

STATE OF NEW YORK
SUPREME COURT

ALBANY COUNTY

In the Matter of the Application of

ADIRONDACK MOUNTAIN CLUB, INC. and
PROTECT THE ADIRONDACKS! INC.,

Petitioners,

for a Judgment Pursuant to
CPLR Article 78

-against-

ADIRONDACK PARK AGENCY and DEPARTMENT
OF ENVIRONMENTAL CONSERVATION OF THE
STATE OF NEW YORK,

Respondents.

PETITION

INDEX NO. _____

DATE OF FILING:

Petitioners, Adirondack Mountain Club, Inc. and Protect the Adirondacks! Inc. ("Petitioners"), for their verified petition herein, by their attorneys, Caffry & Flower, allege as follows:

SUMMARY OF PROCEEDING

1. This CPLR Article 78 proceeding seeks to compel respondent Adirondack Park Agency (hereinafter "APA") to carry out its legal duty under Executive Law § 816 and the Adirondack Park State Land Master Plan ("APSLMP") to classify the Adirondack Forest Preserve lands making up Low's Lake and other waterways in its vicinity "as promptly as possible" pursuant to the APSLMP.

2. Petitioners seek a judgment:

a. Annulling the November 13, 2009 decision by respondent APA that purported to reverse APA's prior September 11, 2009 decision to classify Low's Lake, Bog Lake and certain sections of the Bog River in the Adirondack Forest Preserve as Wilderness and Primitive lands pursuant to the APSLMP;¹ and

b. Declaring that the 1987 classification by APA of over 9,100 acres of State Forest Preserve land in the vicinity of Low's Lake has already classified most of the lake beds, river beds, and waters which are at issue herein as Wilderness or Primitive lands pursuant to the APSLMP; or, in the alternative,

c. Finding that APA has failed to perform a duty enjoined upon it by law, namely that APA must classify the Adirondack Forest Preserve lands which are the beds and waters of Low's Lake, Bog Lake, Clear Pond, Hitchins Pond, and the Bog River above Low's Lower Dam, pursuant to the APSLMP, and ordering that APA must adopt said classifications within three months from the date of judgment.

3. These waterways are State lands in the Adirondack Park, making them part of the Forever Wild Forest Preserve. They make up key sections of major Adirondack wilderness canoe routes in the northwestern corner of the Park. They are adjoined, almost entirely, by other Forest Preserve lands.

¹ Copies of APA's September 11, 2009 decision and its transmittal to the Governor for his approval pursuant to Executive Law § 816 and the APSLMP are annexed hereto as Exhibit A. Copies of APA's November 13, 2009 decision and its transmittal to the Governor are annexed hereto as Exhibit B.

4. Low's Lake stretches approximately ten miles from east to west and is located partially in the Five Ponds Wilderness Area and partially in the Low's Lake Primitive Area of the Forest Preserve. On its west end, a portage, or carry trail, connects it to the upper limits of navigation on the Oswegatchie River, in the Five Ponds Wilderness Area. Low's Lake was created a century ago, in part, by the damming of the Bog River by "Low's Upper Dam", which raised the water level of the river and several pre-existing lakes and ponds, to create one large lake. Therefore, it is sometimes also known as the Bog River Flow. On its east end, Low's Lake is accessed by water from the Bog River and Hitchins Pond in the Hitchins Pond Primitive Area of the Forest Preserve. The level of these water bodies was raised a century ago by "Low's Lower Dam". To the south of Low's Lake lies Clear Pond, which drains into Bog Lake, which drains into Low's Lake. Both Bog Lake and Clear Pond are in the Five Ponds Wilderness Area. All of these waterways are connected to each other by water or by short portages. The waterways at issue herein and the two Low's dams are all depicted on the maps included in Exhibits A and B.

5. APA has classified all of the Forest Preserve lands adjoining these waterways as either "Wilderness" or "Primitive" areas under the APSLMP, but has failed and refused to classify

these waters and the beds of the waterways, despite the clear legal definition that includes waters among the Forest Preserve lands that must be classified and the mandate of the APSLMP that all newly acquired Forest Preserve lands must be classified "as promptly as possible following acquisition".

6. In addition, in its 1987 annual classification action, APA already classified most of these waters and the land under them as Wilderness or Primitive areas, but APA now refuses to acknowledge this fact.

7. Therefore, Petitioners have commenced this proceeding to ensure that these waters are promptly classified, as required by Executive Law § 816 and the APSLMP.

THE PARTIES

8. Petitioner Adirondack Mountain Club, Inc. ("ADK") is a New York not-for-profit corporation, formed in 1922, with its offices in the Town of Lake George, Warren County; Town of North Elba, Essex County; and City of Albany, Albany County, State of New York. It is exempt from taxation pursuant to Internal Revenue Code § 501(c)(3).

9. Among the purposes for which ADK was organized is the following statement from its Certificate of Incorporation:

To protect New York's Forest Preserve, parks and other wildlands and waters and to promote the responsible recreational use thereof, and to that end, to employ a balanced approach to outdoor recreation, advocacy, environmental education, natural resource conservation, public service and stewardship.

10. ADK currently has approximately 28,000 members. Many of its members are regular users of the New York State Forest Preserve in the Adirondack Park and some of them regularly use the Bog River, Low's Lake, Hitchins Pond, Bog Lake, and Clear Pond in the Forest Preserve, and the canoe routes that connect them to other Forest Preserve water bodies. ADK and its local chapters also use these waterways for group outings.

11. Petitioner Protect the Adirondacks! Inc. ("Protect") is a New York not-for-profit corporation, with its offices in the Town of Niskayuna, Schenectady County; and the Village of Saranac Lake, Town of Harrietstown, County of Franklin, State of New York. It is exempt from taxation pursuant to Internal Revenue Code § 501(c)(3). Protect was formed by the consolidation in 2009 of two predecessor organizations: Residents' Committee to Protect the Adirondacks, Inc. (formed in 1990) and The Association for the Protection of the Adirondacks (formed in 1902).

12. Among the purposes for which Protect was organized are the following statements from its Certificate of Consolidation:

- Permanently protect the Park's wildlands, with special emphasis on the Forest Preserve.
- Protect, preserve, and enhance the wilderness character, ecological integrity, scenic resources, and appropriate recreational uses of the New York State Forest Preserve.

13. Protect currently has approximately 5,000 members, about one-half of which reside or own property within the Adirondack Park. Many of its members are regular users of the New York State Forest Preserve in the Adirondack Park and some of them regularly use the Bog River, Low's Lake, Hitchins Pond, Bog Lake, and Clear Pond in the Forest Preserve, and the canoe routes that connect them to other Forest Preserve water bodies.

14. As part of their missions to protect the New York State Forest Preserve, and to promote appropriate recreational use thereof, the Petitioners and their members have long advocated for the acquisition, preservation and improved management of the lands and waters at issue herein.

15. Petitioners and their members use the waterways at issue herein more than most other members of the public. Some members return to them year after year.

16. Petitioners' members regularly use these waterways for recreation and to study and enjoy the lands and waters of these areas, and their flora and fauna. Among the things that attract these users is the fact that Low's Lake has one of the largest loon populations in the State of New York, and these areas are used for nesting by bald eagles and ospreys. They also visit for the sense of wildness and tranquility that is found on these wilderness waterways. These members also enjoy the opportunities to undertake multi-day wilderness paddling trips that are found in few other places in the Adirondack Park.

17. The Petitioners, and many of their members, as well as other interested parties, filed written comments and testified during the public comment period on the recent proposal to classify various Forest Preserve lands in the vicinity of Low's Lake.

18. Respondent APA is an agency of the State of New York created pursuant to Executive Law Article 27, §§ 800, et seq. (the "APA Act"). Its office is located at Ray Brook in the Town of North Elba, County of Essex, New York.

19. Respondent Department of Environmental Conservation ("DEC") is an agency of the State of New York created pursuant to Environmental Conservation Law ("ECL") Article 3. Its principal office is located in the City and County of Albany, New York.

VENUE

20. Venue of this proceeding properly lies in Albany County pursuant to CPLR § 506 because respondent DEC has its principal office in said county.

BACKGROUND

The Adirondack Forest Preserve

21. Article 14, § 1 of the New York State Constitution ("Article 14") provides, in pertinent part:

The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands.

They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed.

22. Pursuant to ECL § 9-0101(6), all lands of the State, with limited exceptions that are not relevant in this proceeding, that are located in the counties of Clinton, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster and Sullivan, are part of the Forest Preserve, which is protected as "Forever Wild" pursuant to Article 14.

23. Land under water in a Forest Preserve county, which is owned by the State, is also part of the Forest Preserve.²

24. The Forest Preserve lands located in Clinton, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, and Washington Counties are sometimes referred to as the "Adirondack Forest Preserve".

The Adirondack Park State Land Master Plan

25. Pursuant to ECL § 9-0101(1) and § 9-0101(6), all or part of the counties of Clinton, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, and Washington make up the Adirondack Park.

26. The APA Act created the APA to oversee and regulate the use and management of state and private land within the Adirondack Park.

² Opinion of the Attorney General No. 96-F2 (finding that State land under Raquette Lake is part of the Forest Preserve).

27. Pursuant to APA Act § 816³, the APSLMP, as approved by the APA and the Governor, controls the use and management of the Forest Preserve in the Adirondack Park.

28. Former APA Act § 807(1) required that, by 1972, APA prepare the APSLMP, in consultation with DEC, and submit it to the Governor for approval. The plan was required to provide for:

... management of state lands, whether now owned or hereafter acquired, located in the Adirondack park. Such plan shall (1) classify such lands according to their characteristics and capacity to withstand use and provide general guidelines and criteria for the management and use of lands within such classifications... .

See APSLMP p. 102.⁴

29. Current APA Act § 816(1)⁵ requires that DEC:

... develop, in consultation with the agency [APA], individual management plans for units of land classified in the master plan for management of state lands heretofore prepared by the agency in consultation with the department of environmental conservation and approved by the governor. Such management plans shall conform to the general guidelines and criteria set forth in the master plan. Until amended, the master plan for management of state lands and the individual management plans shall guide the development and management of state lands in the Adirondack park.

See APSLMP p. 102 (emphasis added).

30. The APSLMP has the force and effect of law and is binding upon APA and DEC.

³ Formerly APA Act § 807.

⁴ All references to the APSLMP herein are to the 2001 edition of the plan, which is the most recent updated edition. It is available on APA's website at www.apa.state.ny.us/Documents/Laws_Regs/SlmpPDF2001.pdf.

⁵ Former APA Act § 807(2) contained similar language. See APSLMP p. 102.

31. The APSLMP divides the Adirondack Forest Preserve into various classifications, including Wilderness, Primitive, Canoe, Wild Forest and Intensive Use. APSLMP p. 15.

32. The APSLMP sets forth what types of facilities and uses are allowed in each such classification of State land in the Adirondack Forest Preserve. APSLMP pp. 16-50.

33. For instance, in Wilderness Areas and Primitive Areas, the APSLMP prohibits the public use of motor vehicles, motor boats, motorized equipment and aircraft. APSLMP pp. 23, 28.

34. The requirement that Forest Preserve lands be classified pursuant to the APSLMP applies equally to land, water and land under water (i.e. the beds of lakes and rivers).

35. APA Act § 802(27) defines "land" as "the earth, on or below the surface of the ground, including water and air above, the flora and fauna" (emphasis added).

36. Former APA Act § 807(1) mandated that DEC and APA prepare the APSLMP, and mandated that the APSLMP classify the state lands in the Adirondack Park. See APSLMP p. 102.

37. That law made no exception for water bodies or land under water.

38. Nor did it make any exception for land or water adjoined by private land. See APSLMP p. 102.

39. Current APA Act § 816(1) mandates that DEC and APA must adopt Unit Management Plans for lands classified in the APSLMP.

40. Again, the law makes no exception for water bodies or land under water.

41. Nor does it make any exception for land or water adjoined by private land.

42. The APSLMP (p. 7) provides that "once new lands have been acquired the [APA] Act requires the master plan to be revised by classifying the lands...". It further provides (p. 8) that "land acquisitions should be classified as promptly as possible following acquisition...".

43. APA acknowledged in its September 11, 2009 and November 13, 2009 decisions that the APSLMP "directs that once new lands have been acquired the Master Plan and map are to be amended to classify the newly acquired areas". Exhibit A, Resolution p. 1, and Exhibit B, Resolution p. 1.

44. As with the APA Act, the APSLMP makes no exception to these mandates for water bodies or land under water.

45. Nor does it make any exception for land or water adjoined by private land.

46. The APSLMP makes it clear that the water bodies at issue herein must be classified.

47. UMPs developed pursuant to the APSLMP must address "the preservation and management of the lakes, ponds, rivers and streams of the area [unit]...". APSLMP p. 10.

48. Since the UMPs are intended to control the management of land classified under the APSLMP (p. 9), it would be inconsistent for such plans to provide for "management of lakes, ponds [and] rivers" if lakes, ponds, and rivers were not required to be classified under the APSLMP.

49. Numerous sections of the APSLMP show that water bodies must be classified:

- "A fundamental determinant of land classification is the physical characteristics of the land or water ...". P. 14.
- The factors to be taken into account in classifying land include "the temperature, chemistry, volume and turnover rate of streams or lakes", "the carrying capacity of the land or water...", and "the amount of human use the land or water itself can absorb". P. 14.
- "In addition, rivers, streams, lakes and ponds and their environs often present special physical problems." P. 14.
- Classification determinants include "the suitability of a given system of lakes and ponds for canoeing or guideboating" or the ability of other water bodies to accommodate motorboats. P. 15.
- "A wilderness area is ... an area of state land or water having a primeval character..." . P. 20.
- A wilderness area "has at least ten thousand acres of contiguous land and water...". P. 20.

50. The Attorney General has ruled that land under water in a Forest Preserve county, which is owned by the State, is part of the Forest Preserve.⁶

⁶ See Opinion of the Attorney General No. 96-F2 (finding that State land under Raquette Lake is part of the Forest Preserve).

51. Also, the Commissioner of DEC has confirmed that the State-owned lands under water in Cranberry Lake which adjoin Forest Preserve land are part of the Forest Preserve and are part of the Five Ponds Wilderness Area.⁷

52. More recently, a DEC administrative law judge has found that an adjoining landowner violated the ECL by maintaining a private dock on Forest Preserve lands under the Stillwater Reservoir.⁸

53. In a situation similar to the case at bar, APA has already classified Little Tupper Lake as part of the William C. Whitney Wilderness Area.

54. In its September 11, 2009 decision, APA found that its classification of the bed and waters of Low's Lake, Bog Lake and the Bog River was consistent with the APSLMP. Exhibit A, Resolution, p. 3.

55. APA's November 13, 2009 decision did not rescind or overrule the finding that waters and their beds could and should be classified, it merely removed said lands and waters from that classification decision. See Exhibit B.

⁷ Matter of Walter W. French, Decision and Order of the Commissioner, July 20, 2007, pp. 6-7, www.dec.ny.gov/hearings/36563.html; 2007 WL 3125218, *4.

⁸ Matter of Eugene F. Bartell, Ruling, June 11, 2009, pp. 17-18, www.dec.ny.gov/hearings/55449.html; 2009 WL 2141498, *13-*14.

56. Therefore, as a matter of law, Forest Preserve waters, including the land under water (or bed) and the water itself, are part of the Forest Preserve and must be classified under the APSLMP.

57. APA must classify Low's Lake, the Bog River, Hitchins Pond, Bog Lake, Clear Pond, and all other lakes, ponds, rivers, and other water bodies in the Forest Preserve pursuant to the APSLMP.

The APSLMP's State Land Classification Process

58. As set forth above at pages 9-10, former APA Act § 807(1) required that the APSLMP classify the Forest Preserve lands in the Adirondack Park into the various categories provided for in the APSLMP.

59. Current APA Act §§ 816 (1) and (2) provide that the APSLMP may be amended. Such amendments "shall be prepared by [APA], in consultation with the department of environmental conservation, and submitted after public hearing to the governor for his approval." APA Act § 816(2).

60. The APSLMP provides that:

once new lands have been acquired the [APA] Act requires the master plan to be revised by classifying the lands and setting guidelines for their management and use pursuant to the statutory procedures (consultation with the Department of Environmental Conservation and submission to the Governor for approval).

APSLMP pp. 7-8.

61. In Adirondack Council v. The Adirondack Park Agency and Jorling, (Sup. Ct. Essex Co. August 18, 1988)⁹ Justice Viscardi held that: "Pursuant to the Master Plan the Agency is required to classify all newly acquired State lands." Id. at 2. That decision further held that: "Following the acquisition of the Perkins Clearing area in 1983, the Agency was required to classify the area in accordance with the Master Plan...". Id.

62. The APSLMP requires that APA take prompt action to classify newly acquired lands, generally within one year of their acquisition.

63. In particular, the APSLMP requires that:

The following procedures will be followed in connection with new acquisitions: ...

-- land acquisitions should be classified as promptly as possible following acquisition and in any case classification of new acquisitions will be done annually;

APSLMP p. 8 (emphasis added).

64. The APSLMP further requires that "[t]he Agency will undertake annual reviews of the master plan to address such issues as the classification of recent acquisitions, [and] reclassification resulting from the removal of non-conforming uses...". APSLMP p. 9. It also requires that DEC annually provide APA with a list of new state land acquisitions, "information necessary for the classifications of the

⁹A copy of this decision is annexed hereto as Exhibit C and incorporated herein.

acquisitions" as well as "a list of non-conforming uses removed during the previous year." APSLMP p. 9.

65. APA and DEC have entered into a Memorandum of Understanding ("MOU") "Concerning Implementation of the State Land Master Plan for the Adirondack Park", which was most recently revised and adopted in July 2007.¹⁰

66. The MOU provides procedures for the coordination of the two agencies' actions in the adoption, revision and implementation of the APSLMP and the UMPs.

67. The MOU (pp. 4-5) specifically admits that "[t]he APSLMP establishes a system and procedure for the classification of all State lands ...". (emphasis added)

68. The MOU (pp. 6-7) further spells out the procedures by which APA will undertake classification of new state land acquisitions, in consultation with DEC.

69. Because the APSLMP applies to both lands and waters, these procedures and requirements apply to both newly acquired land and water.

The Unit Management Plan Process

70. Pursuant to APA Act § 816(1) and the APSLMP (pp. 14-16), the Adirondack Forest Preserve is divided into various geographic areas or "units". For example, these include units as

¹⁰ www.apa.state.ny.us/State_Land/MOU%20APA%20DEC.pdf

varied as the High Peaks Wilderness Area, the Gore Mountain Ski Center Intensive Use Area and the Lake George Wild Forest.

71. The principal Forest Preserve units at issue herein are the Five Ponds Wilderness Area, Round Lake Wilderness Area, Hitchins Pond Primitive Area and Low's Lake Primitive Area.

72. Annexed hereto and incorporated herein as Exhibit D is a copy of a map of "Adirondack Park Unit Management Boundaries" that is found on the DEC website at www.dec.ny.gov/docs/lands_forests_pdf/ADKumpbounds.pdf. The Five Ponds Wilderness Area and Bog River Complex are labeled on the map. The recently created Round Lake Wilderness Area is not yet depicted on the map. In addition, Low's Lake and Round Lake have been hand-labeled on the Exhibit for the convenience of the Court.

73. The APSLMP briefly describes each such Adirondack Park Forest Preserve unit and the management goals for the unit. APSLMP pp. 51-101.¹¹

74. Pursuant to APA Act § 816(1) and the APSLMP (pp. 9-11), each unit of the Forest Preserve must have an approved UMP.

75. Pursuant to APA Act § 816(1), the APSLMP (pp. 9-11) and the APA-DEC MOU, UMPs are developed by DEC and must then receive approval by APA, and final approval by DEC.

76. All UMPs must conform to the requirements of the APSLMP. APA Act § 816(1); APSLMP p. 10.

¹¹ The APSLMP was last reprinted in 2001 and more recent classifications and area descriptions adopted by APA are not yet described in the published version.

77. DEC is charged by law with carrying out the requirements of the UMPs. APA Act § 816; APSLMP p. 11.

78. Each UMP has the force and effect of law and is binding upon APA and DEC.

The Five Ponds Wilderness Area

79. The Five Ponds Wilderness Area is made up of New York State Forest Preserve lands located in Hamilton, Herkimer, and St. Lawrence Counties.

80. It is located in the Adirondack Park of the State of New York.

81. As described in the APSLMP (pp. 53-54), it includes numerous lakes, rivers, ponds, streams, and mountains on over 117,000 acres of mostly forested land.

82. It is crossed by major canoe routes, such as parts of the Bog River - Low's Lake - Oswegatchie River canoe route (35 +/- miles long) and the Little Tupper Lake - Lake Lila - Clear Pond - Bog Lake - Low's Lake - Bog River - Round Lake - Little Tupper Lake circuit canoe route (55 +/- miles long).

83. It also includes many miles of hiking and cross-country ski trails, Adirondack lean-tos, campsites, and other facilities.

84. The Five Ponds Wilderness Area includes large parts of Cranberry Lake on its north side.

85. The Commissioner of DEC has ruled that the State-owned lands under water in Cranberry Lake which adjoin Forest Preserve

land are part of the Forest Preserve and are part of the Five Ponds Wilderness Area.¹²

86. As shown by the maps in Exhibits A and B, on its south and east sides, the Five Ponds Wilderness Area includes large parts of Low's Lake.

87. The Forest Preserve uplands on the south side of Low's Lake, certain islands in the Lake, and the lands under water in much of the eastern and southern parts of the Lake, were acquired by the State in a single deed, from Hiawatha Council, Inc., Boy Scouts of America, in 1986.¹³

88. Grass Pond, which is a northerly arm of Low's Lake, and the western end of Low's Lake, together with the uplands surrounding them, were acquired by the State in 1985 from the Yorkshire Timber Company.¹⁴

89. Said State-owned uplands adjoining Low's Lake, and the state-owned islands in Low's Lake, which were acquired in 1985 and 1986, are part of the Forest Preserve.

90. Said State-owned lands under water in the Lake, and the waters, are part of the Forest Preserve.

¹² Matter of Walter W. French, supra.

¹³ See also Five Ponds Wilderness Area UMP, pp. viii, 1-2; www.dec.ny.gov/docs/lands_forests_pdf/fiveponds.pdf.

¹⁴ Id.

91. Said State-owned uplands adjoining Low's Lake and the state-owned islands in the Lake are part of the Five Ponds Wilderness Area.

92. The State-owned lands under water in Low's Lake, and the waters of the Lake, are part of the Five Ponds Wilderness Area, having already been classified as such by APA in 1987, as set forth below in the Third Cause of Action.

93. However, APA and DEC have refused to acknowledge this fact.

The Bog River Complex of the Forest Preserve

94. The Bog River Complex of the Forest Preserve is located on New York State Forest Preserve lands in the Counties of Hamilton and St. Lawrence.

95. It is located in the Adirondack Park of the State of New York.

96. The Bog River Complex of the Forest Preserve consists of the Hitchins Pond Primitive Area and Low's Lake Primitive Area, as designated in the APSLMP (pp. 76-77, 79), and other, smaller, Forest Preserve land units.

97. As shown by the maps in Exhibits A and B, the Hitchins Pond Primitive Area and Low's Lake Primitive Area include several miles of the Bog River, the eastern end of Low's Lake, Hitchins Pond, and other water bodies along the Bog River.

98. Said waterways and the land under water are part of the Forest Preserve.

99. These waterways are part of a major Adirondack wilderness canoe route, 35 +/- miles long, in which the Bog River and Low's Lake are connected to the Oswegatchie River in the Five Ponds Wilderness Area by a 3 +/- mile portage. They are also part of the Little Tupper Lake - Lake Lila - Clear Pond - Bog Lake - Low's Lake - Bog River - Round Lake - Little Tupper Lake circuit canoe route (55 +/- miles long).

100. The APSLMP (pp. 76, 79) specifically provides that for the Hitchins Pond and Bog River Primitive Areas, "[p]reservation of the wild character of this canoe route without motorboat or airplane usage ... is the primary management goal for this primitive area."

101. The Bog River Complex UMP, which was adopted by APA and DEC in 2003,¹⁵ found (pp. 43-44) that:

The acquisitions in the mid-1980's that provided thousands of feet of additional Forest Preserve frontage on Lows Lake and thousands of acres of upland were envisioned from the start to be extending the Wilderness that already existed in the Five Ponds Area.
...

In the mid '90's there was a substantial increase in motorized use that made motorized use an issue which could not be ignored. The increased motorized use had resulted in a disruption of the wilderness qualities of the lake, and created significant conflicts between

¹⁵ www.dec.ny.gov/docs/lands_forests_pdf/bogrriver.pdf. This version of the UMP does not include certain amendments requiring that floatplane use be phased out, which were adopted in 2009. See Exhibits A and B, Attachment A, pp. 1-2.

motorized users and non-motorized users that had come to frequent this area since its acquisition. The resulting conflicts and increased disturbance contradicted the original vision for the area, and contradicted with [sic] the direction provided in the SLMP regarding management of the Low's Lake and Hitchins Pond Primitive areas. Both areas have as their primary management goal the "Preservation of the wild character of this canoe route without motorboat or airplane usage..." (Master Plan, p. 79).

102. Most of this land was acquired by the State in 1986 and was classified by APA pursuant to the APSLMP as Primitive in 1987.

103. At that time, an additional 640 +/- acres of existing Forest Preserve land was reclassified as part of the Hitchins Pond Primitive Area. This land included part of the Bog River above Low's Lower Dam.

104. The uplands in these Primitive Areas adjoining Low's Lake, Hitchins Pond, and the Bog River are part of the Forest Preserve.

105. The bed and waters of eastern Low's Lake, Hitchins Pond, and the Bog River within the Low's Lake and Hitchins Pond Primitive Areas are part of the Forest Preserve.

106. The bed and waters of eastern Low's Lake, Hitchins Pond, and the Bog River within the Low's Lake Primitive Area and the Hitchins Pond Primitive Area have already been classified pursuant to the APSLMP as Primitive by APA in 1987, as set forth below in the Third Cause of Action.

107. However, APA and DEC have refused to acknowledge this fact.

The Round Lake Wilderness Area

108. The Round Lake Wilderness Area of the Forest Preserve is located on New York State Forest Preserve lands in the Counties of Hamilton and St. Lawrence.

109. It is located in the Adirondack Park of the State of New York.

110. It is north of and adjoins the William C. Whitney Wilderness Area, and is located generally southeast of Low's Lake and Hitchins Pond.

111. It includes Round Lake, a large lake entirely owned by the State, and the Round Lake Outlet, a tributary of the Bog River. Little Tupper Lake, a large State-owned lake which is part of the William C. Whitney Wilderness Area, drains into it from the south.¹⁶

112. These waterways are all part of the 55 +/- mile long Little Tupper Lake - Lake Lila - - Clear Pond - Bog Lake - Low's Lake - Bog River - Round Lake - Little Tupper Lake circuit canoe route, and connect to the 35 +/- mile long Bog River - Low's Lake - Oswegatchie River canoe route.

¹⁶ This tract was acquired since the APSLMP was last reprinted in 2001 and its official description is not in the published version of the APSLMP. Upon information and belief, APA and DEC have not yet adopted a UMP for this Wilderness Area.

113. The majority of this area was acquired by the State in 2005 and the Wilderness Area was created by APA pursuant to the APSLMP in 2006. The parts of this Wilderness Area that are at issue herein are shown on the maps in Exhibits A and B.

Recent State Acquisition of the Bog Lake Area

114. In recent years, the State has acquired additional lands in the Bog River - Low's Lake area.

115. In 2006, the State acquired approximately 1,100 acres south of Low's Lake, including Bog Lake and Clear Pond. In 2007 this land was classified as part of the Five Ponds Wilderness Area. These lands and waters are shown on the maps in Exhibits A and B.

116. Upon information and belief, APA takes the position that it purportedly did not classify the bed and waters of Bog Lake and Clear Pond when it classified the surrounding uplands.

117. The State-owned uplands adjoining Bog Lake and Clear Pond are part of the Forest Preserve.

118. The State-owned lands under water, and the waters, in Bog Lake and Clear Pond are part of the Forest Preserve.

119. Pursuant to the APA Act and APSLMP these lands and waters must be classified.

The 2009 Forest Preserve Classification

120. In recent years, additional lands along the south side of Low's Lake and the Bog River have been acquired by the State. These lands are shown on the maps in Exhibits A and B.

121. As set forth above, pursuant to the APSLMP, APA was required to classify these new Forest Preserve lands promptly after their acquisition, within approximately one year thereof.

122. Pursuant to the APA Act, the APSLMP, and the MOU, in 2009, APA undertook to classify said newly acquired lands under the APSLMP, in coordination with DEC.

123. Said lands were proposed to be added to either the Five Ponds Wilderness Area or the Round Lake Wilderness Area.

124. In addition, as part of that process, APA undertook to reclassify much of the existing Forest Preserve land in the Bog River Complex as Wilderness, by adding it to either of the two adjoining Wilderness Areas, the Five Ponds and Round Lake Wilderness Areas, and eliminating the Low's Lake Primitive Area and the Hitchens Pond Primitive Area.

125. In addition, as an outgrowth of prior litigation over the use of floatplanes on Low's Lake in violation of the APSLMP, APA and DEC undertook to classify as Wilderness the bed and waters of Low's Lake, parts of the Bog River, and Bog Lake. See Exhibits A and B, Attachment A, pp. 1-2.

126. In the prior litigation, the Petitioners herein, and other parties, filed suit in 2008 to compel DEC to carry out its

duty under the APSLMP and the Bog River Complex UMP to ban the use of floatplanes on Low's Lake. That litigation with DEC was ultimately settled in 2009.¹⁷

127. APA and DEC are in the process of putting in place the regulatory structures required to implement the ban on floatplanes on Low's Lake, pursuant to the settlement with DEC. See Exhibits A and B, Attachment A, pp. 1-2.

128. That Stipulation and Order of Discontinuance (Exhibit E) provides at page 3, in part:

WHEREAS, on May 14, 2009, at the request of DEC and the Agency [APA] staff, the Agency directed the Agency staff to initiate the process for amending the Master Plan to classify the bed and waters of Lows Lake, and to reclassify certain State-owned lands adjoining Lows Lake, as "wilderness;"... .

THEREFORE, in consideration of the foregoing ... the proceeding... is discontinued as moot... (emphasis added).

129. Most of the existing two Primitive Areas were proposed to be reclassified as Wilderness. Only pre-existing roadways providing access to private inholdings and some land around Hitchins Pond and the Low's Upper Dam on the Bog River were proposed to remain classified as Primitive, as part of a much smaller Eastern Five Ponds Access Primitive Area.

130. APA proposed two alternatives, both of which proposed to classify the bed and waters of Low's Lake as part of the Five Ponds Wilderness Area. One alternative also proposed classifying

¹⁷ A copy of the Stipulation and Order of Discontinuance in that case is annexed hereto as Exhibit E and incorporated herein.

the bed and waters of Bog Lake as part of the Five Ponds Wilderness Area. The other alternative proposed to leave Bog Lake as unclassified land.

131. No proposal was put forth which would have left any of the bed and waters of Low's Lake or the Bog River above Low's Upper Dam as unclassified land.

132. Upon information and belief, Hitchins Pond, the Bog River below there, and Clear Pond were not proposed for classification, despite all being entirely owned by the State and being entirely surrounded by State Forest Preserve land.

133. APA duly noticed this classification proposal and conducted the required public comment period, public hearing, and environmental impact review pursuant to the State Environmental Quality Review Act, ECL Article 8 and 6 NYCRR Part 617 ("SEQR").

134. The Petitioners and many of their members participated in the public comment process, testifying and filing written comments on the proposals.

135. Following the public comment process, APA revised its proposal so that the eastern end of Low's Lake, as well as the Bog River above Low's Upper Dam, which adjoin a large private inholding, were also proposed to become part of the new Eastern Five Ponds Access Primitive Area, rather than being added to a Wilderness Area.

136. In a memorandum dated September 2, 2009 the APA staff advised that APA had the power to classify the water and land under water in question.

137. At its September 11, 2009 meeting, APA was advised by its General Counsel that it has the authority to classify lands under water and "that the Master Plan defines land to include water". Minutes of September 11, 2009 APA meeting, p. 10.

138. At that meeting, APA voted to approve the classification proposal, as revised.

139. Consistent with the settlement Stipulation and Order in the prior litigation (Exhibit E, p. 3), the DEC representative on the APA board voted in favor of the classification.

140. The proposal which was approved included classification of the bed and waters of both western/central Low's Lake, and Bog Lake, as part of the Five Ponds Wilderness Area, and eastern Low's Lake and the Bog River above Low's Upper Dam as part of the Eastern Five Ponds Access Primitive Area.

141. Altogether, approximately 10,827 acres of land and water were approved for classification or reclassification as part of the two Wilderness Areas and the new Primitive Area. See Exhibit A, Attachment A, p. 1.

142. By a letter dated September 15, 2009, APA duly transmitted the proposal which it had approved to the Governor for his approval pursuant to APA Act § 816 and the APSLMP.

**AS AND FOR A FIRST SEPARATE
AND DISTINCT CAUSE OF ACTION**

143. Each and every allegation set forth above is hereby repeated and realleged.

144. Following the September 11, 2009 APA meeting, at its October 9, 2009 meeting, APA voted to reconsider the September 11th vote, due to an alleged technical defect in the voting procedure.

145. The effect of this October 9th vote was purportedly to nullify the September 11th approval of the state land and water classifications that were approved at that meeting.

146. However, the resolution to reconsider which was approved at that time did not actually state that it rescinded the prior action.

147. Therefore, the September 11, 2009 resolution remains in full force and effect.

148. On November 12, 2009, the State Lands Committee of the APA voted to recommend re-approval of the Forest Preserve land and water classifications that had been approved in September.

149. At the November 13, 2009 meeting of the APA, a resolution to re-approve the Forest Preserve land and water classifications that had been approved in September failed to gain approval.

150. At the November 13th meeting, a second resolution was then made, and approved, "to eliminate the classification of the

lakebed and waters from the classification" and to otherwise re-approve the Forest Preserve land classifications that had been approved in September. Minutes of APA meeting, November 13, 2009, p. 10.

151. This second decision resulted in the classification and reclassification of about 8,002 acres of land, excluding water. See Exhibit B, Attachment A, p. 1.

152. As a result of this change, approximately 2,825 acres of Low's Lake, Bog Lake and the Bog River were excluded from classification. Compare Exhibit A, Attachment A, p. 1 to Exhibit B, Attachment A, p. 1.

153. At this meeting, DEC acted inconsistently with its prior settlement Stipulation and Order, and voted against "amending the Master Plan to classify the bed and waters of Lows Lake ... as 'wilderness;'"¹⁸

154. The effect of this resolution was that the upland areas in question were classified as either Wilderness or Primitive Areas, but that the bed and waters of Low's Lake, the Bog River and Bog Lake were left unclassified.

155. The stated reasons for this change included concerns that the timing was not right for this action.

¹⁸ Exhibit E, p. 3.

156. This position is contrary to the requirement of the APSLMP (p. 8) that "land acquisitions should be classified as promptly as possible...".

157. The other stated reason for the change was that the shoreline of Low's Lake is in mixed public and private ownership, due to the existence of a small number of inholdings.

158. This position is contrary to the requirement of the APSLMP and the APA Act that, as set forth above at pages 9-14, all Adirondack Forest Preserve lands must be classified pursuant to the APSLMP.

159. Following said re-vote, by a letter dated November 15, 2009, APA transmitted the new proposal which it had approved to the Governor for his approval pursuant to APA Act § 816 and the APSLMP.

160. Upon information and belief, action by the Governor on said proposal is imminent.

161. The November 13, 2009 action of the APA in failing to classify the bed and waters of Low's Lake, the Bog River and Bog Lake was arbitrary and capricious, and affected by error of law, because:

a. It was contrary to the requirement of the APSLMP that "land acquisitions should be classified as promptly as possible...";

b. It was contrary to the requirement of the APA Act and APSLMP that all Adirondack Forest Preserve lands and waters shall be classified;

c. There was no prior proposal to remove the beds and waters of these waterways from the classification, no public notice of this alternative was given, no public hearing was held, and the public had no opportunity to comment thereon;

d. No action was taken by APA to annul the September 11, 2009 classification of the beds and waters of these waterways and that resolution remains in effect; and

e. The proposal to leave the bed and waters of these waterways unclassified was not subjected to environmental review under SEQR.

162. Therefore, the November 13, 2009 vote to classify uplands, but to eliminate the classification of the lake beds, river bed, and waters of Low's Lake, Bog Lake, and the Bog River, should be annulled and the September 11, 2009 vote should be declared to be in full force and effect.

**AS AND FOR A SECOND SEPARATE
AND DISTINCT CAUSE OF ACTION**

163. Each and every allegation set forth above is hereby repeated and realleged.

164. In the alternative, in the event that the Court does not grant the First Cause of Action, the Petitioners seek a

declaration that Hitchins Pond and the parts of Low's Lake and the Bog River which were acquired in 1985 and 1986 were classified as part of the Five Ponds Wilderness Area, Low's Lake Primitive Area and Hitchins Pond Primitive Area when the adjoining upland Forest Preserve Lands were classified in 1987, and that said waters and lands under water remain as part of said Wilderness Area and said Primitive Areas, and/or the Round Lake Wilderness Area and Eastern Five Ponds Access Wilderness Area.

165. As set forth above at page 19, in 1985 and 1986 the State acquired most of western and central Low's Lake, as well as Hitchins Pond and sections of the Bog River, along with adjoining uplands, totaling about 9,135 +/- acres.

166. These lands were all classified as part of the Five Ponds Wilderness Area, Low's Lake Primitive Area and Hitchins Pond Primitive Area in 1987.

167. In a May 11, 1987 memorandum to the APA commissioners, APA staff person Charles W. Scrafford spelled out the acreage involved in this classification action:

The four acquisitions total 9,100 acres +/- acres of land and water. They include Lowes [sic] Lake, Grass Pond, Hitchins Pond and Sections [sic] of the Bog River itself. ...

The most prominent feature of the area is water which totals 2,680 +/- acres and extend in excess of 10 miles from the lower dam on the east to the west shore of Lowes [sic] Lake.

168. Thus, the record before APA at the time shows that the 9,100 +/- acre figure includes about 2,680 acres of water in

Low's Lake, Grass Pond, Hitchins Pond and the Bog River, and that there were only about 6,455 acres of uplands included in the acquisition and classification.

169. The entire 9,100 +/- acres of land and water was approved for classification as Wilderness and Primitive by the APA at its May 1987 meeting.

170. If APA had not classified the 2,680 acres of water identified in the May 1987 Scrafford memo, then it would not have said that it was classifying 9,100 +/- acres of land and water.

171. The July 15, 1987 letter from APA transmitting the package of classifications to Governor Cuomo specifically stated that the Bog River Flow classification totaled "approximately 9,100 acres of land and water."

172. Governor Cuomo's letter dated May 18, 1988 approving said classifications specifically stated that he was approving the classification of the entire 9,100 acres, including the "canoe waters".

173. By letter dated January 9, 2009, from petitioner ADK to the Chairman of APA, this state of facts was brought to the attention of APA. Extensive supporting documentation proving that these waters were classified in 1987 was filed with that letter. APA has never refuted this letter.

174. For the foregoing reasons, the beds and waters of Low's Lake, the Bog River and Hitchins Pond which were acquired in 1985 and 1986 have already been classified as Wilderness and

Primitive by the APA, pursuant to the APSLMP, and it is requested that the Court so declare.

**AS AND FOR A THIRD SEPARATE
AND DISTINCT CAUSE OF ACTION**

175. Each and every allegation set forth above is hereby repeated and realleged.

176. In the alternative, in the event that the Court does not grant the First Cause of Action, the Petitioners seek a declaration that APA has failed to perform a duty enjoined upon it by law, and the issuance of an order of mandamus requiring APA to classify all Forest Preserve lands making up:

a. Any parts of the bed and waters of Low's Lake and the Bog River that were acquired by the State before 1985 and after 1986;

b. The bed and waters of Bog Lake; and

c. The bed and waters of Clear Pond.

177. Likewise, in the event that the Court does not grant the First Cause of Action or the Second Cause of Action, the Petitioners seek an order of mandamus requiring APA to classify all Forest Preserve lands making up:

a. The entire bed and waters of Low's Lake;

b. The bed and waters of the Bog River between Bog Lake and Low's Lower Dam;

c. The bed and waters of Hitchins Pond;

- d. The bed and waters of Bog Lake; and
- e. The bed and waters of Clear Pond.

178. As set forth above at pages 10-14, the bed and waters of these lakes and ponds are part of the Forest Preserve.

179. As set forth above at pages 9-10 and 14-16, APA is mandated by APA Act § 816 and the APSLMP to classify all Forest Preserve lands under the APSLMP's classification system.

180. As set forth above at pages 14-16, APA is mandated by the APSLMP to make such classifications "as promptly as possible" after the land is acquired, and in any event, to do so annually.

181. As set forth above at page 19, most of Low's Lake, the Bog River and Hitchins Pond were acquired by the State in 1985 and 1986.

182. As set forth above at pages 22-25, the remainder of Low's Lake and other nearby waters were acquired by the State before that, or else between 1987 and 2007.

183. As set forth above at page 24, Bog Lake and Clear Pond were acquired by the State in 2006.

184. All of these acquisitions occurred over one year ago and the adjoining uplands have all been classified, yet the APA has failed and refused to classify these Forest Preserve lands and waters, as required by APA Act § 816 and the APSLMP.

185. Indeed, the APA had a more than adequate opportunity to do so, and to comply with the law, when it first voted on the classification at its September 2009 meeting.

186. However, the APA has failed and refused to perform the duty enjoined upon it by law to classify said lands and waters pursuant to the APSLMP.

187. The APA should be ordered to perform said duty "as promptly as possible", as required by the APSLMP (p. 8), within a maximum time of three months from the date of judgment.

WHEREFORE, it is requested that judgment be granted:

(A) On the First Cause of Action, annulling the November 13, 2009 decision by respondent APA that purported to reverse APA's prior September 11, 2009 decision to classify Low's Lake, Bog Lake and certain sections of the Bog River in the Adirondack Forest Preserve as Wilderness or Primitive lands pursuant to the APSLMP;

(B) In the alternative, on the Second Cause of Action, declaring that the 1987 classification by APA of over 9,100 acres of State Forest Preserve land in the vicinity of Low's Lake has already classified most of the lake beds, river beds, and waters which are at issue herein as Wilderness or Primitive lands pursuant to the APSLMP;

(C) In the alternative, on the Third Cause of Action, finding that APA has failed to perform a duty enjoined upon it by law, namely that APA must classify the Adirondack Forest Preserve lands which are the beds and waters of Low's Lake, Bog Lake, Clear Pond, Hitchins Pond, and the Bog River above Low's Lower

Dam, pursuant to the APSLMP, and ordering that APA must adopt said classifications within three months from the date of judgment;

(D) Awarding Petitioners the costs and disbursements of this proceeding;

(E) Awarding Petitioners their legal fees and other expenses pursuant to the New York State Equal Access to Justice Act, CPLR Article 86; and

(F) Granting such other and further relief as may be deemed just and proper by the Court.

/S/ John W. Caffry

Dated: January 11, 2010

Caffry & Flower
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(518)792-1582

STATE OF NEW YORK)
)SS.:
COUNTY OF WARREN)

John W. Caffry, being duly sworn, deposes and says that deponent is the attorney for the petitioners herein; that deponent has read the foregoing petition and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true; and that this verification is made by the deponent because all of the material allegations thereof are within the deponent's personal knowledge.

/S/ John W. Caffry

John W. Caffry

Sworn to before me this

 11th day of January, 2010.

/S/

NOTARY PUBLIC

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