

2. I am familiar with the file in this matter, having represented Agency staff in the administrative enforcement proceeding, and any facts stated herein are upon information and belief or based upon the affidavits submitted by Agency staff in the administrative enforcement proceeding, including my own affirmation.

3. I submit this affidavit in support of the APA's supplemental answer to claims three, five, six, seven, eight, nine, ten and eleven, and in further opposition to the Amended Petition.

APA Jurisdiction under the APA Act

4. The Adirondack Park Agency Act ("APA Act") establishes unequivocal permitting jurisdiction over certain types of specifically defined land uses and development in the Adirondack Park. Permits are required by APA Act § 809 for all new land uses and development listed in § 810 as either class A regional projects or class B regional projects. Many of the new land uses and development listed in § 810 are specific uses that are expressly defined in § 802.

5. APA Act § 809(1) provides that:

"The agency shall have jurisdiction to review and approve all class A regional projects, including those proposed to be located in a land use area governed by an approved local land use program, and all class B regional projects in any land use area not governed by an approved and validly enacted or adopted local land use program."
(emphasis added).

6. APA Act § 809(2)(a) provides that:

"Any person proposing to undertake a class A regional project in any land use area, or a class B regional project in any land use area not governed by an approved and validly enacted or adopted local land use program, shall make application to the agency for approval of such project and receive an agency permit therefore prior to undertaking the project."

See also, Record, Volume I, Item 1, Determination of the Enforcement Committee in the Matter of Lewis Family Farm, Inc., dated March 25, 2008 ("Determination"), ¶ 17.

7. Since the Town of Essex does not have an approved local land use program, the Agency has permitting jurisdiction over all of the new land uses and development listed in Section 810 proposed to be undertaken there.

Subdivision Jurisdiction

8. APA Act § 810(1)(e) lists the Class A regional projects in a Resource Management land use area that require an Agency permit. These projects include, inter alia, all subdivisions of land (and all land uses and development related thereto) involving two or more lots, parcels or sites. Executive Law § 810(1)(e)(3).

9. "Subdivision" is defined in APA Act § 802(63) as:

"any division of land into two or more lots, parcels, or sites ... for the purpose of ... any form of separate ownership or occupancy (including any grading, road construction, installation of utilities or other improvements or any other land use and development preparatory or incidental to any such division) . . ." (emphasis added).

10. The Agency's regulations define "subdivision into sites" as occurring:

"where one or more new dwelling(s) or other principal building(s) is to be constructed on a parcel already containing at least one existing dwelling or other principal building, and regardless of whether the existing building is proposed to be removed after completion of the new building(s)." 9 NYCRR § 570.3(ah)(3).

11. All subdivisions into sites of Resource Management lands require an Agency permit pursuant to APA Act §§ 809(2)(a) and 810(1)(e)(3). The Agency's Enforcement Committee found in its March 25, 2008 Determination that Lewis Farm had undertaken a subdivision into sites and violated these provisions by constructing three new single family dwellings on the Resource Management portion of the Lewis Farm. See, Record Volume I, Item 1, Determination, ¶¶ 6, 41 and 42.

Single Family Dwelling Jurisdiction

12. APA Act § 810(2)(d) lists the Class B regional projects in a Resource Management land use area that require an Agency permit in the Town of Essex. These projects include, inter alia, all single family dwellings. APA Act § 810(2)(d)(1).

13. "Single family dwelling" is defined in APA Act § 802(58) as:

"any detached building containing one dwelling unit, not including a mobile home."

14. The APA Act does not provide any exception to § 810(2)(d)(1) permitting jurisdiction over all new single family dwellings in Resource Management. In contrast, APA Act § 810(1)(e)(8) asserts Agency permitting jurisdiction over all structures in excess of forty feet in height in Resource Management, "except agricultural use structures and residential and radio and television antennas". (emphasis added). Presumably, the NYS Legislature would have included a similar exception for single family dwellings in Section 810(2)(d)(1) if certain single family dwellings were to be considered agricultural use structures.

15. All new single family dwellings (except for lawful replacements of pre-1973 dwellings) on Resource Management lands require an Agency permit pursuant to §§ 809(2)(a) and 810(2)(d)(1). Based on a cursory review of Agency records, I have identified at least seventy Agency permits issued pursuant to these provisions for single family dwellings in Resource Management, including four permits issued to farms for farmer and farmworker housing. The Agency's Enforcement Committee found in its March 25, 2008 Determination that Lewis Farm had violated these provisions by constructing three new single family dwellings on the Resource Management portion of the Lewis Farm. See, Record Volume I, Item 1, Determination, ¶¶ 6, 45 and 46.

APA Jurisdiction under the Rivers Act and 9 NYCRR Part 577

16. The Wild, Scenic and Recreational Rivers Act ("Rivers Act") was enacted pursuant to a legislative finding that:

"many rivers of the state, with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values."

ECL § 15-2701(1); see also, Determination, ¶ 27.

17. The Rivers Act was enacted to implement a public policy that:

"certain selected rivers of the state which, with their immediate environs, possess the aforementioned characteristics, shall be preserved in free-flowing condition and that they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations."

ECL § 15-2701(3).

18. Section 15-2705 of the Rivers Act charges the Adirondack Park Agency with responsibility for administration and enforcement of the Rivers Act on private lands within the Adirondack Park, and the Agency has promulgated regulations in 9 NYCRR Part 577:

"for the management, protection, and enhancement of and control of land use and development in the wild, scenic and recreational river areas."

ECL § 15-2709(1); see also, Record Volume I, Item 1, Determination, ¶ 29.

19. The Bouquet River is designated as a recreational river in 9 NYCRR Appendix Q-6 (See, Item 5a. (Recreational Rivers)) The recreational river area associated with the Bouquet River in the Town of Essex, Essex County, extends one-quarter of a mile from each bank of the river. See also, Determination, ¶ 6.

20. Pursuant to 9 NYCRR § 577.4(a), "no person shall undertake a rivers project without first obtaining an agency permit." See also, Record Volume I, Item 1, Determination, ¶ 30.

21. In recreational river areas, rivers projects include, inter alia, all subdivisions of land in Resource Management land use areas. 9 NYCRR § 577.5(c)(1); see also, Determination, ¶ 31. In the Determination, the Agency's Enforcement Committee found that Lewis Farm had undertaken a subdivision into sites on Resource Management lands in a recreational river area in violation of 9 NYCRR Part 577. Determination, ¶¶ 43, 44.

22. In recreational river areas, unless otherwise provided, rivers projects that require an Agency permit also include all land uses and developments classified as "compatible uses" by the Adirondack Park land use and development plan in Resource Management land use areas. 9 NYCRR § 577.5(c)(1); see also, Record Volume I, Item 1, Determination, ¶ 32.

23. Section 805(3)(g)(4) of the APA Act lists the compatible uses on Resource Management lands in the Adirondack Park that constitute "rivers projects" under 9 NYCRR Part 577. While agricultural uses (§ 805(3)(g)(4)(1)) and agricultural use structures (§ 805(3)(g)(4)(2)) are listed as "primary compatible uses", these uses are expressly exempted from Agency "rivers project" permitting requirements by 9 NYCRR § 577.4(b)(3)(ii).

24. Pursuant to APA Act § 805(3)(g)(4)(1), single family dwellings are listed as "secondary compatible uses" in Resource Management land use areas. Thus, all single family dwellings (except lawful replacements of pre-1973 dwellings) require Agency permits as "rivers projects" pursuant to 9 NYCRR § 577.4(a). See also, Record Volume I, Item 1, Determination, ¶¶ 33, 38. In its Determination, the Agency's Enforcement Committee found Lewis Farm in violation of 9 NYCRR Part 577 by failing to obtain a permit from the Agency prior to constructing its three new single family dwellings on Resource Management lands in the Bouquet River recreational river area.

Single Family Dwellings and Agricultural Use Structures

25. Single family dwellings and agricultural use structures are defined separately in APA Act § 802. The term "structure" is broadly defined in § 802(62) to include:

"any object constructed, installed or placed on land to facilitate land use and development or subdivision of land, such as buildings, sheds, single family dwellings, mobile homes, signs, tanks, fences and poles and any fixtures, additions and alterations thereto."

26. This wide-ranging definition applies to a number of specific types of structures that are individually and expressly defined in § 802 of the Act:

- Agricultural use structure [§ 802(8)]
- Forestry use structure [§ 802(22)]
- Mineral extraction structure [§ 802(36)]
- Mobile home [§ 802(37)]
- Multiple family dwelling [§ 802(39)]
- Public or semi-public building [§ 802(54)]
- Single family dwelling [§ 802(58)]
- Tourist accommodation [§ 802(64)]

27. Not all "structures" trigger the Agency's permit jurisdiction pursuant to APA Act §§ 809 and 810. However, except for agricultural use structures, all of these separately-defined structures listed in § 802 require an Agency permit as new land use and development in Resource Management pursuant to §§ 809 and 810. In addition, all "structures" in excess of forty feet in height (except for agricultural use structures and private television and radio antennas) require an Agency permit.

28. The term "agricultural use structure" is defined in APA Act § 802(8) as:

"any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use."

Pursuant to the definitions provided by the APA Act, the examples of agricultural use structures provided in § 802(8) are all accessory structures¹ to an "agricultural use".²

29. Significantly, the definition of agricultural use structure in the APA Act does not expressly include any reference to on-farm single family dwellings or mobile homes. On-farm single family dwellings or mobile homes are not agricultural use structures in the definitions of "single family dwelling" and "mobile home" provided by the Act. In fact, nowhere in the APA Act is there any express indication that on-farm "single family dwellings" or "mobile homes" are defined or considered as "agricultural use structures".

¹ "Accessory structure" means any structure...customarily incidental and subordinate to a principal land use or development and that customarily accompanies or is associated with such principal land use or development... APA Act § 802(5).

² "Agricultural use" means any management of any land for agriculture; raising of cows, horses, pigs, poultry and other livestock; horticulture or orchards; including the sale of products grown or raised directly on such land... APA Act § 802(7).

30. Further, single family dwellings and agricultural use structures are treated differently by, and distinguished within, the definition of "principal building" in § 802(50) of the APA Act. "Principal building" is defined at § 802(50) as:

- a. a single family dwelling constitutes one principal building;
- b. a mobile home constitutes one principal building;
- c. a tourist cabin or similar structure for rent or hire over three hundred square feet or more of floor space constitutes one principal building;
- d. each dwelling unit of a multiple family dwelling constitutes one principal building;
- e. each motel unit, hotel unit, or similar tourist accommodation unit which is attached to a similar unit by a party wall, each accommodation unit of a tourist home or similar structure, and each tourist cabin or similar structure for rent or hire involving less than three hundred feet of floor space, constitutes one-tenth of a principal building;
- f. each commercial use structure and each industrial use structure in excess of three hundred square feet constitutes one principal building;
- g. all agricultural use structures and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use, and members of their respective immediate families, will together constitute and count as a single principal building;
- h. any other structure which exceeds twelve hundred fifty feet of floor space constitutes one principal building.

An accessory structure does not constitute a principal building."³

31. Under §§ 802(50)(a) and 802(50)(b) of the APA Act, all single family dwellings and mobile homes each count separately as "principal buildings". Agricultural use structures, however, do not automatically count as a "principal building". See, APA Act § 802(50). Other large structures, including agricultural use structures, only count as a "principal building" if their floor space exceeds twelve hundred and fifty feet. See, APA Act § 802(50)(h).

32. Under Section 802(50)(g) of the APA Act, the NYS Legislature made an exception to these counting rules in order to encourage the agricultural use of land in the Adirondack Park. Specifically, § 802(50)(g) provides that all structures on farms that would ordinarily count separately as principal buildings under normal counting rules are combined to count as only one principal building.

33. The NYS Legislature recognized and § 802(50)(g) expressly distinguishes between agricultural use structures and single family dwellings by referring to them as separate types of structures in the same paragraph. If the NYS

³ The definition of "principal building" relates to the overall intensity guidelines ("OIGs") for development in classified private land use areas in the Adirondack Park. In Resource Management, only 15 "principal buildings" are allowed per square mile (§ 805(3)(g)(3)). Based on the definition of "principal building", the OIGs are applied in the permitting of all projects listed in § 810 pursuant to § 809(10)(c).

Legislature considered on-farm single family dwellings and mobile homes to be agricultural use structures, there would be no need for the excepting language "and single family dwellings or mobile homes occupied by a farmer of land in agricultural use, his employees engaged in such use, and members of their respective immediate families" in § 802(50)(g) of the Act. This express language of § 802(50)(g) leaves no doubt that the NYS Legislature did not consider single family dwellings or mobile homes to be agricultural use structures under the APA Act.

34. In ¶¶ 37 and 38 of its March 25, 2008 Determination, the Agency's Enforcement Committee specifically found that "single family dwellings" and "agricultural use structures" are mutually exclusive "structures" for purposes of APA jurisdiction. Specifically, in ¶ 37, the Committee found that "agricultural use structures" are accessory in nature and related to:

"the storage of agricultural equipment, animals and products ("barn, stable, shed, silo, garage"), or the on-site accessory use sale of farm products ("fruit and vegetable stand")."

By contrast, in these paragraphs of its March 25, 2008 Determination, the Committee found that a farmer's dwelling or a dwelling for a farmworker and his family more precisely fit under the definition of "single family dwelling", and that the NYS Legislature had clearly intended to treat "agricultural use structures" and "single

family dwellings" as separate and distinct uses concluding in ¶ 38 that:

"While the Agency agrees that farm worker housing is important to the enhancement of farm operations, it is not an "agricultural use structure" under the Act, but either a "single family dwelling," "multiple family dwelling," or "mobile home," depending on the type of dwelling."

Local Government Review Board Participation

35. In the March 13, 2008 Lewis Farm proceedings before the Enforcement Committee, Lewis Farm's attorney submitted to the Committee a letter and resolution from the Local Government Review Board to former Governor Spitzer. In the Determination (page 2), the Committee specifically lists this letter as document number 13 that it considered prior to making its findings and determinations. See Record, Volume I; Item 1.

36. Furthermore, during the March 13, 2008 proceedings before the Enforcement Committee, Local Government Review Board Executive Director Frederick Monroe participated in the proceedings by offering a statement on the Lewis Farm Matter. See, Record Volume I, Item 1, Transcript, page 46, lines 19-25, and page 47, line 3-17.

Dated: Ray Brook, New York



Paul Van Cott, Esq.

Sworn to before me this
30th day of July, 2008

Mary B. Palmer
Notary Public

MARY B. PALMER
Notary Public, State of New York
01PA6128439
Commission Expires June 13, 20 09