December 30, 2011

Ms. Leilani Ulrich, Chairwoman, Agency Members and Designees
NYS Adirondack Park Agency
P.O. Box 99
Ray Brook, NY 12977

Re. Motion Pursuant to 9 NYCRR 580.14 (h) (1)
Project 2005-100, Adirondack Club and Resort

Dear Chairwoman Ulrich, Agency Members and Designees:

INTRODUCTION

Due to the applicant's failure or refusal to shoulder its legal burden, it is clear that there are large gaps in the Adirondack Club and Resort adjudicatory record that make it impossible for the Agency to reach informed findings and determinations required by Section 809 of the APA Act. The Agency has a final opportunity now to ensure that the record is supplemented so that you can reach an informed, reasoned, and lawful determination.

The executive staff's presentation has overwhelmingly focused on the hearing staff's position that this project is approvable with conditions, giving short shrift to the evidence presented by other parties. To date, there has been an incomplete, even misleading summary of the record. Your regulations (9 NYSCRR 580.l8) state that "the agency staff may summarize the record of any hearing for the aid of the agency," and that "the parties participating in the hearing shall be provided an opportunity to make written comment with respect to the completeness of the summary." The Agency has yet to provide all parties with this opportunity.

We repeat what we stated in our closing statement: The Agency should not condition such a defective and deficient application. According to both hearing and executive staff, post-permit biological studies may only result in "non-material" modifications, effectively preempting anything significant that those studies may reveal in the way of impact avoidance through project redesign. Furthermore, there is the issue of due process. The other parties and their experts would have no ability to meaningfully comment upon the quality and professionalism of after-the-fact wildlife or other natural resource studies.

We conclude that the Agency must either deny the project without prejudice to resubmittal of a satisfactorily supplemental application, or re-open the hearing to gain the evidence now so clearly lacking.

If the Agency accepts its executive staff's recommendation, it will approve a project on 6,235 gross acres, 4,805 of which are classified Resource Management, lands "where the need to protect, manage and enhance forest, agricultural, recreational, and open space resources is of paramount importance," the basic purposes of which 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."

The Agency cannot adequately protect delicate physical and biological resources for the simple reason that there is no biological inventory and assessment on which to base a legally informed judgment. Instead,

- Every expert witness except the applicant's, as well as Agency hearing and executive staff found the application and the record woefully insufficient as to the effect of fragmentation of the Resource Management lands on wildlife and wildlife habitat;

- Hearing and executive staff found that neither the applicant nor the hearing record sufficiently examined alternative project designs;

- The applicant failed to conduct a wildlife functional assessment requested in three Notices of Incomplete Application (2005-2006). The Applicant's response to the 3rd NIPA merely provided general recitation of impacts of exurban development (Glennon, Kretser, 2005) without describing where and on what species those impacts could occur on the project site, and how the project would avoid or minimize those impacts;

- The applicant failed to conduct ecological impact zone assessment, or to assess alternatives that would cluster development in order to overlap impact zones – both requested by Agency staff;

- The applicant failed to assess the specific alternative requested by Agency staff to keep all lands east of Read Road as undeveloped open space, nor did the applicant conduct a wildlife assessment based on that alternative, as directed by Agency staff.

- Agency hearing and executive staff have, thus far, failed to consult Agency past precedent in permits which did not tolerate fragmentation of the private lands critical to the unique character of the Adirondack Park, tightly clustered housing in one small part of each project site, and reserved large contiguous forest acreage in Resource Management for its legislative purposes of forestry and open space recreation, and

- Hearing staff admit that the smaller Great Camp lots are neither on substantial acreages, nor in small clusters, as the APA Act requires.

MOTION TO REOPEN
ADJUDICATORY HEARING

For these reasons, discussed in greater detail below, Adirondack Wild: Friends of the Forest Preserve respectfully moves pursuant to 9 NYCRR 580.14 (h) (1) that the Agency direct that the hearing be reopened and held open until the applicant can provide (a) meaningful wildlife studies and (b) alternative project designs, developed in sufficient detail to allow meaningful evaluation, and supported by direct testimony of qualified witnesses and tested in cross-examination of those witnesses.

INSUFFICIENT WILDLIFE STUDIES

The APA Staff Recommendation to Go to Public Hearing dated January 31, 2007 pointedly states that:

> The wildlife functional assessment failed to provide a detailed species inventory and was not conducted over a number of days nor during different seasons. It did not identify vernal pools and amphibian crossing locations. Consequently, lack of information makes it difficult to assess possible habitat fragmentation and potential wildlife impacts or to determine potential localized changed in animal species, composition, diversity, and functional organization from the development and any changes to the biotic integrity of the site and the adjacent properties.

Nothing changed over the ensuing four years. The applicant's expert, Kevin Franke, admitted under cross examination that no wildlife or habitat studies or assessments were ever conducted after the project was sent to hearing in 2007.

The applicant failed to provide this critical information at the adjudicatory hearing, as he was required to do. None of the environmental experts who testified were afforded an opportunity to broadly sample the project site over one or more field seasons, and all of them urged that such studies be undertaken throughout the project site, and over a reasonable length of time, one field season at minimum, to allow the agency to intelligently assess project impacts in advance of a determination.

In its Revised Draft Order your staff has asked you to espouse, as some Members (Ms. Drabicki and Mr. Booth) have already recognized, two logically inconsistent statements.

The first is:

> 117. A comprehensive biological inventory of the project site was not conducted, so it is not possible to make specific findings concerning impacts to habitat from the proposed project or to identify the presence or location of specific areas on the project site that should be prioritized for protection...

The second immediately follows:

> However, based on project design and through the imposition of conditions, adequate habitat protection can be assured on RM lands.

The next proposed finding begins with a completely disingenuous statement:

> 118. There is no indication of endangered or threatened species on the project site.

There is "no indication" for the simple reason that nobody looked; "[a] comprehensive biological inventory of the project site was not conducted. Moreover, this proposed finding inexplicably makes no mention of rare species, nor does it address whether there has been any indication of rare species on the project site.

The staff asks you to join it in a blind inductive leap over a critical omission from an application it said, in sworn hearing testimony (joined in by a number of highly credentialed outside experts), was deficient in (and in our opinion well-nigh devoid of) wildlife and habitat information.

This you cannot do. A determination made as a result of an adjudicatory hearing - in this case that there will be no undue adverse impact upon natural, ecological or wildlife resources, taking into account "habitats of rare and endangered species and key wildlife habitats" - is required by law to be supported by "substantial evidence."

THE AGENCY CANNOT FULFILL ITS LEGAL DUTIES WITHOUT SUBMISSION AND EVALUATION OF MEANINGFUL ALTERNATIVE PROJECT DESIGNS

Asked whether the applicant had developed alternative plans and compared them to its preferred alternative, the Agency's former Deputy Director, Mr. Sengenberger, answered "No" (p. 877).

In his prefiled direct testimony, the Agency's chief scientist, Mr. Spada, stated the process of identifying alternatives was "short-circuited" by the applicant having chosen a preferred alternative prior to doing so, and that "there has not been an organized and rational discussion of reasonable, potential alternatives." Moreover, he testified that one alternative, eliminating the eight "Great Camp" lots east of Simon Pond and relocating them closer to the smaller "Great Camp" lots, themselves reduced in size and sprawl (perhaps, we suggest, to a degree that they comply with the statutory requirement of "small clusters"):

> …would reduce road mileage and infrastructure costs, minimize loss of open space, minimize habitat fragmentation and allow for continued effective sustainable forest management east of Simon Pond. This alternative scenario, although suggested by Agency staff, was never proposed by the Project Sponsor nor was it evaluated to the same level as the existing proposal.

The Hearing Staff's Closing Statement reads as follows in pertinent part (pp. 35-36):

> Overall, the design of the proposed project has not changed significantly since conceptual review by the Agency's Regulatory Programs Committee in 2004. In that process, the Project Sponsor reviewed a no action alternative and three alternative designs to the preferred scheme. The Committee sought additional explanation of why designs of different scales or magnitude were not selected. The Committee also recommended that the Project Sponsor work with staff on site-specific design alternatives.
>
> The Project Sponsor has consistently sought Great Camp Lots on RM lands, though the size and configuration of those lots has changed over time. In various submissions, the Project Sponsor has responded to the Regulatory Programs Committee and to Agency staff regarding the analysis of alternatives. Despite these responses, staff has continued to question whether other project design alternatives exist that might have less impact and still achieves the Project Sponsor's land use objectives.
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> Testimony at the hearing showed the potential for other project design alternatives. It also showed the difficulties of developing alternative designs taking into account land use boundaries and sensitive resources.

Proposed Findings 133 and 134 of the Revised Draft Order similarly conclude:

> 133. The overall design of the proposed project has not changed significantly since conceptual review of the initial design by the Regulatory Programs Committee in 2004. The Project Sponsor has largely retained its preferred design, rejecting alternative development schemes of differing scales or magnitude due to its assessment of financial feasibility and site development constraints.
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> 134. The Project Sponsor has consistently sought Great Camp Lots on Resource Management lands in its 2004, 2005, 2006 and 2010 application submissions, albeit of differing sizes and in differing configurations.

In short, as both Mr. Valentino and Mr. Booth have pointed out, the applicant submitted no realistic alternative proposal, and made only minor changes to its preferred design.

Although the Agency is exempt from the EIS requirements of SEQR in project review, the exemption was placed in the statute because the Legislature believed the Agency's review procedures would be at minimum equally rigorous as SEQR requirements. Alternatives analysis is at the very heart of SEQR's EIS process, and the Agency's regulations authorize it to require the submission of a DEIS fully akin to one which would be required by SEQR. Ms. Drabicki was careful to point out that DEC must apply SEQR (with its explicit alternatives analysis requirements) in determining whether to issue the many permits the project requires from that agency.

Nor is the Agency exempt from the legal duty SEQR casts on all agencies to act and choose alternatives that minimize environmental impacts to the maximum extent practicable. The

Adirondack Park deserves no less--and, we submit, merits even more from the Agency.

No other party bears the applicant's burden to prove the project will be compatible with the character description and purposes, policies and objectives of Resource Management lands, and no other party bears the applicant's burden to prove the project will not have an undue adverse impact upon, among others, the natural, ecological, wildlife and open space resources of the Park. As Drs. Glennon and Kretser testified with elegant simplicity, a project will have an undue adverse impact if there exists an alternative that avoids that impact.

Since 2004, both the Agency staff and its Regulatory Programs Committee have consistently asked the applicant to provide alternative designs in sufficient detail to evaluate the preferred one. The applicant has equally consistently failed to do so, with the unfortunate result that the record, generated seven years later, is insufficient to allow the Agency to make the requisite statutory findings.

PAST AGENCY PRECEDENT

We respectfully commend to the Agency its own precedent as it evaluates this project. ALJ O'Connell noted that the parties could, and indeed should discuss the Agency's precedent with respect to large projects on Resource Management lands in their closing statements and briefs. Adirondack Wild presents a number of them in an appendix to its closing statement, including:

- Patten Corporation (APA 87-340A)
- Butler Lake (APA 89-312)
- Whitney Park (APA 96-138)
- Oven Mountain Estates (APA 91-110)
- Diamond Sportsmens' Club (APA 2001-217)

Another, the Persek project (APA 2001-76) in the Town of Horicon, Warren County, was not only the subject of colloquy at the hearing, but was presented as a model for conservation design of development, impact avoidance, and protection of large, contiguous tracts in Resource Management by Agency staff in the Staff Recommendation to Go to Hearing (January 31, 2007).

All these projects adhered to the purposes, policies and objectives of Resource Management and Rural Use. They were informed by substantive natural resource inventories and assessments, clustered development in a small area of the project site, eliminated lots, or chose alternative locations based on decisions to sustain ecosystem function and avoid habitat fragmentation, and maintained the vast majority of the acreage in Resource Management as undeveloped forest and open space, as the statute commands. The ACR project now before you grossly violates past Agency precedent.

Mr. Booth has repeatedly asked your Executive Staff to, without fail, bring forward the big issues and concerns early in your deliberations, not at the last minute. We, therefore, respectfully remind you there has yet to be any consideration, reflection or debate by the Agency Members

themselves as to the legally required compatibility of this ACR project with the statutory character, description and purposes, policies and objectives of Resource Management lands. This is at the very heart of the legal conclusions you are required to make.

THREE UNRESOLVED ISSUES

Lastly, the record is deficient with respect to three potentially highly significant issues, one of which arose post-hearing:

1. As Ms. Drabicki has pointed out, DEC has not arrived at a definitive position as to the legality under Article XIV, Section 1 of the State Constitution of the applicant's plan to utilize the DEC boat launch as, in effect, a project amenity used by the nautical valet service. Should it conclude that the plan is unconstitutional, this part of the project will require substantial redesign. DEC must determine its position, and put it before the Agency and the parties in a reopened hearing.

2. Substantial project redesign may also be required as a result of the November 28 Decision and Order of County Court, Franklin County, which confirmed the award to the applicant of a right-of-way across lands of the Nature Conservancy by a jury summoned pursuant to Highway Law SS301 and 304-306. That decision, however, nullified a part of the jury verdict that granted the applicant the right to install underground electric service along the ROW to its 1,282-acre "Moody Pond Parcel." The effect of the denial of electric service to this large part of the project is unknown.

   Mr. Booth has already asked for more information with regard to “the Nature Conservancy lands” (which we presume means the newly-confirmed award of the ROW). Adirondack Wild respectfully submits this issue cries out for further evidence in a reopened record.

3. The hearing record with respect to “commercial, industrial, residential, recreational or other benefits of the project, which the Agency must by law take into account in making its decision, is unsubstantiated by credible, competent witnesses for the applicant. The applicant’s sales and tax projections were shown by eminently credentialed, independent experts to be exaggerated or misleading assertions. We respectfully ask you to reopen the hearing, directing the applicant to obtain independent, competent evaluations of the housing market and sales volume projections so that the Agency is fully informed on this issue, which is at the very heart of the decision you are legally required to make.

CONCLUSION

The law does not make allowances for these frequently heard excuses:

- it is too late in the process;
- the staff did not adequately clarify its requests or the draft Order for Public Hearing;
- the project will be delayed, or

- this has been a learning moment, and we'll apply the learning to the next project.

It is not too late. The Executive Director reported to you on the first day of the November meeting that: "The January meeting agenda will be focused on the Board's decision to approve the project with conditions, *deny the project, or return the project for additional information through further adjudication"* (emphasis added).

Agency staff actually went to great lengths to clarify its request for substantive wildlife and habitat information in numerous informal meetings, in no less than three Notices of Incomplete Application (2005-2006), in its Motion to Proceed to Hearing (January 31, 2007), and during three years of pre-hearing conferences and mediation (2007-2009).

The project has been delayed by the applicant many times in seven years, seven years in which a professional wildlife study and alternatives analysis could have been conducted, but was not. This motion merely seeks one or more field season(s) to conduct meaningful wildlife studies and to analyze meaningful alternative designs, as well as pursue the other issues cited here for which evidence is either missing or deficient.

The Agency has had seven years to apply ACR's "learning moments." The Agency will never apply its learning to "the next project" if it fails this current test of its own law.

The applicant's failure to include meaningful wildlife and habitat information and assessments, as well as "reasonable alternative means of achieving project goals" was not corrected during the hearing. Therefore, Adirondack Wild respectfully moves that the hearing be reopened and supplemented to allow the Agency to discharge its legal duty.

Thank you for considering our motion. Attached for your convenience are relevant portions of:

(a) The Hearing Staff Closing Statement;
(b) The Revised Draft Order;
(c) The Three NIPAs;
(d) The Statements at the December 2011 Agency Meeting, and
(e) The Hearing testimony.

Sincerely,

David H. Gibson	Robert C. Glennon	Daniel R. Plumley
Partner	Advisor	Partner

ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE

ATTACHMENT
Cc: Agency Executive Staff
Hearing Parties
Applicant
Hon. Daniel O'Connell, ALJ