federal preclusion obviate the need for an APA permit.

1. Intervenor's Right to Participate in Pre-Hearing Proceedings

The crux of Applicants' argument on this point is that APA's hearing regulations at 9 NYCRR 580.7(a) state that any person may seek to become "a party in order to present evidence, cross-examine witnesses, and otherwise participate in a public hearing by filing a written petition". In Applicants' view, that means that intervening parties can only participate in the *public hearing* portion of an adjudicatory proceeding and not the *pre-hearing* portion of the proceeding. Because the public hearing portion of the proceeding will not begin until an actual hearing date occurs, Intervenor's lack the power to file a pre-hearing motion to dismiss. Applicants bolster their claim that the APA hearing regulations limit Intervenor's status in the hearing in this way by citing instances in the APA hearing regulations and in SAPA that demonstrate that adjudicatory proceedings are divided into pre-hearing and public hearing phases, such that the use of the term "public hearing" in 9 NYCRR 580.7(a) must be read as a limitation to the right to participate.

I find this argument to be thoroughly unconvincing. The simplest reading of 9 NYCRR 580.7(a) is that the wording "public hearing" is just a reference to the proceeding in general. In defining the "parties to the hearing" at 9 NYCRR 580.5, the APA hearing regulations identify, among other entities, the project sponsor, any public agency, any person receiving individual notice pursuant to 9 NYCRR 580.4(b)(3) and *any persons granted intervention* pursuant to 9 NYCRR 580.7. There are no classes of parties with individualized powers and responsibilities in the definition, a "party" is a "party" to the hearing. Moreover, as APA Hearing Staff points out in their reply to the Cross-Motion, the phrase "and otherwise participate in a public hearing" in 9 NYCRR 580.7 is best understood to be a catch-all that is there to ensure that an intervening party

is a full party to the hearing enjoying the same rights as APA Hearing Staff and an applicant.¹ Likewise, as the Intervenor's point out in their reply to the Cross-Motion, 9 NYCRR 580.9 grants a hearing officer the power to direct "the parties" to appear for a "*pre-hearing* conference" (Reply Aff. ¶ 16). Similarly, APA hearing regulations 9 NYCRR 480.14(f) concerning *pre-filed* testimony state that "[w]herever feasible, the hearing officer may request or require that testimony be reduced to writing and distributed to *the parties*" (*id.*).

Applicants themselves admit that the intervening parties in a previous APA hearing concerning the proposed project of Adirondack Club and Resort participated as full parties in pre-hearing proceedings without objection (*see* Aff. in Opposition to Joint Motion and Support of Cross-Motion ¶¶ 17-19). That matter involved extensive pre-hearing proceedings, multiple hearing dates over several months and ultimately led to the Agency granting permits for the project. Another example of such an APA permit hearing is the proposal of Nextel to build a cell tower on the shores of Lake George on Pilot Knob. In the Nextel proceeding, the Residents' Committee to Protect the Adirondacks and Adirondack Council intervened and participated in pre-hearing proceedings, the evidentiary hearing, and post-hearing argument. In that matter as well, the Agency ultimately approved the project (*see Cellphone Tower Wins Approval on Park Shore*, NY Times July 9, 2005 by Lisa W. Foderaro *available at* <https://www.nytimes.com/2005/07/09/nyregion/cellphone-tower-wins-approval-on-park-shore.html>).

Although there are only a few examples of APA project permit hearings, there are many examples of intervenors with party status engaging in all aspects of an adjudicatory proceeding—including pre-hearing proceedings—in permit hearings before other State agencies (*see e.g., Matter of Greenidge Generation LLC*, 2024 WL 2273410, at *1 [intervening parties appealing a pre-hearing issues ruling]; *Matter of CWM Chemical Services, LLC*, 2023 WL 11679220, at *4 [ruling on intervenor's pre-hearing motion to modify the issues for adjudication]).

Accordingly, I find no reasonable basis to support Applicants' Cross-Motion for an order barring Intervenor's from participating in pre-hearing proceedings. In light of the above, Applicants' Cross-Motion is DENIED.

2. The Missile Silo Lot's Status as Part of the Proposed Project

The Applicants argue that the missile silo site is not a part of the Proposed Project and, therefore, even if the Intervenor's have a right to participate in pre-hearing proceedings, they have no right to inspect the missile silo site (Aff. in Opposition to Joint Motion and Support of Cross-Motion ¶¶ 24-26). The Applicants assert that to the extent the Intervenor's Joint Motion to Dismiss is based upon the Applicants' refusal to permit them to inspect the missile silo site, it must be denied (*id.*).

¹ Indeed, if the APA regulations were intended to create different classes of hearing participants, it would state so explicitly as is the case with New York State Department of Environmental Conservation permit hearing regulations at 6 NYCRR 624.5 which allow for both full party intervenors and 'amicus' intervenors who do not have the power to participate in an evidentiary hearing other than to file a brief.

Based on the record before me, Applicants, the Agency Hearing Staff, or the other parties to the proceeding do not have a common or mutual understanding of the parcels at issue in the hearing and part of the Project Application.

In a July 13, 2026 communication with the parties prior to the site visit anticipated in the Scheduling Order planned to occur on July 15, 2026, APA Hearing Staff stated that there were issues that had arisen from the site visit discussions that needed to be resolved (Aff. in Support of Joint Motion ¶ 23, Ex. D). APA Hearing Staff related that the Agency had designated both the property at 195 Hale Hill Lane (Lot 31) and the missile silo site at 87 Hale Hill Lane (Lot 29) as necessary and integral parts of the Proposed Project site (*id.*). APA Hearing Staff also related that the record landowner of the missile silo site is Diversified Upstate Enterprises LLC, which did not sign the Project Application. Because Agency Regulations require written consent of the landowner, APA Hearing Staff separately sought written consent signed by an authorized representative of Diversified Upstate Enterprises LLC to include Lot 29, the missile silo site, as part of the Proposed Project site (*id.*). APA Hearing Staff stated that should "Diversified Upstate Enterprises LLC refuse to sign such a consent, the Agency will be unable to continue processing the application as currently proposed and the hearing proceeding will be suspended" (*id.*).

Applicants have confirmed that consent has not and will not be provided from Diversified Upstate Enterprises LLC regarding 87 Hale Hill Lane (Lot 29) and reiterated their position that the missile silo site is not a part of the Proposed Project (Aff. in Opposition to Joint Motion and Support of Cross-Motion ¶ 25). Because Agency Hearing Staff have stated that, without consent of the landowner of the missile silo site at 87 Hale Hill Lane (Lot 29), the Agency will be unable to continue processing the Project Application and the hearing proceeding must be suspended, I find that the lack of agreement concerning the missile silo site's status as part of the Proposed Project is an independent basis to refer the proceeding to the APA Board for further action.

3. Argument on Federal Preclusion

Applicants' third argument in opposition to the Joint Motion to Dismiss and in support of the Cross-Motion is that the proposed howitzer testing site operation will be conducted under a federal contract and, thus is exempt from State and municipal land use laws including the APA Act, making the Intervenor's Joint Motion to Dismiss moot (Aff. in Opposition to Joint Motion and Support of Cross-Motion ¶¶ 27-31). Applicants contend that the Supremacy Clause of the United States Constitution and "the doctrine of intergovernmental immunity" render "any argument or proof submitted against the application [] irrelevant," and that the "entire project is subject to . . . only federal regulations" and is "immune to state regulation, including the APA Act" (*id.*). Applicants cite to a line of federal cases in support of this argument (*id.*).²

The Intervenor's counter that the Applicants' claim is improperly raised, because a challenge to APA's jurisdiction should be raised in a motion to dismiss for lack of jurisdiction (Reply Aff. ¶ 21). Intervenor's further assert that the claim is premature because it rests on Applicants' possessing a federal contract to conduct the howitzer testing, which Intervenor's

² Applicants relate that they decided to "continue with the application before the APA in good faith to demonstrate transparency and consider the concerns the APA and Green Groups may have with the project" (*see* Aff. in Opposition to Joint Motion and Support of Cross-Motion ¶ 30).

contend Applicants' counsel has admitted does not presently exist (*id.* at ¶ 22). Intervenor also contend that the caselaw submitted by the Applicants is either distinguishable, inapposite, or does not support the Applicants' claim (*id.* at ¶ 23).

APA Hearing Staff agree with the Intervenor's assessment that the preemption and federal immunity arguments are improperly raised and premature and note that, in the event Applicants obtain a federal contract, they reserve the right to make further arguments on the issue (APA Hearing Staff Reply p. 3).

I find that without an executed federal contract for this project, these arguments are not ripe for review. Additionally, there is no need to make a preemption or federal immunity determination to rule on the Joint Motion and Applicants' Cross-Motion. As APA Hearing Staff points out, if Applicants do not believe they are subject to APA jurisdiction or believe that they do not need an APA land use permit to conduct the activities they desire on the land in question, they are free to withdraw the Project Application. If the Applicants instead wish to remain in the hearing proceeding and seek an APA permit, they are then waiving any jurisdictional or federal immunity claim and submitting to the APA permit process, including this hearing. Accordingly, while this proceeding is ongoing, it is the law of the case that Applicants' Project Application is subject to APA jurisdiction and APA hearing regulations. Therefore, I reject Applicants' claim that preemption or federal immunity provide a defense to the Joint Motion to Dismiss or a basis to find in favor of the Cross-Motion.

B. Joint Motion to Dismiss

The Intervenor's Joint Motion to Dismiss this matter and refer the matter to the APA Board for further action is based upon the claim that the purpose of the hearing is to provide information to the Agency for it to grant or deny the Project Application and that the Applicants have failed in their burden to provide information to the Agency for it to make the statutorily required findings for permit issuance. Intervenor points primarily to two instances of this failure to provide the Agency with the information it requires via the hearing: (i) the failure to submit pre-filed testimony in accordance with the Scheduling Order; and (ii) the barring of the Intervenor from inspecting the Proposed Project sites at penalty of trespass (Aff. in Support of Joint Motion ¶¶ 6-7, 10, 22-25, 26-31). Intervenor contends that the failure to submit pre-filed testimony per the Scheduling Order, without any explanation, prejudiced the Intervenor's ability to prepare their witnesses and evidence for the hearing because they relied upon the Scheduling Order to prepare their case and engage their experts. The Intervenor also contends that the Applicants' assertion that the missile silo site is not a part of the Project Application and the refusal to allow the Intervenor to inspect either parcel both frustrate the Intervenor's right to gather information of their own to present to the Agency.

APA Hearing Staff agree, noting that nine months into the hearing process "the record is littered with unsubstantiated procedural challenges and entirely void of additional information that would aid the Agency Board in their review" (APA Hearing Staff Response to Joint Motion at p.1). In their response to the Joint Motion, APA Hearing Staff advocated for a variety of possible actions with respect to ruling on the Joint Motion to Dismiss, including dismissal and

reversion to the APA Board, noting that "some form of admonishment is proper" (*id.* at p. 5).³ After reviewing the Applicants response to the Joint Motion and reviewing Applicants Cross-Motion, APA Hearing Staff's position became more direct, stating, among other things, that if "the applicant does not intend to present evidence, address the hearing issues . . . and participate in good faith, the Application should be returned to the Board for a determination" (APA Hearing Staff Reply at p. 1).

The Applicants' response to the Joint Motion to Dismiss is more telling in what it does *not* say than in what it does. There were three arguments against the Joint Motion, but none addressed the underlying bases for the Joint Motion to Dismiss.

There was no reason stated by counsel for the Applicants when he requested a 21-day extension of time to file pre-filed testimony the day before the deadline, he only said "I simply need more time" (Aff. in Support of Joint Motion, Ex. G). There is no dispute that the Scheduling Order required extension requests to be made at least 10-days prior to a due date and be made only after consulting with the other parties to attempt to resolve the issue. There is an alternate provision in the APA hearing regulations for "Extension of time by consent" at 9 NYCRR 580.20 that allows for time periods to be extended for good cause by written mutual consent of the project sponsor and Agency staff (*see* Aff. in Support of Joint Motion, Ex. H). None of the three arguments asserted by the Applicants in the Cross-Motion papers address the failure to adhere to the timelines in the Scheduling Order. There is no assertion of good cause—or any reason at all—for the failure, no plan for submitting the pre-filed testimony, and no recommendation for how to cure the prejudice caused to the other parties.

I concur with APA Hearing Staff's description of legal authority for a hearing officer to dismiss a matter as a sanction (*see* APA Hearing Staff Response to Joint Motion at pp. 3-6). APA Hearing Staff notes that "[i]ndependently, failure to comply with the scheduling order would be unlikely to be read as 'willful, contumacious, or in bad faith', however, in the broader context of this application and these proceedings, it is hard to separate this failure from what appears to be a larger strategy of avoidance" (*id.* at p. 5). I agree. Moreover, here the Applicants have not presented arguments otherwise.

I would like to address, as briefly as possible, a few issues relating to the planned site visit in this proceeding. The parties had agreed to a site visit to be conducted on July 15, 2026, but prior to that day the parties did not agree on the start time, the duration of the visit, and the specific project lots to be visited and Applicants rescinded their permission for the Intervenors to enter the property, stating "law enforcement will be called if any unauthorized individuals attempt to enter upon the land where the project site is located" (*see* Aff. in Support of Joint Motion, Ex. E). At the time and since then it was the understanding of the hearing participants that the APA hearing regulations do not have a specific provision for ordering a site visit as part

³ On September 11, 2026, after the schedule for Joint Motion to Dismiss and Cross-Motion responsive papers had expired, counsel for Applicants submitted a letter addressed to the Hearing Officer for inclusion in the hearing record that responded to APA Hearing Staff's motion papers. The letter stated, among other things, that counsel for Applicants had not pursued a deliberate course of delay or a strategy of avoidance, rather was advocating in Applicants' best interests and using available legal tools and procedures. As requested, I have made the letter a part of the hearing record.

of a hearing (*see* Aff. in Opposition to Joint Motion and Support of Cross-Motion, Exs. A, B).⁴ No party has requested I, as the Hearing Officer, order a site visit, and I have not done so. Nonetheless, the purpose of a site visit would be to obtain understanding of the Proposed Project in order to present evidence and information to the APA Board, and I find the refusal to allow the Intervenor to conduct a site visit has negatively impacted their ability to present evidence and information to the APA Board.

In the Project Order, the APA Board ordered the hearing, finding that a "Public hearing would facilitate the receipt of testimony to address these issues. This information would help the Agency make the findings and determinations it is required to make under the APA Act" (Project Order No. 2021-0276; *see* Aff. in Support of Joint Motion, Ex. B). Applicants' conduct demonstrates that they are not interested in obtaining approval of the Project Application by presenting evidence to the APA Board that the Project Application meets the required criteria for approval. I conclude that the Applicants' failure to comply with the Scheduling Order and provide testimony is part of a broader pattern of disregard for the Agency's hearing process.

The Project Order specified that the Agency is not requesting that the hearing officer make findings of fact or conclusion of law and that the Agency reserves to itself the right to make its own finding of fact and conclusions of law as part of its final Agency determination. Accordingly, I decline to dismiss the matter directly, but I will grant the Joint Motion to Dismiss' request for referral to the APA Board for a determination on whether to dismiss this proceeding. In light of the above, Intervenor's Joint Motion is GRANTED IN PART, and I will refer the Project Application to the APA Board as the Joint Motion to Dismiss requests.

IV. Recommendations to the APA Board

Taken together and in the context of the course of this proceeding, I am persuaded by the Intervenor's Joint Motion to Dismiss and with APA Hearing Staffs' concurrence that the Applicants have violated the Scheduling Order, have not proceeded with the conduct of this hearing in good faith, and have failed to present evidence or address the hearing issues identified by the Agency Board and therefore failed to meet their burden to show that the Project Application meets the criteria for approval. Accordingly, I will refer and return the Project Application to the APA Board for a determination, and I recommend that the APA Board dismiss this proceeding for lack of prosecution and deny the Project Application. Additionally, the lack of agreement concerning the missile silo site's status as part of the Proposed Project is an independent basis to refer the proceeding to the APA Board for further action.

V. Ruling

⁴ In their Reply Affirmation in Support of Intervenor's Joint Motion and in Opposition to the Applicants' Cross-Motion, in a footnote, Intervenor points to CPLR Section 3120(1)(ii), which authorizes any party to be permitted "entry upon designated land or other property" owned by another party. The CPLR provision describes a process where a party serves a notice upon another party to permit entry for the purpose of "inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation thereon" (CPLR 3120[1][ii]; *c.f.* 6 NYCRR 624.7[c][4] [provision in NYSDEC permit hearing procedures allowing real property inspection by permissive order of an Administrative Law Judge]). To my knowledge no such notice has been served in this matter.

For the reasons discussed above, the August 17, 2026, Joint Motion for an order dismissing this adjudicatory proceeding and referring the Project Application and APA Project No. 2021-0276 to the APA Board for a determination is GRANTED IN PART.

The August 28, 2026, Cross-Motion for an order barring Adirondack Council, Adirondack Wild: Friends of the Forest Preserve, Protect the Adirondacks, and Sierra Club from participating in pre-hearing proceedings is DENIED.



David N. Greenwood
APA Hearing Officer

Dated: September 14, 2026
Albany, New York

To: Attached Service List
Appendix: Joint Motion to Dismiss and Cross-Motion Ruling Record

APPENDIX
APA Project No. 2021-0276 Public Hearing
Motion to dismiss and Cross-Motion Ruling Record

1. Notice of Joint Motion dated August 17, 2026.
2. Affirmation in Support of Intervenors' Joint Motion to Dismiss This Hearing and Refer to APA Board for Final Action on the Application dated August 17, 2026.
Exhibit A: Emails between the hearing participants dated July 8 and July 9, 2026.
Exhibit B: APA Project Order 2021-0276.
Exhibit C: Third Revised Scheduling Order dated June 24, 2026.
Exhibit D: Email from Grace Sullivan, APA hearing staff to hearing participants dated July 13, 2026.
Exhibit E: Emails between the hearing participants dated July 10, 2026.
Exhibit F: Letter from Todd D. Ommen, counsel for Sierra Club to Hearing Officer Hon. David N. Greenwood dated August 10, 2026, with Exhibits A-E.
Exhibit G: Letter from Matthew D. Norfolk, Esq. to Hearing Officer Hon. David N. Greenwood dated August 11, 2026.
Exhibit H: Email from Hearing Officer Hon. David N. Greenwood to hearing participants dated August 12, 2026.
3. Scheduling Conference Recording dated August 19, 2026.
4. APA Hearing Staff Response to Intervenors' Joint Motion to Dismiss received August 28, 2026.
5. Notice of Cross-Motion dated August 28, 2026.
7. Attorney Affirmation in Opposition to the Intervenors' Motion to Dismiss and in Support of Applicants' Cross-Motion to Bar the Intervenors from Participating in Pre-Hearing Proceedings dated August 28, 2026.
Exhibit A: Emails between the hearing participants dated July 9 and July 10, 2026.
Exhibit B: Letter from Matthew D. Norfolk, counsel for Applicants to Hearing Officer Hon. David N. Greenwood dated July 7, 2026.
7. Reply Affirmation in Support of Intervenors' Joint Motion and in Opposition to the Applicants' Cross-Motion dated September 3, 2026.
8. APA Hearing Staff Reply to Applicant's Response and Cross-Motion received September 4, 2026.

Service List
APA 2021-0276 Public Hearing
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