

STATE OF NEW YORK SUPREME COURT
ESSEX COUNTY

LEWIS FAMILY FARM, INC.,

Petitioner,

v.

Hon. Richard B. Meyer

NEW YORK STATE ADIRONDACK
PARK AGENCY,

Respondent.

INDEX No. 315-08
RJI No. 15-1-2008-0109

ADIRONDACK PARK AGENCY,

Plaintiff,

v.

LEWIS FAMILY FARM, INC.,
SALIM B. LEWIS and BARBARA LEWIS,

Defendants.

INDEX No. 332-08
RJI No. 15-1-2008-0117

ADIRONDACK PARK AGENCY'S MEMORANDUM OF LAW IN SUPPORT OF
ITS CROSS-MOTION FOR SUMMARY JUDGMENT AND TO STRIKE
SECOND RECORD, AND IN OPPOSITION TO PETITIONER'S MOTION

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PRELIMINARY STATEMENT

The Adirondack Park Agency ("APA"), submits this memorandum of law in support of its cross-motion for summary judgment in its action (Index No. 332-08) to enforce: (1) the Adirondack Park Agency Act ("the Act") (Executive Law §§ 801-820); (2) the Wild, Scenic, and Recreational Rivers System Act (the "Rivers Act"), (Environmental Conservation Law, ["ECL"] § 15-2701, et seq. and its implementing regulations set forth at 9 NYCRR Part 577); and (3) the APA's March 25, 2008 Determination. This enforcement action stems from the construction of three single family dwellings in the Adirondack Park, in Essex County, by Lewis Family Farm Inc., Salim B. and Barbara Lewis ("Lewis Farm"), without an APA permit. The Agency also moves to strike the second record submitted by Lewis Farm in its motion for summary judgment.

This memorandum also opposes Lewis Farm's August 1, 2008 motion for summary judgment in the instant consolidated proceeding and action. Several of Lewis Farm's claims have already been rejected by this Court and will therefore not be addressed herein: (1) Lewis Farm's motion to dismiss the APA's enforcement action against Lewis Family Farm Inc., which was already denied; (2) Lewis Farm's claim that Agriculture and Markets Law § 305-a supercedes the APA Act, which was also dismissed; and (3) Lewis Farm's claim that the APA was required

by law to defer to an opinion of the Commissioner of Agriculture and Markets, which was similarly rejected.¹

Lewis Farm concedes that it installed and constructed three single family dwellings in the Adirondack Park on lands designated Resource Management and within 1/4 mile of a New York State designated recreational river, without an APA permit. See Return and Record, Item 1² (Determination ¶¶ 5-7); Record Item 5 (Affidavit of Douglas Miller dated July 20, 2007 "Miller 7/20/07 Aff."); Record Item 6 (Affidavit of Douglas Miller dated December 12, 2007 "Miller Aff. 12/12/07"); Record Item 12 (Affidavit of Douglas Miller dated March 4, 2008 "Miller Aff. 3/4/08"). There is no dispute as to these material facts underlying the violations. The APA is entitled to summary judgment as a matter of law for Lewis Farm's violation of the Act and the Rivers Act and is entitled to judgment upholding the APA's Determination.

STATEMENT OF FACTS

A summary of facts regarding the construction of the dwellings at the Lewis Farm was previously submitted to the Court in the APA's memorandum of law dated June 13, 2008 and in the Van Cott Aff. dated June, 2008, ¶¶ 35-64, and is not repeated herein.

¹ See Lewis Family Farm v. Adirondack Park Agency, 2008 NY Slip Op. 51348 (Sup. Ct., Essex Co., July 2, 2008).

² References are to the Agency certified record, not the record submitted by counsel for Lewis Farm; see Point III herein.

In addition, there are now pending before the Appellate Division Third Department three separate appeals related to these matters: (a) Lewis Farm's appeal of Justice Ryan's August 16, 2007 order in Lewis Farm I; (b) Lewis Farm's appeal of the Court's April 11, 2008 order regarding a stay in Lewis Farm II; and (c) the APA's appeal of the Court's July 2, 2008 order in Lewis Farm III.

STATUTORY AND REGULATORY FRAMEWORK

In 1971, the New York State Legislature enacted the Adirondack Park Agency Act, codified at Article 27 of the Executive Law, to protect the unique scenic, historic, ecological and natural resources within the Adirondacks. See L. 1971, c. 706; Executive Law § 801. The Legislature has described the six-million acre Adirondack Park as containing "priceless resources" of "national and international significance." See Executive Law § 801. The Act recognizes the State's obligation to ensure that "contemporary and future pressures on the park resources are provided for within a land use control framework which recognizes not only matters of local concern but also those of regional and state concern." Id. The Legislature crafted the statute specifically to combat the "unrelenting pressures for development being brought to bear on the area" in recognition of the difficulty encountered by local governments in exercising "their discretionary powers to create an effective land use and development control framework." Id.; see also Affidavit of Paul

Van Cott dated August 8, 2008 ("Van Cott Aff.") ¶¶ 30-40.

A. The Land Use Plan

To further these goals, the Act created the APA and charged it with administering the Act, drafting necessary rules and regulations, and carrying out the purposes of the Act, including land use planning for both private and public land within the Park. See Executive Law § 803. Among other things, the Legislature directed the APA to prepare an Adirondack Park Land Use and Development Plan ("Land Use Plan") to regulate land use and development on private lands within the Park. See L. 1971, c. 706; Executive Law § 805. In accordance with the Act, the APA prepared the plan and submitted it to the Legislature and Governor for review. Id. In 1973, the Legislature approved the plan and incorporated the plan into the Act through a legislative amendment. See L. 1973, c. 348; Executive Law § 805 (McKinney's 2005).

In accordance with the Land Use Plan, the Official Adirondack Park Land Use and Development Plan Map ("Plan Map") classifies private lands in the Adirondack Park under the following land use categories: "Hamlet," "Moderate Intensity Use," "Low Intensity Use," "Rural Use," "Resource Management," and "Industrial Use."³ See Executive Law § 805. The 1973 Land

³ Resource Management areas, defined in Executive Law § 805(3)(g)(1), provide for the protection of forest, agricultural,

Use Plan adopted by the Legislature placed the property owned by Lewis Farm where the three single family dwellings are located in a Resource Management area.⁴ See Executive Law § 805; see also Record Item 12 (Miller 3/4/08 Aff., Exhibit A).

**B. Land Uses and Development and Subdivisions
Require an APA Permit**

In Resource Management areas virtually all new land uses and development and all subdivisions of land require an APA permit before they may begin. See Executive Law §§ 809(2),

recreational and open space resources because of overriding natural resource and public considerations. Executive Law § 805(3)(g)(2) instructs the Agency on the purposes, policies and objectives for land use on Resource Management lands in the Adirondack Park:

"The basic purposes and objectives of resource management area are to protect the delicate physical and biological resources, encourage proper and economic management of forest, agricultural and recreational resources and preserve the open spaces that are essential and basic to the unique character of the park...." [Emphasis supplied.]

Executive Law § 805(3)(g)(4)(1) classifies agricultural uses as a primary compatible use on Resource Management lands. See Van Cott Aff. dated August 8, 2008, ¶¶ 30-40.

⁴ While Lewis Farm's motion for summary judgment has a detailed discussion of a hypothetical development in "Hamlet" areas, that entire discussion is irrelevant because the area where the dwellings are constructed is classified Resource Management pursuant to the Plan Map. See Lewis Farm Memorandum of Law dated August 1, 2008, footnote 3. The APA Plan Map for the area where the dwellings were installed is part of the Record. See Record Item 12 (Miller 3/4/08 Aff., Exhibit A); see also Affidavit of Paul Van Cott dated August 8, 2008, ¶¶ 5, 8.

810(1).⁵ Specifically, the Act defines all subdivisions of land as constituting "class A regional projects." See, e.g., Executive Law 810(1)(e)(3) (defining "class A regional projects" for "resource management areas"). Where there is no agency approved local land use program, the APA reviews both class A and class B regional projects. See Executive Law §§ 809(1) and 810(2)(d)(1) (single family dwelling). The APA cannot approve such a project unless it determines that the project is consistent with the land use and development plan, is consistent with the overall intensity guideline for the specific land use involved, and will not have an undue adverse impact on the natural, scenic, aesthetic, ecological, wildlife, historic, recreational or open space resources of the Adirondack Park. See Executive Law §§ 809(10)(a)-(e).

⁵ The APA Act defines "Land use or development" as "any construction or other activity which materially changes the use or appearance of land or a structure or the intensity of use of land or a structure" See Executive Law § 802(28). "Subdivision of land" or "subdivision" is defined as "any division of land into two or more lots, parcels or sites whether adjoining or not, for the purpose of sale, lease, license or any form of separate ownership or occupancy...." See Executive Law § 802(63).

C. Enforcement of the APA Act

Executive Law §§ 813(1) and (2) empowers the APA to commence an action for civil penalties and injunctive relief against "any person" who violates any provision of the Adirondack Park Agency Act, the Agency's implementing rules and regulations, or the terms of any Agency order or permit. It provides for a civil penalty of "not more than \$500.00 for each day . . . during which such violation continues." See Executive Law § 813; see also Van Cott Aff. dated August 8, 2008, ¶ 50.

D. The Rivers Act

The APA also has jurisdiction over Lewis Farm's dwellings and subdivision under the Rivers Act. See ECL § 15-2701 et. seq. and 9 NYCRR Part 577, et. seq.; see also Van Cott Aff. dated July 30, 2008 ¶¶ 16-24 and Van Cott Aff. dated August 8, 2008, ¶¶ 41-49. Lewis Farm's three single family dwellings require Agency permits as "rivers projects." See 9 NYCRR §§ 577.4(a), 577.5(c)(1); and Executive Law § 805(3)(g)(4) (see "Secondary Uses in Resource Management Areas" [1]); see also VanCott Aff, ¶¶ 41-49. In contrast, an actual "agricultural use structure" is exempted from Agency jurisdiction on Resource Management lands in recreational river areas, unless located within 150 feet of a shoreline or in wetland areas pursuant to 9 NYCRR Parts 577 and 578. See 9 NYCRR § 577.4(b)(3)(ii). Moreover, pursuant to 9 NYCRR ¶ 577.4(a), Lewis Farm's subdivision into sites requires an

Agency permit. See 9 NYCRR §§ 577.5(c)(1) and 570.3(ah)(3); Executive Law, § 802(63). Enforcement provisions of the Rivers Act set forth civil penalties of not more than one thousand dollars for each day of violation. See ECL § 15-2723; see also Van Cott Aff. dated August 8, 2008, ¶ 51.

ARGUMENT

POINT I

THE COURT SHOULD GRANT SUMMARY JUDGMENT TO THE APA BECAUSE THERE ARE NO TRIABLE ISSUES OF MATERIAL FACT

Summary judgment is warranted where the supporting proof shows "that there is no defense to the cause of action or that the cause of action or defense has no merit." C.P.L.R. 3212(b); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). The proponent of a summary judgment motion "must make a prima facie showing of an entitlement to judgment as a matter of law sufficient to demonstrate the absence of any material issue of fact.'" State of New York v. Williamson, 8 A.D.3d 925, 928 (3d Dep't 2004) (quoting Flacke v. NL Indus., 228 A.D.2d 888, 890 (3d Dep't 1996)). To withstand a motion for summary judgment, the non-movant must "demonstrate, through evidence in admissible form, the existence of material questions of fact requiring a trial." Williamson, 8 A.D.3d at 928. If the movant sufficiently establishes that there is no defense or the cause has no merit, "then [summary] judgment must be granted." S.J. Capelin Assocs.

Inc. v. Globe Mfg. Corp., 34 N.Y.2d 338, 341 (1974).

The court's job on a motion for summary judgment "is not to determine credibility but whether there exists a factual issue, or if arguably there is a genuine issue of fact." Id. A "shadowy semblance of an issue" cannot defeat a properly supported motion for summary judgment. S.J. Capelin, 34 N.Y.2d at 341 (quoting Hanrog Distr. Corp. v. Hanioti, 10 Misc.2d 659, 660 (N.Y. Co. Sup. Ct. 1945)): Where a dispute turns on the meaning or applicability of a statutory provision, "the courts may offer the definitive resolution of these issues of law." Wurzer v. Seneca Sport Parachute Club, 66 A.D.2d 1002, 1003 (4th Dep't 1978) (quoting James v. Board of Educ. of New York City, 42 N.Y.2d 357, 365 [1977]).

A. The APA Is Entitled to Summary Judgment Regarding Lewis Farm's Violation of the APA Act and Rivers Act

1. The APA Act Requires That Single Family Dwellings on Resource Management Lands Require a Permit

The scope of material facts involving the violations alleged by the APA in its Amended Complaint are limited and undisputed by Lewis Farm: (i) Lewis Farm constructed three single family dwellings on its property in the Adirondack Park (ii) the dwellings were constructed in an area designated Resource Management pursuant to the APA Act, and are located within 1/4 mile of the Bouquet River pursuant to the Rivers Act; and (iii) Lewis Farm did not have a permit from the APA for construction of

the dwellings. These uncontested facts establish the APA's entitlement to award summary judgment on its Amended Complaint.

First, there is no dispute that Lewis Farm installed and constructed three single family dwellings on its property without a permit from the APA. See Return and Record Item 1 (Determination); Record Item 5 (Miller 7/20/07 Aff.); Record Item 6 (Miller 12/12/07 Aff.); Record Item 12 (Miller 3/4/07 Aff.); Record Item 9 (Affidavit of Barbara Lewis dated January 17, 2008) and Return and Record Item 1 (Determination ¶ 7). In fact, Lewis Farm's own affidavit concedes they built the houses and understood that continuing construction of the dwellings could result in an APA penalty. See Record Item 9 (Affidavit of Barbara Lewis dated January 17, 2008, ¶ 26). The record makes clear that Lewis Farm continued installation and construction of the dwellings, even after the APA issued a cease and desist order. See Record Item 5, Affidavit of Paul Van Cott dated December 13, 2007 ("Van Cott 12/13/07 Aff.") Exhibit G (Cease and Desist Order); Record Item 5 (Miller 7/20/07 Aff., ¶ 17-21). Furthermore, Lewis Farm continued construction even after Justice Ryan's August 16, 2007 Decision and Order dated August 16, 2008 confirming that the APA had jurisdiction over this housing project. See Record Item 6 (Miller Aff.). Lewis Farm's own motion for summary judgment acknowledges that there are no

material issues of fact in dispute.⁶ See Memorandum of Law dated August 1, 2008, p. 2. Accordingly, the APA has demonstrated unequivocally that Lewis Farm installed and constructed three single family dwellings in the Adirondack Park without a permit.

Moreover, there is no dispute that the three dwellings are located on land designated "Resource Management" pursuant to the Official Map, and that the dwellings are within 1/4 mile of the Bouquet River. See Return and Record Item 1 (Determination ¶ 6); Record Item 5 (Miller 7/20/07 Aff.); Record Item 12 (Miller 3/4/08 Aff., Exhibit A). The APA Act requires an Agency permit for subdivisions and placement of single family dwellings in Resource Management areas within the Adirondack Park. See Executive Law §§ 809(2)(a), 810(1)(e)(3) and 810(2)(d)(1). Again, it is undisputed that Lewis Farm failed to obtain an APA permit. See Return and Record Item 1 (Determination ¶ 7); Record Item 5, Paul Van Cott 12/13/07 Aff., Exhibit A (Affirmation of Sarah Reynolds dated July 20, 2007, ¶¶ 34-38); Record Item 5, Affidavit of John Quinn dated July 23, 2007 ("Quinn 7/23/07 Aff." ¶ 4-8). In fact, Lewis Farm applied for a permit in March 2007,

⁶ In its memorandum of law in support of summary judgment, Lewis Farm sets forth nearly four pages of alleged material facts "to which there is no dispute." The APA concedes only that there is no dispute regarding that salient facts, namely that Lewis Farm constructed three single family dwellings on Resource Management lands, within 1/4 mile of a designated river, without an APA permit. See Lewis Farm Memorandum dated August 1, 2008, p. 1-4. The rest of Lewis Farms' facts are not material.

but concedes that it commenced construction well before the application was submitted, in November of 2006. See Record Item 5 (Quinn 7/23/07 Aff. ¶ 4-8).

2. The Rivers Act Requires a Permit For New Single Family Dwellings And Subdivisions Within 1/4 Mile of a Designated River

The Wild, Scenic, and Recreational River System Act ("Rivers Act"), Environmental Conservation Law ("ECL") § 15-2701, which is implemented within the Adirondack Park pursuant to the Agency's regulations at 9 NYCRR Part 577, also requires an Agency permit for subdivisions and placement of single family dwellings on Resource Management lands in Recreational River Areas. The three single family dwellings and the septic system serving them were installed and constructed within 1/4 mile of the Bouquet River, a river designated by the Legislature as "recreational" under the Rivers Act, without a permit. See Record Item 5 (Miller 7/20/07 Aff.); Record Item 12 (Miller 3/4/08 Aff., Exhibit A).

Accordingly, because Lewis Farm concedes that it constructed the dwellings without a permit on Resource Management land within 1/4 mile of the Bouquet River, there are no material facts requiring a trial, summary judgment on the APA's Rivers Act claim should be granted to the Agency.

B. The Agency Determination Enforcing the APA Act and the Rivers Act Is Rational and Should Be Upheld

This Court should grant summary judgment to the APA and order Lewis Farm to comply with the APA's March 25, 2008 Determination, upholding the Agency's enforcement of the APA Act and the Rivers Act. Summary judgment for an agency Determination is appropriate where, following joinder of issue, the defendant fails to raise any material facts concerning its continued violation. See Cahill v. Harter, 277 A.D.2d 655, 656 (3d Dep't, 2000) (upholding summary judgment for DEC administrative enforcement order and civil penalty for violations of ECL where defendant failed to raise any material issues of fact concerning the continued violations); see also APA v. Bucci et al., 2 A.D.3d 1293, 1295 (4th Dep't 2003), appeal denied, 3 N.Y.3d 634 (2004) (finding the APA was entitled to summary judgment as a matter of law based on its administrative Determination that driveway built without a permit over wetlands violated APA Act and Freshwater Wetlands Act). The APA Determination discusses the factual record, the regulatory requirements, finds violations of those requirements and directs Lewis Farm to correct them by submitting specific documentation for an after-the-fact permit and for the septic system serving the three dwellings. See Return and Record Item 1 (Determination). The APA Determination also imposes a \$50,000 civil penalty for Lewis Farm's plainly intentional violations, which penalty is authorized by the Executive Law §

813 and ECL § 15-2723. See Return and Record Item 1 (Determination p. 12).

The proper standard of review for an agency Determination is whether the Determination was "arbitrary and capricious" or an "abuse of discretion" under CPLR § 7803(3). As demonstrated by the record, the APA's March 25, 2008 Determination is a sound, rational and proper exercise of its discretion and statutory authority. The APA's decision must be upheld unless it is found to be "without sound basis in reason and . . . without regard to the facts." County of Monroe v. Kaladjian, 83 N.Y.2d 185, 189 (1994); Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974). Judicial review is limited to the record before the Agency when it made its Determination. Aldrich v. Pattison, 107 A.D.2d 258, 267-269 (2d Dep't 1985); Ryan v. Adirondack Park Agency, 186 A.D.2d 922, 924 (3d Dep't 1992). A court may not substitute its judgment for that of the agency whose Determination is being reviewed. See Flacke v. Onondaga Landfill Systems, Inc., 69 N.Y.2d 355, 363 (1987); see also Matter of Binghamton-Johnson City Joint Sewage Board et al. v. NYSDEC et al., 159 A.D.2d 887, 890 (3d Dep't 1990) (finding the Court may not substitute its judgment for that of the Agency where DEC's reclassification of river segment, after weighing factors supported by record, had a rational basis); Matter of Ball v. NYSDEC, 35 A.D.3d 732 (2d Dep't 2006) (finding DEC's wetlands permit Determination had

rational basis, was neither arbitrary or capricious and was upheld). Deference should be accorded agencies for interpretation of their own statutes. See Flacke v. Onondaga Landfill Systems, Inc., 69 N.Y.2d 355, 363 (1987). Where an agency's determination involves expertise and judgment, that determination will be upheld unless it is patently arbitrary and capricious.⁷ See County of Monroe v. Kaladjian, 83 N.Y.2d 185, 189 (1994); Flacke v. Onondaga Landfill Systems, Inc., 69 N.Y.2d 355, 363 (1987); Pell v. Board of Education, 34 N.Y.2d 222, 231 (1974); see also Champion v. Adirondack Park Agency, 188 A.D.2d 877 (3d Dep't 1992) (upholding APA's determination that construction of cottage and subdivision within 1/4 mile of recreational river is subject to Rivers Act, had rational basis and should not be disturbed). Lewis Farm argues that because of the APA Determination "three new homes for working families inside the Park will be lost." See Lewis Farm Memorandum of Law dated August 1, 2008, p. 17, footnote 9. This assertion is unsubstantiated in the Record. The APA Determination does not require removal of the dwellings. Rather, the Determination

⁷ Lewis Farm argues that the APA is not entitled to deference to interpret the APA Act because it has "no farmers on staff," "no agricultural expertise" is "simply inept" and therefore "not entitled to deference". See Lewis Farm Memorandum of Law dated August 1, 2008 p. 21-22. This diatribe provides no legal basis for summary judgment against the APA, and ignores the basic mission entrusted to the APA by the Legislature: to protect and preserve the natural resources of the Adirondack Park, for which it is entitled to deference.

requires Lewis Farm to obtain an "after-the-fact" permit, provide septic information and to pay a penalty, a reasonable and rational approach to resolution of the deliberate violation.

Likewise, Lewis Farm's assertions that the APA is reclassifying its property is also unavailing. See Lewis Farm Memorandum of Law dated August 1, 2008, p. 26, footnote 17. There is absolutely no proof in the record that the APA's Determination reclassifies Lewis Farm's housing for tax purposes. In any event, any tax consequence to Lewis Farm for its construction project is not relevant to jurisdiction of the APA.

Lewis Farm also seeks summary judgment arguing that no subdivision of land occurred. See Lewis Farm Memorandum of Law dated August 1, 2008, p. 29, Point IV. In the first instance, Justice Ryan determined that a subdivision occurred here:

Under the APA regulations, this building project constitutes a "subdivision" even though it is not a typical suburban subdivision.

See Decision and Order dated August 16, 2007 (Ryan, Acting J.S.C.), p. 5; Amended Complaint, Exhibit H. Conveniently ignoring Justice Ryan's Decision and Order, Lewis Farm characterizes the APA's subdivision cause of action as "complete nonsense." See Lewis Farm Memorandum of Law dated August 1, 2008, p. 30. Lewis Farm fails to acknowledge that subdivision pursuant to the APA Act is not only the division of land into parcels for separate ownership, but also occurs where there is

any form of separate occupancy. See Executive Law § 802(63); see also 9 NYCRR § 570.3 ah (3) (where one or more dwellings is to be constructed on a parcel already containing one dwelling).

Under the penalty provisions specifically authorized by the New York Legislature the Agency Determination assessed a \$50,000 penalty. See Executive Law § 813 (allowing up to five hundred dollars for each day the violation occurs); Return and Record Item 1 (Determination); and ECL § 15-2723 (\$,1000 per day). As explained in the APA Determination, Lewis Farm applied for an APA permit but before even the application was complete, it installed the homes. See Return and Record Item 1 (Determination ¶ 13). In addition, Lewis Farm willfully violated an Agency cease and desist order, and ignored Justice Ryan's August 16, 2007 Decision and Order in Lewis Farm's own declaratory judgment action, which determined that the APA had jurisdiction over this housing project. See Amended Complaint dated May 14, 2008, Exhibit B (Order dated December 26, 2000, Dawson, J.S.C.); Record Item 5, Miller 7/20/07 Aff. Exhibit G (APA Cease and Desist Order); Amended Complaint dated May 14, 2008, Exhibit H (Decision and Order dated August 16, 2007, Ryan, Acting J.S.C., p. 4-5); see also Howard v. Cahill, 290 A.D.2d 712, 713 (3d Dep't 2002) (finding for DEC where petitioner violated state environmental law and consent order, and upholding \$50,000 penalty imposed without an adjudicatory hearing where there was not triable issue

of fact). Moreover, Lewis Farm was well aware of APA jurisdiction having had a prior wetlands violation with the APA where it was required to make a \$50,000 environmental benefit payment. See Amended Complaint, Exhibit B.

Regarding the Determination's assessment of a \$50,000 civil penalty, Lewis Farm argues that the penalties imposed by the APA "serve no land use purpose" and constitute a "senseless attack." See Lewis Farm Memorandum of Law dated August 1, 2008, p. 16. In fact, the penalty assessed serves an important regulatory purpose: to punish violations of the Adirondack Park Agency Act and to deter others from such actions. To that end, the Executive Law provides for a maximum civil penalty of \$500 for each day that a violation continues, and the Rivers Act provides for a penalty of \$1,000 per day. See Executive Law § 813(1); ECL § 15-2723.

Courts have found civil penalties are appropriate to punish violation of environmental protection laws like the APA Act; to disgorge the economic benefit gained from the violation; and to deter others from similar conduct. See e.g. State of New York v. Town of Wallkill, 170 A.D.2d 8, 10-11 (3d Dep't 1991) (analyzing similar penalty provisions in ECL § 71-1929 concerning water pollution); see also Scott v. N.Y.S. Dep't. of Env'tl. Conservation, 112 A.D.2d 726 (4th Dep't 1985) (upholding penalties imposed administratively "not only to punish

petitioners but also to deter future violations"). Indeed, New York courts have sustained significant civil penalties. See Pell v. Board of Educ. of Union Free School Dist. No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222 (1974) (recognizing that significant administrative penalties support the "prospect of deterrence of the individual or of others in like situations"); New York Site Dev. Corp. v. New York State Dep't of Env'tl. Conservation, 217 A.D.2d 699 (2d Dep't 1995) (citing Pell and upholding a DEC administrative order that imposed a \$1,000,000 financial penalty for a violation of a state environmental regulation); Williamson, 8 A.D.2d 925, at 930 (the Court cited the scope and willfulness of violations and noted higher penalty authorized by statute in upholding \$15,000,000 penalty). The State respectfully submits that the APA's Determination to impose a \$50,000 penalty where \$1,000,000 is applicable (Record Item 8, pp. 15-19), is appropriate and rational based upon the facts, and furthers the State's legitimate interest in deterrence and punishment.⁸

⁸ The APA offered an administrative settlement for \$10,000 in 2007; but Lewis Farm refused to settle the matter. See Record Item 5 (Reynolds Aff. ¶¶ 33-39).

POINT II

**LEWIS FARM'S SUMMARY JUDGMENT MOTION SHOULD
BE DENIED AS A MATTER OF LAW**

Lewis Farm's motion for summary judgment must be rejected as a matter of law because the Record unequivocally shows that Lewis Farm violated the APA Act and the Rivers Act by failing to obtain a permit for its construction of three single family dwellings in the Adirondack Park. This Court has already rejected Lewis Farm's primary excuse for failing to obtain a permit: that the APA Act is superceded by Agriculture and Markets Law § 305-a. See Lewis Family Farm v. Adirondack Park Agency, 2008 NY Slip Op. 51348 (Sup. Ct., Essex Co., July 2, 2008) p. 6. Therefore, applying the clear requirements of the APA Act and the Rivers Act, Lewis Farm's motion for summary judgment fails as a matter of law. While Lewis Farm raises numerous defenses for its failure to obtain an APA permit, none excuse its liability for violation of the APA Act and the Rivers Act, nor do they contradict the findings in the APA's Determination.

A. Lewis Farm's Arguments That Its Three Dwellings Are Excused from the Permitting Requirements of APA Act and the Rivers Act Are Without Foundation in Law

Lewis Farm continues to argue that it is not subject to the APA Act and the Rivers Act because (i) the APA lacks authority to regulate agriculture; (ii) the Agency has failed to comply with the New York State Constitution; (iii) the Agency has failed to

comply with Agriculture and Markets Law S 305(3); (iv) the Agency violated the Court of Appeals directives in Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001) ("Lysander"); and (v) the Agency failed to consider the recommendation of the Adirondack Park Local Government Review Board.⁹ See Lewis Farm Memorandum of Law dated August 1, 2008, Points II-V. The APA answered and refuted each of these arguments in the context of Lewis Farm's Article 78 proceeding. However, for the convenience of the Court, the APA provides an additional response herein.

1. The Issue Before This Court is Whether The APA's Determination to Require a Permit For Single Family Dwellings Under the APA Act and the Rivers Act is Rational

Contrary to Lewis Farm's assertions, the Agency has not asserted jurisdiction over any agricultural use structures on the Lewis Farm. See e.g. Lewis Farm Memorandum of Law dated August 1, 2008, Points II and III. The APA Determination, as authorized by the APA Act and the Rivers Act, requires a permit for Lewis Farm's single family dwellings in a Resource Management area, and within 1/4 mile of the Bouquet River, and specifically found that the dwellings were not "agricultural use structures." See Return and Record Item 1 (Determination). The Determination clearly

⁹ As indicated above, this Court also rejected Lewis Farm's argument that the Agency Determination was affected by error of law for failure to consider an opinion of the Commissioner of Agriculture and Markets, and therefore this issue is not addressed herein.

sets forth in a rational manner, that single family dwellings are not "agricultural use structures" under the APA Act, and are subject to the Agency's jurisdiction. See Return and Record Item 1 (Determination). The Agency also noted in its Determination that Justice Ryan had made the same finding in his August 16, 2007 Decision and Order, which Lewis Farm represented to the Agency had not been appealed. See Return and Record Item 1 (Determination ¶ 14); and Item 2 (Agency transcript pp. 44-45). Thus, the APA's Determination in this regard was rational and consistent with the Supreme Court ruling in Lewis Farm I.

Lewis Farm persists in arguing that its single family dwellings are exempt from APA regulation because they are used for farm workers. See Lewis Farm Memorandum of Law dated August 1, 2008, Points II and III. However, the simple fact is that there is no exemption in the APA Act or Rivers Act for single family dwellings that are used for farm worker housing.¹⁰ Moreover, there is no basis to argue - using the APA Act or Rivers Act - that "agricultural use structure" includes on-farm single family dwellings. Rather, new single family dwellings in Resource Management and designated recreational river areas are

¹⁰ Lewis Farm creates a "Venn" diagram to demonstrate how farm worker housing could be exempt, calling it a "basic truth". Notably, it cites no law providing "farm worker housing" exemption; there is no such exemption in the APA Act or Rivers Act. See Lewis Farm Memorandum of Law dated August 1, 2008, p. 19.

subject to APA permitting jurisdiction.¹¹ See Executive Law §§ 802(58) and 810(2)(d)(1).

As explained previously, permits are required under the APA Act Section 809 for all new land uses and development listed in Section 810 as Class A or Class B regional projects. See Van Cott Aff. dated July, 2008, ¶¶ 4-15; and Van Cott Aff. dated August 8, 2008, ¶ 30-35. Section 810 requires permits for subdivisions and single family dwellings in Resource Management. See Executive Law §§ 810(1)(e); 810(2)(d)(1); see also Van Cott Aff. dated August 8, 2008, ¶¶ 34-37. Thus, the Act requires permits for all new single family dwellings on Resource Management lands, except lawful replacements of dwellings in existence prior to 1973. See Executive Law §§ 809(2)(a) and 810(2)(d)(1). This permit requirement applies to Lewis Farm's three single family dwellings. The Act further specifies that all subdivisions in Resource Management require an Agency permit.

¹¹ Lewis Farm's argument that certain single family dwellings are agricultural use structures, would create a significant loophole in the Agency's permitting jurisdiction. The Legislature specifically chose not to include single family dwellings in the definition of agricultural use structures. Under Lewis Farm's argument, an owner of a vacant Resource Management parcel in a River Area could install a chicken coop as a pretext for building a single family dwelling to house an "employee" to tend the chickens. After constructing the dwelling, however, the landowner could abandon his "agricultural use" and sell the single family dwelling and land for residential purposes without any need for an Agency permit. The NYS Legislature recognized the potential for this type of "gamesmanship" and required permits for all single family dwellings in Resource Management and River Areas.

See Executive Law §§ 809(2)(a) and 810(1)(e). This provision applies to the subdivision into sites affected by Lewis Farm. See 9 NYCRR § 570.3 ah (3) (definition of "subdivision into sites").

The APA also has jurisdiction over Lewis Farm's dwellings and subdivision under the Rivers Act. See ECL § 15-2701 et. seq. and 9 NYCRR Part 577, et. seq.; see also Van Cott Aff. dated July 2008 ¶¶ 16-24. Lewis Farm's three single family dwellings require Agency permits as "rivers projects." See 9 NYCRR §§ 577.4(a), 577.5(c)(1); and Executive Law § 805(3)(g)(4) (see "Secondary Uses in Resource Management Areas" [1]); VanCott Aff., ¶¶ 16-24. In contrast, an actual "agricultural use structure" is exempted from Agency jurisdiction on Resource Management lands in recreational river areas; unless it is located within 150 feet of a shoreline or in wetlands pursuant to 9 NYCRR Parts 577 and 578. See 9 NYCRR § 577.4(b)(3)(ii). Pursuant to 9 NYCRR § 577.4(a), Lewis Farm's subdivision into sites requires an Agency permit. See 9 NYCRR §§ 577.5(c)(1) and 570.3 ah (3); Executive Law § 802(63).

2. The APA Determination is Consistent With the New York State Constitution and Agriculture and Markets Law § 305(3).

Lewis Farm moves for summary judgment on the basis that the APA's Determination is in violation of the New York State Constitution, Article XIV, Section 4, which encourages and

mandates protection of the State's agricultural heritage as well the Adirondack Park. It is not. The Determination is wholly consistent with the Constitution and construes applicable law correctly and consistently.

The State Constitution Article XIV, § 4, added the existing Forest Preserve protections in Article XIV in 1970, states:

The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. The legislature, in implementing this policy, shall include adequate provision for the abatement of air and water pollution and excessive and unnecessary noise, the protection of agricultural lands, wetlands and shorelines, and the development and regulation of water resources.

Thereafter, in June 1971, the Legislature enacted Agriculture and Markets Law Section 305(3), which directs state Agencies to "encourage the maintenance of viable farming in agricultural districts and their regulations and procedures shall be modified to this end. . . ." 1971 N.Y. Laws 137. At the same time in 1971, the Legislature passed the Adirondack Park Agency Act. See L. 1971, c. 706.

While Lewis Farm seeks to sow conflict between the different missions delegated by statute to the Department of Agriculture and Markets and the Adirondack Park Agency, the interests of the State and its citizens require that the Court construe them to balance and advance both. See e.g. Beneke v. Town of Santa

Clara, 36 A.D.3d 1195 (3d Dep't 2007), appeal denied, 10 N.Y.3d 706 (2008) (in declaratory judgment action brought against Town and Department of Environmental Conservation to determine jurisdiction over a floating boathouse, Court noted that conflicts between Navigation Law and Executive Law could and should be reconciled); Matter of Sun Beach Real Estate Dev. Co. v. Anderson, 98 A.D.2d 367, 369 (2d Dep't 1983), affirmed, 62 N.Y.2d 965 (1984) (Developer sued to direct city to issue approval for a subdivision and the Court, construing New York State Town Law and State Environmental Quality Review Act noted "conflicting statutory provisions should be harmonized in a manner that preserves the essential purposes of both"). Even where a state statute contained specific language superceding all other state and local laws relating to mining activities, the Court of Appeals read the provision narrowly, to apply only to the actual operation and process of mining; finding that it did not deprive the APA of its broad regulatory jurisdiction. See Hunt Brothers, Inc. v. Glennon, 81 N.Y.2d 906, 909 (1993). (citations omitted).

The statute creating and empowering the APA is aimed at establishing a superagency to regulate development in the Adirondack Park region, which the Legislature has singled out for special protection because of its unique environmental significance. (See, Executive Law § 801). The agency's powers and goals thus resemble those of both a local planning board and a local zoning entity. (citations omitted).

Inasmuch as the APA's mission concerns the

broad area of land use planning within the Adirondack Park district, its enabling statute is not a law "relating to the extractive mining industry." Consequently, ECL 23-2703 (former [2]) does not deprive the agency of all jurisdiction to regulate petitioner's activities.

The Legislature itself struck the balance and articulated in Article XIV, Section 4 by providing statutory exemptions for certain agricultural uses and structures in the APA Act. See generally Van Cott Aff., June 13, 2008. These provisions, consistent with both the Constitution and § 305(3) of Agricultural and Markets Law, provide exemption from regulation for certain farm structures, as well as exemption from Agency density standards for farms in the Adirondack Park. Specifically, the APA Act exempts agricultural use structures from Agency jurisdiction by omitting such structures from the list of jurisdictional projects. See Executive Law § 810. In addition, Executive Law § 810(1) specifically exempts land use and development within various critical environmental areas from Agency jurisdiction when the land use and development involves agricultural uses, and agricultural use structures in excess of forty feet in height from Agency jurisdiction, where all other structures except residential radio and television antennas require permits from the Agency. Executive Law § 810(1) also expressly exempts land use and development within various critical environmental areas from Agency jurisdiction when the

land use and development involves agricultural uses.

With respect to the three residences at issue in this case, Executive Law § 802(8), defines "agricultural use structures" as "any barn, stable, shed, silo, garage, fruit and vegetable stand or other building or structure directly and customarily associated with agricultural use." This definition does not include single family dwellings, which are separately defined under the APA Act at Executive Law § 802(58) and expressly subject to APA permit jurisdiction pursuant to 810(2)(d)(1). In Executive Law § 802(50)(g), passed in 1976 (1976 N.Y. Laws, ch. 899), the Legislature confirmed that single family dwellings and agricultural use structures are separate structures for jurisdictional purposes, but provided a density benefit to farms under the APA Act's overall intensity guidelines. These provisions were crafted by the Legislature after § 305(3) of Agriculture and Markets Law was enacted, and reflect the policy goal of § 305(3) to "encourage the maintenance of viable farming." Following the Legislature's direction in these statutory definitions, the Agency Determination -- consistent with the Act -- the APA exercised its authority to regulate single family dwellings in specific protected areas including resource management and river areas, not the agricultural use structures on Lewis Farm.

Moreover, the Agency Determination was made only after

Justice Ryan's decision held that the APA had jurisdiction over these specific dwellings, in this location, pursuant to the APA Act and Rivers Act. See Amended Complaint, Exhibit H (Decision and Order dated August 15, 2007, Ryan Acting J.S.C.). The APA fulfilled its legal obligations to protect the Park and encourage agriculture in its March 25, 2008 Determination. The fact that Lewis Farm disagrees with the Agency's interpretation and application of its own statute does not render the Agency's decision irrational, an abuse of discretion or legally flawed.

The Agency Determination is wholly consistent with the constitution and the APA's mandate to protect the natural resources of the Adirondack Park, by ensuring among other things, that the single family dwellings and their septic systems do not have an undue adverse impact on the environment, including the Bouquet River. Protection of Park resources is the primary focus of the Act. See Ryan v. APA, 186 A.D.2d 922 (3d Dep't 1992). In Ryan, where a new dwelling violated an APA permit, the Court noted that:

Supreme Court's conclusion . . . is inconsistent with the function of respondent and purpose of the permit, namely, preservation of the Adirondack Park and its resources together with the environmental and scenic attributes of the area. Respondent's purpose is not to assure the economic success of the developer

Id. at 924-925. Lewis Farm's construction of three single family dwellings, installation of foundations and septic systems, and

subdivision of land, all without APA permits, interferes with the protection of Adirondack Park lands. It also frustrates the legislative intent for enhanced protection of a New York designated river corridor. See *Campion v. APA*, 188 A.D.2d 877 (3d Dep't 1992) (the Rivers Act directs management of rivers and their environs "for their protection and enhancement against improvident development"). Lewis Farm's unilateral and conscious decision to bypass the APA's regulatory process undermines the Agency's regulatory mandate.

Moreover, since occupancy of the structures will logically lead to use of the septic systems, the APA had broad authority to restrict occupancy until the informational and permitting provisions of the March 25, 2008 Determination were met. See e.g. *Gerdts v. State*, 210 A.D.2d 645 (3d Dep't 1994), appeal dismissed 85 N.Y.2d 857 (1995). In *Gerdts*, petitioners argued that unless the statute expressly authorized particular activities, the APA lacked authority to undertake them. The Court rejected petitioner's view, finding that the APA had broad comprehensive statutory authority to carry out its mission to protect the Park, including participating in or sponsoring regulatory conferences:

As an administrative agency, the APA has those powers expressly conferred by its authorizing statute, as well as those required by necessary implication. "The APA is charged with an awesome responsibility and the Legislature has granted it formidable

powers to carry out its task." Nevertheless, the APA cannot operate outside its lawfully designated sphere, with the propriety of its actions often depending upon the nature of the subject matter and the breadth of the legislatively conferred authority.

Considering the Legislature's comprehensive statement of findings and purposes contained in the Executive Law § 801 and the delegation of power to the APA "to do any and all things necessary or convenient to carry out the purposes and policies of this article" (Executive Law § 804[9]), we conclude that the APA did not exceed its authority by sponsoring environmental conferences. The negative inference approach argued by petitioners is a disfavored interpretative tool, especially where, as here the legislature includes a broad delegation of authority to effect the stated legislative goals.

Gerdtz, 210 A.D.2d at 648-649 (citations omitted).

3. The APA Determination is not Affected by Error of Law Pursuant to Town of Lysander v. Hafney, 96 N.Y.2d 558 (2001)

Lewis Farm also moves for summary judgment claiming that the APA's Determination is affected by error of law because it unreasonably restricted farm operations, contrary to Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001) ("Lysander"). See Lewis Farm Memorandum of Law dated August 1, 2008, Point V, C, p. 42. Id. at 96. However, this Court dismissed petitioner's Agriculture and Markets Law § 305-a claim as *res judicata* in its July 2, 2008 Decision and Order. See Lewis Family Farm v. Adirondack Park Agency, 2008 NY Slip Op. 51348U (Sup. Ct., Essex Co., July 2, 2008). Therefore, the only remaining question is

whether any other aspects of Lysander apply to the APA's Determination in the Lewis Farm matter. They do not.

In Lysander, the Court of Appeals considered whether a local zoning ordinance regarding installation of mobile homes to house migrant farm workers was superceded by Agriculture and Markets Law § 305-a(1)(a).¹² The Court of Appeals found that "farm operations" under Agriculture and Markets Law § 301(11) included farm worker housing. See Agriculture and Markets Law § 301(11); Lysander, 96 N.Y. 2d at 562-563. While the literal language of that statute did not include residential farm worker housing, the Court determined that the statute makes plain that all buildings "on-farm" may be considered part of the farm operation under the Agriculture and Markets Law for purposes of local land use controls, noting that the Commissioner of Agriculture and Markets supported that view. Id. at 564. Lysander's broad reading of "farm operations" in the context of Section 301(11) of Agriculture and Markets Law does not provide grounds to challenge the APA's March 25, 2008 Determination that single family dwellings are not "agricultural use structures" under the APA

¹² This provision reads: Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules, or regulations, shall exercise these powers in such a manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purposes of this article unless it can be shown that the public health or safety is threatened." Agriculture and Markets Law § 305-a(1)(a).

Act. See Return and Record Item 1 (Determination ¶¶ 24, 25, 37-40). Lysander addresses local regulation of "farm operation," not regulation by other State agencies which may incidentally affect a non-farming component of a larger farming operation. Simply put, the Agriculture and Markets Law does not in any way supercede Agency jurisdiction under the APA Act. See, e.g., Hunt Brothers, Inc. v. Glennon, 81 N.Y.2d 906, 909 (1993).

Fundamental principles of statutory construction support APA's exercise of regulatory jurisdiction under the APA Act. The preface to the "Definitions" section of the Agriculture and Markets Law limits its application of the definitions to "when used in this statute." See Agriculture and Markets Law § 301 (emphasis added). By use of this language, the Legislature expressly limited the definitions in Agriculture and Markets Law § 301 to that statute. There is no language in Agriculture and Markets Law which applies its definitions to other state statutes, nor is there language that indicates that the Agriculture and Markets Law supercedes any other state statutes. In fact, in Lysander the Court of Appeals found the Agriculture and Markets Law, § 305-a supercedes only actions of local governments. Lysander, 96 N.Y.2d at 561, 563 (noting that Agriculture and Markets Law § 305-a(1)(a) directs that local governments shall not unreasonably restrict or regulate farm operations); see also Matter of Inter-Lakes Health Inc. v. Town

of Ticonderoga, 13 A.D.3d 846 (3d Dep't 2004) (finding that a local zoning ordinance was superceded by Agriculture and Markets Law § 305-a(1)(a)). In the same way, the Legislature limited the definition section of the APA Act to that Act (Executive Law § 802 "as used in this article..."). Logic dictates that the definition section of a particular state statute should be read to apply only to that statute, unless the statute expressly states otherwise. Thus, Agriculture and Markets Law does not supercede the APA Act.

4. Lewis Farm's Motion for Summary Judgment Against the APA Based on a Resolution of the Local Government Review Board has no Basis in Fact or Law

Lewis Farm asserts that it is entitled to summary judgment arguing that the Agency failed to consider a recommendation of the Adirondack Local Government Review Board ("Review Board"). This allegation is without merit and is contrary to the record. The Review Board was established pursuant to Executive Law § 803-a to advise and assist the APA in carrying out its functions, powers and duties in the Adirondack Park. It is comprised of twelve members, each of whom is a resident of a county within the Park. The APA Act directs that the Review Board:

shall monitor the administration and enforcement of the Adirondack park land use and development plan and periodically report thereon, and make recommendations in regard thereto, to the governor and the legislature, and to the county legislative body of each of the counties wholly or partly within the

park.

See Executive Law § 803-a(7). On March 4, 2008, the Review Board passed a resolution stating that, in its view, the Agency's enforcement proceeding against Lewis Farm, "is in conflict with the terms of the [Adirondack Park Land Use and Development] Plan, which provide that agricultural use structures are non-jurisdictional". See Record Item 15 (Adirondack Park Review Board Resolution dated March 4, 2007).

Lewis Farm's claim that the resolution was not considered by the Agency in its March 25, 2008 Determination is simply wrong. The Review Board resolution was directed to the Governor, was submitted by counsel to Lewis Farm at the APA Enforcement Committee at its March 13, 2008 proceeding, and was made part of the record. See Record Item 15 (Adirondack Park Review Board Resolution dated March 4, 2007). In addition, the Executive Director of the Review Board attended and participated in the APA administrative proceeding concerning Lewis Farm. See Return and Record Item 1 (Minutes of March 13, 2008 proceeding, pages 1 and 5) and (APA Determination, page 2, ¶ 13); and Item 2 (transcript of APA Proceeding pages 1, 45-46).

Section 803-a clearly provides that resolutions of the Review Board are advisory and not binding on the Agency, and does not give rise to any cause of action. Moreover, the record demonstrates that the Agency considered the Review Board's March

4, 2008 resolution in making its subsequent Determination. Thus, Lewis Farm's claim based on the Review Board's resolution is completely without basis in fact or law and should be rejected.

POINT III

LEWIS FARM'S SUBMISSION OF A SECOND RECORD IS INAPPROPRIATE AND SHOULD BE STRICKEN

In support of its motion for summary judgment Lewis Farm's counsel attaches what he characterizes as a "Bates stamped version of the administrative record," ostensibly for the convenience of the Court. See Affirmation of John Privitera dated August 1, 2008, ¶ 7, Exhibit D. However, this "copy" of the Agency record has not been certified by the Agency, nor did counsel for Lewis Farm provide a copy to counsel for the APA to review before its reproduction, and a cursory review has disclosed at least two errors.¹³ Because the submitted documents will become part of the eventual appellate record, there is a potential for confusion and duplication. Accordingly, the APA must object to the submission of Lewis Farm's version, which was neither certified or reviewed by the Agency for accuracy. See Patterson Materials Corporation v. Zagata, 237 A.D. 2d 366, 367 (2d Dep't 1997); appeal denied, 95 N.Y.2d 754 (2000)

¹³ For example, the Lewis Farm version of the "record" July 20, 2007 Miller affidavit is missing the page denoting Exhibit F, which was in the certified APA Return and Record, and the numbering skips from page 188 to page 190. See August 1, 2008 Affidavit of John J. Privitera, Exhibit D.

(determination should not be made on a record before Supreme Court and Appellate Division which is incomplete).

If the Agency had been consulted regarding Lewis Farm's interest in providing a Bates-indexed copy of the APA's certified Return and Record, perhaps this problem could have been avoided.

However, under these circumstances, the APA requests that the second record submitted by Lewis Farm in its motion for summary judgment be stricken, and the Court and parties refer to the APA's certified Return and Record of the APA previously submitted.

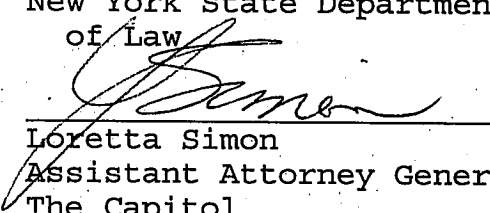
CONCLUSION

The Adirondack Park Agency respectfully requests that the Court grant the APA's motion for summary judgment and deny summary judgment to Lewis Farm.

Dated: August 8, 2008

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