

# After the Fact:

## The Truth About Environmental Enforcement in the Adirondack Park

*An Analysis of the Adirondack Park Agency's  
Enforcement Programs*



The Adirondack Council

November 1999

# ACKNOWLEDGMENTS

This report is the latest in a series of public policy studies on the Adirondack Park issued by the Adirondack Council. The Adirondack Council is an 18,000-member, privately funded, not-for-profit organization dedicated to protecting and enhancing the natural character and human communities of the Adirondack Park through research, education, advocacy and legal action.

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# EXECUTIVE SUMMARY

By all appearances 1999, was a banner year for law enforcement at the Adirondack Park Agency. In a variety of decisions, the APA took on high visibility cases, chasing down violations of the law involving a prominent singer celebrity and then taking on one of the world's largest timber companies, in an effort to protect the natural resources of the Adirondack Park. Like a highly charged auction, the size of fines imposed on these and other high profile violators escalated one after another to new and record levels, unparalleled in the Agency's history. After years of inadequate penalties, the civil fines began to reflect the magnitude of the violations.

But if you look beyond the headlines, the program of enforcement by the Adirondack Park Agency is in shambles. Unintentional and purposeful violators alike are caught up in a cumbersome, ineffective process conducted by a hopelessly overwhelmed, but diligent professional staff. After-the-fact permits routinely sanction out-of-compliance construction. Thousands of backlogged cases go unresolved for lack of staff to move them through the process. Willful and skillful violators can and do take advantage of the lack of resources at the APA.

With three enforcement staff covering a park the size of the neighboring State of Vermont, violations are not generally identified by enforcement staff as a product of their own investigations, but rather from neighbors' complaints and the routine processing of applications for new permits, which, when reviewed, reveal prior, unreported violations. Simply put, the Adirondack Park Agency has little or no idea of what violations of state law are occurring in the Adirondack Park, and lacks the resources to do much about it.

This report provides policy makers and the public a glimpse into the reality of the oversight of development in the Adirondack Park. The report reveals not the bureaucratic dragon of Adirondack lore bent on destroying all development, but instead a rather toothless, besieged and under-funded defender of the Adirondack Park and the laws that, until now, most New Yorkers thought were being enforced.

Immediate assistance can come from the Attorney General of the State of New York. The APA can use assistance in drafting settlement agreements with landowners, tackling the backlog of cases, even recovering unpaid civil fines. The Commissioners of the APA need to turn their attention to enforcement by revising Agency policies and regulations. The most significant assistance can only be secured in the Executive Budget of the Governor. The APA needs additional staffing, the restoration of local planning assistance, and the ability to cover the costs now borne by taxpayers with fees from developers in the Adirondack Park. Finally, the State Legislature should consider giving the Adirondack Park Agency the authority to correct violations of the law by administrative order, a power already given to the Department of Environmental Conservation and other agencies.



*The Adirondack Council*

# INTRODUCTION

## I. What is the Adirondack Park?

The Adirondack Park is the largest park in the contiguous United States. It contains six million acres, covers one-fifth of New York State and is equal in size to neighboring Vermont. Few people realize that the Adirondack Park is nearly three times the size of Yellowstone National Park.

More than half of the Adirondack Park, 3.5 million acres, is private land, devoted principally to forestry, agriculture and open-space recreation. The Park is home for 130,000 permanent and 110,000 seasonal residents, and hosts an estimated nine million visitors each year. The remaining 45 percent of the Park is publicly owned Forest Preserve, protected as “Forever Wild” by the NYS Constitution since 1895.

Plants and wildlife abound in the Adirondack Park, many of them found nowhere else in New York State. Never-cut ancient forests cover more than 100,000 acres of public land.

The western and southern Adirondacks are a gentle landscape of hills, lakes, wetlands, ponds and streams. In the northeast are the High Peaks. Forty-three of them rise above 4,000 feet and 11 have alpine summits that rise above timberline.

Nothing characterizes the Adirondack Park like its waters. The Adirondacks include the headwaters of five major drainage basins. Lake Champlain and the Hudson, Black, St. Lawrence and Mohawk rivers all draw water from the Adirondack Park. Within the Park are more than 2,800 lakes and ponds, and more than 1,500 miles of rivers, fed by an estimated 30,000 miles of brooks and streams.

In the next century and beyond, the Adirondack Park must continue to offer vast areas of undisturbed open space as a sanctuary for native plant and animal species, and as a natural haven for human beings in need of spiritual and physical refreshment. It must also provide for sustainable, resource-based local economies and for the protection of community values in a park setting.

## II. What is the Adirondack Park Agency?

*The Adirondack Park Agency maintains a website on the Internet ([www.northnet.org/adirondackparkagency](http://www.northnet.org/adirondackparkagency)) which provides this description of the Agency and its functions:*

The Adirondack Park Agency is an independent, bipartisan state agency responsible for developing long-range Park policy in a forum that balances statewide concerns and the interests of local governments in the Park. It was created by New York State law in 1971. The legislation defined the makeup and functions of the Agency and authorized the Agency to develop two plans for lands within the Adirondack Park. The approximately 2.5 million acres of public lands in the Park are managed according to the Adirondack Park State Land Master Plan.

**The Adirondack Park Land Use and Development Plan regulates land use and development activities on the 3.5 million acres of privately owned lands. The Agency also administers the State's Wild, Scenic and Recreational Rivers System Act for private lands adjacent to designated rivers in the Park, and the State's Freshwater Wetlands Act within the Park.**

The Agency operates two visitor interpretive centers (VIC's) at Paul Smiths, Franklin County and at Newcomb, Essex County. These Centers are the Park's environmental education and traveler orientation centers.

The Agency Board is composed of 11 members, eight of whom are New York State residents appointed by the Governor and approved by the State Senate. Five of the appointed members must reside within the boundaries of the Park. In addition to the eight appointed members, three members serve in an ex-officio capacity. These are the Commissioners of the Departments of Environmental Conservation and Economic Development, and the Secretary of State. Each member from within the Park must represent a different county and no more than five members can be from one political party.

The Agency's headquarters are located in Ray Brook, halfway between the villages of Lake Placid and Saranac Lake. The board of the APA meets monthly to act on Park policy issues and permit applications.

**Editor's Note:** In 1998, the Adirondack Park Agency had a total budget of \$3,492,800 dollars, with a full time (equivalent) staff of 60 people.

### **III. What authority does the APA have to enforce the laws?**

The Adirondack Park Agency is entrusted by the State Legislature with the protection of the natural resources of the Adirondack Park and, toward that end, with the enforcement of state laws on private lands that are located throughout the six million acre Park, as described in the Adirondack Park Agency Act. As previously mentioned, the APA administers the Wild, Scenic and Recreational Rivers System Act and the Freshwater Wetlands Act.

The authority to enforce the provisions of the APA Act are clearly spelled out in the state statutes and reproduced as an appendix to this report. Also reproduced are the regulations which the APA adopted to carry out the mandate given it by the state legislature .

In general terms, the Adirondack Park Agency Act provides the Agency and its staff with two options in dealing with violators. First, staff attempt to settle with the landowner to bring the site into compliance with the law. State law anticipates that the Agency would levy civil fines against violators as part of a settlement. If settlement is not an option, the Agency is then authorized to refer the case to the Attorney General of the State of New York to pursue through legal channels.

The regulations of the Agency, which were adopted to implement the APA Act, ensure that a landowner believed to be in violation of the law has an opportunity to be heard. If negotiations with enforcement staff fail, the landowner can request a hearing before the Enforcement Committee, which includes several of its Commissioners. While normally informal, at the request of the landowner these hearings can be formal, with a transcript prepared.

### **IV. How do landowners learn about the rules and regulations?**

Most small developers or individual landowners seeking information on the laws that apply in the Park contact the Adirondack Park Agency directly. Thousands of New Yorkers, residents, landowners, developers and tourists write, call or stop in at the APA every year.

Some applicants applying to the Agency for larger projects hire an attorney to shepherd their project through the process. Some attorneys specialize in representing clients before the Agency. Developers with larger projects often hire engineering firms and landscape architects to develop proposals and to ensure compliance with the requirements of the APA for the approval of major projects.

## Publications

A Citizen's Guide to Adirondack Park Agency Land Use Regulations published by the APA provides guidelines to citizens regarding the need for permits and the application process. The Agency also provides copies of the laws and regulations that govern the Agency and its functions free of charge.

## Outreach

To its credit, the APA staff and commissioners have been aggressive in getting out to various locations in the Adirondack Park, at public hearings or informal meetings with local officials, giving local residents an opportunity to see the Agency at work and to talk directly to its leadership. The Agency sponsors an annual Local Government Day with workshops on issues of interest to town officials and the public alike.

## Citizens Contact the APA

The APA receives thousands of phone calls every year from citizens asking for information about the Park and the role of the Agency. From landowners, the simple question is often "Do I need a permit?"

These "jurisdictional inquiries" are often more complex than they seem. The answer often depends on the date a house was constructed or on research on past deeds or subdivision approvals conducted by the landowner or the Agency's staff. It also depends on the level of information provided by the inquirer and its accuracy. According to the 1998 *Annual Report of the Adirondack Park Agency*, the Agency responded in writing to 660 jurisdictional inquiries in that year and conducted 305 in-office meetings with interested parties.

## V. How do violations get reported?

**The APA has no effective way to identify violators on its own. There are only three enforcement officers who must cover the entire six million acre Park. The Agency most frequently learns about violations from sources outside the Agency. Here are the most common methods:**

- 1) Violators may acknowledge their own violation. For example, a family may wish to settle an estate, or a second owner discovers a previous violation while preparing for a new project.
- 2) Neighbors notify the Agency of violations occurring around them.
- 3) Banks often require a permit or written verification from landowners that the APA has no legal jurisdiction, and no approvals are required, before approving a loan or mortgage.
- 4) In towns and villages that have building permits or other zoning tools, local officials may notice potential violations during their own reviews.



# **VI. What is supposed to happen when there is a violation?**

When a violation is reported to the Agency one of the three enforcement officers is assigned to the case. If there are allegations that there is ongoing harm to the environment or the potential for immediate harm, the enforcement officer conducts a site visit as soon as possible. The officer will travel to the site and seek permission from the landowner to gain access.

The officer will ask the violator to stop and if necessary, issue a “cease and desist” order. Enforcement officers are authorized by the Agency to issue such orders on their own authority for a duration of 72 hours. If necessary, a second “cease and desist” order can be issued by the Executive Director, and will be in force indefinitely.

In most cases, even if the enforcement officer has reason to believe that the violation is not causing a serious threat to the environment, enforcement officers will make a site visit. Sometimes several site visits will be required.

In all cases, the enforcement officer must make a preliminary determination as to whether a violation has occurred, and what options exist to remedy any damage and resolve the violation. Preliminary determinations are based not only on the professional judgement of the officer but also on the results of a site visit, and background research for relevant maps, tax and deed history. Enforcement officers often consult with technical, legal and project review staff at the Agency.

If the enforcement officer determines that there is a violation, the enforcement officer brings the matter to an interdisciplinary enforcement team, which evaluates the case. The enforcement team determines the appropriate terms for settlement of the case, then the officer and the assigned attorney then pursue negotiations with the party in violation. If no settlement is reached, the staff team then determines whether to refer the matter (not all cases are referred) to the Enforcement Committee of the Agency, which is comprised of several of the appointed Commissioners. The Enforcement Committee has been delegated the authority to act on the Agency’s behalf. If these efforts also do not lead to a settlement, the matter will most likely be referred to the Attorney General for legal action.

The primary objective of the enforcement staff is to reach an appropriate settlement with the landowner(s). This can be relatively simple or a time-consuming and arduous task. In most cases, the motivation of the violator determines whether they can come to a quick resolution.

Settlement negotiations themselves can involve many parties. A settlement can include the need for transfer of lands between adjacent landowners, replacement of septic systems, relocation of roads, removal of fill from wetlands and the nagging details of who will do what and when. It may require hundreds of hours of staff time to resolve just one dispute where multiple landowners are affected.

## VII. The After-the-Fact Permit

The after-the-fact permit, or ATF, is a frequently used tool of the enforcement team. A settlement agreement with a landowner may often include a provision that the violator will seek an after-the-fact permit from the Agency. In the opinion of the enforcement team, the ATF is often the only option when structures have already been constructed on a parcel without the benefit of a permit from the Agency.

The ATF permit provides several advantages to the enforcement staff. It ensures that the violator of the regulations is subjected to the same process that other applicants, who have followed the law, have been required to pursue. The ATF permit process may also yield additional information about the site and useful documents that the APA staff would not otherwise be able to obtain or develop on its own.

The enforcement process itself is a negotiation. The Agency has little or no ability to demand information from the violator under its regulations. If, however, the violator agrees to seek an ATF permit, the Agency routinely demands additional information from an applicant to ensure adequate review of the permit application. At times, the additional information, such as an engineering design report, could yield critical data that will help the Agency staff assess the adverse impact of the proposed project on the environment and to mitigate those impacts. The ATF permit also allows the Agency to impose conditions, such as the recording of the permit in county records, that can prevent future purchasers from unknowingly violating Agency standards in the Park.

## VIII. Why is enforcement important?

It is not uncommon for a visitor to the Adirondack Park on a “windshield tour” to observe some development or structure along the roadside and comment, “Why would *they* allow that to happen? *We* expect that there are responsible people who are looking out for *our* Park.”

The damage to the Adirondack Park from violations of the law go well beyond the poorly sited building next to the roadway. Every year wetlands that are critical for water quality, wildlife and flood control are illegally filled. Septic systems that are placed too close to water bodies degrade their purity. Vegetation along shorelines that filters and slows the flow of polluting runoff from lawns and construction is cut down. Illegal clear cutting destroys wildlife habitat.

Each of these events individually may take place only on an acre or two of the 3.5 million acres of private land in the Park. In and of themselves, they may seem to be small potatoes. But in the aggregate and over time, the cumulative effect on the natural resources of the Adirondack Park can be substantial and irreversible. The result has been described as “death by a thousand cuts.”

# REALITY CHECK

*We know what the law requires. We know how the law is supposed to work. We know what we expect from the Adirondack Park Agency. Is the Agency doing the job? Can it do the job? Is the law being enforced? Is the Adirondack Park being protected? Our investigation yielded some disturbing and surprising answers.*

## A. Current Staffing is Woefully Inadequate

In 1993, then APA Chairman John Collins, in an effort to boost public confidence in the Adirondack Park Agency, announced that he was forming a citizens task force comprised of local government officials, practicing attorneys and other interested parties. They discussed ways to improve the Agency's efficiency and effectiveness, within the scope of its current statutory authority. The Agency had been under attack for years as being inconsistent, intimidating and incomprehensible.

After numerous meetings, the final report of the *Task Force on Expediting Adirondack Park Agency Operations and Simplifying its Procedures* was issued in May of 1994. The report made dozens of recommendations, most of which the Agency has dutifully, but slowly, pursued. *The Citizens Task Force Report*, as it was called, found "the Agency's present enforcement division is inadequately staffed to handle known violations." (p.27)

This same issue had been raised four years before by *The Adirondack Park in the Twenty First Century*, the report of a study commission established by then-Governor Mario Cuomo. Volume 2 of the technical reports that supported the findings and recommendations of the Commission observed:

"Agency monitoring and enforcement function is criticized as being completely overwhelmed by the volume of the activity of the park . . . The effort to provide for a credible monitoring and enforcement program has repeatedly been frustrated by budgetary limitations. The result has been to respond only to reported violations. According to enforcement staff only a fraction of the reported (and subsequently field checked) violations result in enforcement action by the Agency's enforcement committee. Clearly, responding to reported violations take valuable staff time from systematic review of specific areas and projects." (p.202)

For the next five years, the recommendations of the Governor's Commission were hotly debated. The budget of the Adirondack Park Agency, however, remained relatively unchanged. Then, in 1996, Governor George Pataki proposed across-the-board cuts in staffing for most state agencies, including the Adirondack Park Agency. The cuts threatened to devastate the enforcement capability of the Agency. The move prompted four former chairmen of the APA to write to the Governor asking him to reverse his course of action:

". . . In your last State of the State message, you called for the implementation of the recommendations of the Task Force on Expediting Agency Operations and Simplifying Its Proce-

dures. The Task Force Report called for an increase of eleven members of the staff of the Agency. The present budget calls for a decrease of thirteen. If the present cuts are allowed to stand, one enforcement officer of three will go, two attorneys of five will go . . .”

The cuts to the APA were restored in negotiations with the Legislature. Later in 1996, in its formal response to the recommendation by the *Citizens Task Force* that the Agency be given adequate funding for enforcement staff, the Agency responded:

“We agree wholeheartedly. We hope that this recommendation includes adequate resources for education and the prevention of violations. We have a pressing need now for one cartographic/paralegal position and at least one senior level enforcement officer, or the equivalent. We also need an additional attorney whose time will be devoted to enforcement.”

## **Incredible Backlog**

**APA staff estimate that they have amassed a backlog of enforcement cases of at least one thousand, and perhaps as many as three thousand, unresolved violations.**

Over the past three years, the budget of the Agency has remained unchanged, with vacancies filled over time as they occur. In August of 1999, in an update on the progress made by the Agency in its implementation of the recommendation of the *Citizens Task Force*, the Agency conceded that five years later, it still needs enforcement staff: “The Agency agrees that additional staff resources are an important priority for the enforcement program.”

## *A Tale of Two Parks*

### **In the Adirondack Park**

The Adirondack Park Agency enforces the provisions of the Executive Law that govern land use decisions on 3.5 million acres, scattered over nearly 10,000 square miles. Its staff is also responsible for the enforcement of the Freshwater Wetlands Act and the Wild, Scenic and Recreational Rivers Act throughout the Adirondack Park. It has three enforcement officers and three attorneys.

### **In the Catskill Park & Westchester**

The New York City Department of Environmental Protection (DEP) enforces land use rules in the watershed around the reservoirs of the Catskill Park, and in Westchester County, that supply New York City’s drinking water. The entire New York City watershed is roughly 2,000 square miles, only one-fifth of the size of the Adirondack Park. DEP has 60 enforcement inspectors and 10 attorneys.

The APA has three of its five attorneys assigned to assist the enforcement officers. They also assist the project review staff, develop regulatory initiatives, conduct legal research and prepare administrative hearings.

A review of enforcement staff reports submitted to the Commissioners of the Agency over the past two years is telling (see appendices). Every month, more new files are opened than old files closed. Many cases are worked on, but few are resolved. The buildup of the case backlog is steady.

Unsettled cases linger and then are overshadowed by other more pressing cases. The Agency has no ability to direct a resolution of the matter on its own authority. Many cases that are simple to solve are pushed to the bottom of the pile because the Agency does not have the resources to settle cases even with people who are willing to comply with the Agency's conditions.

Politically charged cases, like cream, rise to the top. Other cases stall somewhere along the process. Settlement agreements are not drafted. Cases are not moved up the chain. Not all unresolved cases are referred to the Attorney General for legal action.

Ten years after the Commission report first brought public attention to the fact that enforcement staffing was inadequate to do the job, staffing still has not increased.

## **B. APA Lacks Authority**

**There is no mystery to why there is a current backlog of a thousand or more cases. The Agency has no ability to direct a resolution of the matter on its own authority. Other agencies can impose an administrative penalty or remedy on a landowner without the need to refer the case to the Attorney General for court action.**

When an alleged violator will not settle with the enforcement staff, the case can be referred to the Enforcement Committee. The Enforcement Committee, which includes members of the Agency, may initiate legal action, but routinely seeks a settlement, which is itself a time-consuming process. A landowner may request a hearing before the committee and may demand that the hearing be formal, with a written transcript. The assigned enforcement officer must suspend other work in order to attend the hearing. Despite all the effort at settlement, the hearings, and all the time put in by the APA staff, the landowner may still decline to settle. Only violators who choose to settle, do settle.

In some ways, the Agency's own regulations perpetuate the settlement game. After the informal or formal hearing offered the alleged violator, the enforcement committee meets to compose an offer of settlement to be forwarded to the violator. The party then can accept the offer of settlement, appeal the decision to the full Agency or simply not respond. In time, the enforcement committee can elect to shelve the case or to refer the matter to the Attorney General.

## C. A Fundamental Provision of the APA Act Has Failed

The final report of the *Task Force on Expediting Adirondack Park Agency Operations and Simplifying Its Procedures* was issued in May of 1994. Recommendation 99 was for the Agency to revive the “circuit rider” program. The circuit rider program lost support in the State Legislature and its funding. In the few years it was in existence, the APA provided contractual or direct technical and legal assistance by the APA staff to local government officials, planning boards, zoning boards of appeals and building inspectors.

In January of 1996, the Agency responded to the recommendation by stating “the Agency’s previous budget submission included a request for restoration of local planning assistance funds, including circuit riders. This recommendation will continue to be pursued in the context of future Agency budget proposals.” In August of 1999, the Agency reported “While the Agency supports this recommendation, funds have not been available to pursue it.”

Local planning assistance is not a luxury in the Adirondack Park, it is a necessity. Consider the findings of a report from the Legislative Commission on Rural Resources released in September of 1999:

The bipartisan Legislative Commission on Rural Resources conducted a survey of Land Use Planning and Regulations in New York State Municipalities. The survey shows which municipalities are applying selected land use and community development planning tools and makes note of variations among rural and metropolitan usage of specific tools. The survey “illustrates the continuing difference and diversity among municipalities in the state in their capacity or desire to utilize planning and zoning tools. The higher density development in cities, suburbs and villages -- and the more rapid change found in these places -- creates a climate more receptive to land use regulation than is found in many remote, rural towns.” (part one, p.3)

The data the legislative commission collected shows rural towns and villages throughout the state have established fewer zoning tools than many suburban and metropolitan areas. **The Adirondack Council, using the commission’s data, took a closer look at towns and villages located within the Adirondack Park. We found that on average, rural towns and villages in the Park have even fewer zoning tools than rural communities elsewhere in the state. More than twenty-five years after the creation of the APA, only 15 of the Park’s 105 towns and villages have APA approved local land use programs.**

The Legislative Commission surveyed whether zoning regulations exist in rural towns and villages statewide and found 64% of rural towns and 83% of rural villages have zoning regulations. When the cumulative data on rural towns and villages is compared to that of rural towns and villages lying within the Adirondack Park, we find 51% of towns and 67% of villages inside the Park have existing zoning regulations.

The existence of subdivision regulations was also surveyed by the Legislative Commission. It found 71% of towns and 66% of villages statewide have subdivision regulations while only 66%

of rural towns and 55% of rural villages regulate subdivisions. Of the towns and villages located within the Adirondack Park, just 51% of towns and 50% of villages have subdivision regulations.

Towns or villages within the Adirondack Park still lack land management tools.

**The State Legislature assumed incorrectly that local governments would be eager to take responsibility for smaller development projects in the Adirondack Park.**

In the absence of local regulation, the state legislature provided, in 1973, for the APA to monitor and review development on private lands in the Adirondack Park. The Legislature also created a mechanism for local governments to assume control of smaller projects proposed within their political boundaries. The APA Act provides for the review and approval of many projects to be returned to local decision makers when the town or village receives approval for a local land use program from the APA. An approved local program must contain certain land use regulatory elements, including subdivision and zoning regulations.

Since so few communities have bothered to develop APA-approved local land use plans, the APA's staff and commissioners are still consumed with the review and enforcement of hundreds of minor development projects throughout the Park each year.

**The sponsors of the Adirondack Park Agency Act never anticipated that more than 25 years later, hundreds of minor development projects would still be coming before the APA for review. The minor projects contribute to the volume of workload for the project review staff and the attorneys, and to the backlog of the enforcement team. Local planning assistance is necessary for localities to effectively assume authority for minor projects in their communities in the Adirondack Park.**

## **D. The Agency has failed to address the other shortcomings of its enforcement program**

**The current enforcement regulations for the Park Agency were adopted in 1982. The six goals of the Agency's enforcement policy, adopted as guidelines in 1991 and unchanged since that time are reproduced and then discussed below.**

**Enforcement Goal 1:** To provide due process to alleged violators.

**Comment:** In the name of due process, the APA developed a cumbersome process that serves the willful violator best. The refusal to acknowledge a "notice of possible violation" from the Agency is statistically the best response which a violator can make to avoid prosecution.

**Enforcement Goal 2:** To prevent environmental harm and protect the public interest by helping landowners avoid violations.

**Comment:** With limited financial resources, the Agency has diligently attempted to inform interested landowners of their rights and obligations under the law. The myth of tough enforcement,

ironically perpetuated by some of the APA's most fervent detractors, has served the Agency well.

**Enforcement Goal 3:** To remedy environmental harm and protect the public interest by requiring both immediate and long-term remediation actions.

**Comment:** The staff and members of the APA clearly identify on-going and imminent harm to the environment as its highest remediation priority and has a positive record of accomplishment when such environmental harm is identified.

**Enforcement Goal 4:** To treat similarly violations involving similar circumstances.

**Comment:** State Agency sponsored projects, illustrated best by the Gabriels Prison Case Study elsewhere in this report, have consistently frustrated the Agency. Its record feeds the public impression of a double-standard. The adoption of Executive Order 150, which requires state agencies to behave before the APA as if they were private applicants, has not resulted in meaningful reform.

**Enforcement Goal 5:** To deter violations by the use of appropriate and significant civil penalties, and by the elimination of profit derived from the violation.

**Comment:** The Old Valcour and Snug Harbor Marinas project, a case study described elsewhere in this report, resulted in the first large fine ever imposed by the APA. It was also innovative in that the civil penalty selected was based in part on the commercial profits reaped by the owner as a direct result of the violation. The 1991 guidelines also state that there shall be a civil penalty imposed in every case except in cases of extreme hardship or where the violation was insignificant. The predictable outcome of a civil penalty is an important deterrent to potential violators. In practice, a review of enforcement reports over the last two years reveals that in the majority of cases, no fine is imposed.

**Enforcement Goal 6.** To maximize efficiency in the settlement of enforcement matters.

**Comment:** This goal will never be realized under the present circumstances. Additions to staff and revisions to the Agency procedures, regulations, and legal authority are necessary for the Agency to effectively offer an efficient approach to enforcement.



# RECOMMENDATIONS

## **(1) Add New Enforcement Staff**

Additional permanent staff should be added to the enforcement team of the Adirondack Park Agency in the upcoming state budget. The number of enforcement officers should be doubled, to a total of six. The addition of three more attorneys will not only assist in tackling the backlog of thousands of enforcement cases, but will also free attorney time to assist all other operations of the APA to serve the public more quickly and effectively.

## **(2) Revise Enforcement Laws and Regulations**

It has been seventeen years since the adoption of the regulations governing enforcement of the laws protecting the Adirondack Park. The Agency still has no program designed to identify violations in the Park.. The cumbersome procedures that are now provided for in the Agency's regulations only hamstring the Agency's ability to act swiftly and directly with violators.

The Agency's limited ability to act on violations, other than by settling with potential violators, must be addressed. The Agency should be given explicit authority to direct remediation of a site by administrative order. The absence of such authority is a significant shortcoming in the APA Act, especially since other agencies with similar functions are fully equipped to issue administrative orders.

## **(3) Restore State Funding for Local Planning Assistance**

The restoration of local planning assistance funds, administered by the APA, should be a budget priority for the Governor and the State Legislature. The regulatory scheme of the APA Act anticipates that local governments will seek to assume the review of small projects in their communities by adopting local land use programs. This was meant to relieve the pressure of dealing with hundreds of small projects from the board of commissioners. But this delegation of zoning authority to local governments is substantially incomplete. To date, only 15 of the 105 towns and villages wholly or partially within the Adirondack Park have approved local land use programs.

The lack of local planning assistance has frustrated the original intent of the law. The Pataki Administration has publicly expressed its support for local planning and has encouraged local governments to seek an approved local land use program from the Agency. Without additional funding to the APA, only limited progress can be expected.

## **(4) The Attorney General Should Create an Adirondack Park Enforcement Team**

Attorney General Eliot Spitzer has, in his short tenure, already achieved some notoriety for aggressive and creative solutions to long-standing issues. Environmental enforcement in the Adirondack Park, as we have indicated, is stalled for lack of funding and burdened by a backlog of cases that have grown every

year. We urge the Attorney General to establish a Special Team within the Office of the Attorney General to assist the Adirondack Park Agency staff in expediting the resolution of cases pending before the Agency as well as tackling the backlog of thousands of cases that are awaiting resolution. We urge the Commissioners of the Adirondack Park Agency to welcome any such assistance.

**The Attorney General's Adirondack Park Enforcement Team should:**

1. Assist APA staff in the drafting of settlement offers to violators.
2. Expedite the conduct of administrative hearings on behalf of the APA.
3. Recover fines that have not been collected.
4. Take action to speed the referral of cases to the Attorney General.
5. Take steps to ensure prompt action when cases are referred.
6. Take steps to ensure that every case not settled goes to the Attorney General.

## **(5) APA Commissioners Need to Make Enforcement a Priority**

As a body, the members of the Adirondack Park Agency have been generally ineffective in persuading the Governor or the State Legislature to increase funding for the Agency as a whole, much less for enforcement staff. The piper is now being paid.

The appointed citizen members of the Agency, who number a majority of eight by law, must work together to address the shortcomings of the enforcement program. Whether an in-Park or out-of-Park resident, members of the APA need to address the budget, the backlog, and the process.

And there is much to do. The enforcement guidelines for the Agency, are well conceived, but are inconsistently applied. The guidelines call for a civil penalty to be assessed in most cases. This guideline is routinely ignored.

Over the years, the Agency has adopted as a routine practice, the after-the-fact permit. As the name implies, an after-the-fact permit allows a violator of the Adirondack Park Agency Act to proceed with a project with the blessing of the Agency by incorporating the violation, and in most cases the illegal structures built as a result, into a legal permit. After-the-fact permits, while a useful tool, have become a coping mechanism, used to hide the flaws in the process and compensate for a the lack of staff and resources. Conceived as the exception, after-the-fact permits are now the rule.

Other initiatives that will improve enforcement and compliance with the law have been left to rot on the vine. The APA's much ballyhooed regulatory reform program is moving at a pace that only a snail could love. No proposal has gone to formal hearing. There has been little public discussion of reforms that will improve enforcement and compliance.

Action is also stalled on a proposed environmental benefit policy, which would allow some civil penalties to be deferred in favor of funding for a project that would have direct benefit to the Park. The 1998 Annual Report of the APA states, "The Agency is also reviewing and considering for adoption a policy to use environmental benefit projects in lieu of a portion of a civil penalty." As of the October 1999 meeting of the Agency, the policy remains in draft form.

When high visibility cases are before the Agency, the Commissioners have discharged their duties in a professional manner. It is when the camera lights are turned off that the real work of the Agency gets done.

## **(6) Give the APA the Authority to Collect Fees and Fines**

### **A. Application fees will shift costs from taxpayers to developers**

Governor George Pataki should propose in the 2000-2001 Executive Budget and the State Legislature should approve legislation that would authorize the Adirondack Park Agency to collect fees from permit applicants. The cost of reviewing and acting upon applications for new projects within the Adirondack Park is born solely by the taxpayers. Applicants pay nothing to compensate taxpayers for the extensive review of projects that they stand to profit from and that may even eventually be abandoned. A classic example in recent years was the fruitless effort by the Wal-Mart Corporation to site a new store near Lake Placid, which alone consumed hundreds of hours of staff time. Major projects can take months of work by Agency staff, weeks of administrative hearings and the processing of thousands of pages of documents.

The Adirondack Park Agency, to our knowledge, is the only major regulatory agency in the State of New York without even a minimal fee structure to cover costs. Even the Lake George Park Commission, which lies within the Adirondack Park, has such authority. Application fees are charged by local governments throughout the state and by localities within the Adirondack Park. The adoption of a fee system alone will not meet the need for new funds for the Agency. The Legislature should approve a dedicated revenue fund to receive the fees and return them directly to the APA.

Application fees can be based on the size and type of project, on a sliding scale to minimize fees for minor projects. Projects sponsored by local governments should be exempt. Developers should bear the cost of legal notices, accommodations for public hearings, and for stenographic hearing transcripts.

In fact, the revenue from major projects will benefit minor project applicants, who are overwhelmingly residents of the Park. Minor project applicants readily receive agency staff advice on filling out applications and are encouraged to seek consultations with staff. Major project developers usually employ teams of professionals to prepare their applications.

### **B. Civil penalties should be dedicated to Agency programs**

In 1999, the New York State Assembly approved the establishment of a dedicated revenue fund to receive fines assessed against violators of the APA Act and to return these monies to the Agency directly, rather than to the general fund of the State. These funds, while not substantial, could be used to improve service to the general public. While this proposal was not taken up by the Senate and the Governor in final budget negotiations, it too has merit and deserves to be adopted into law.

# CASE STUDIES

## A. Estate of Baldwin

**The violations that appear before the enforcement staff at the Adirondack Park Agency run the gamut. Here is a recent example of perhaps the simplest form of violation.**

Mr. Baldwin, and subsequently the Baldwin estate, subdivided the original contiguous acreage into three parcels. The subject property contained wetlands and was therefore subject to the jurisdiction of the APA. When two lots were sold, a subdivision permit was required but never obtained. The Baldwin Estate and the two other property owners agreed to submit an application for an after-the-fact three-lot subdivision. No civil penalty was collected.

Enforcement number E99-007

## B. Jerome Schick

**The following example demonstrates what little the Agency actually can do in the face of an obvious violation.**

In this case Jerome Schick, applicant for the ATF permit, “requests after-the-fact approval for the two lot subdivision creating the 116.5 acre parcel and requests after-the-fact approval for the installation of the 14-foot-by-60-foot mobile home. The mobile home was installed approximately 150 feet west of the right-of-way of Stony Creek Road. The applicant has routinely cleared the vegetation, except for several mature trees, between the road and the area developed by the mobile home, making the mobile home and related development visible from Stony Creek Road. The mobile home currently utilizes a 1,000-gallon septic tank connected to a dry well for the on-site wastewater treatment system, instead of a conventional absorption field leaching system. Current New York State Department of Health standards do not allow the use of dry wells for new development.”

The Agency settled with the applicant for an after-the-fact permit which allows for one mobile home, and no more than 13 additional mobile homes, single family dwellings or principal buildings, on the 116.5 acre parcel being authorized unless the overall intensity guidelines of the APA Act are amended. No additional existing vegetation within 50 feet of the right-of-way of Stony Creek Road would be cut or disturbed, except for an area not to exceed 25 feet in width for the driveway and utilities.

Project number 98-185

## C. Robert John Lange

**This case was notorious because the applicant, who is also known as “Mutt” Lange, was record producer for his spouse, singer Shania Twain. The Agency’s investigation was denounced by local officials and the press as a campaign to harass celebrities, long before the facts were in.**

When Robert Lange bought the project site, it contained a large residential structure, the historic Sunbeam Lodge, several smaller structures, Dexter Lake, and its wetlands. The applicant razed the existing structures and constructed a music studio complex (the music studio plus guest’s and nanny’s quarters) without obtaining a permit from the Adirondack Park Agency. After beginning the construction without Agency permission, the architect obtained a building permit from the town of Waverly on December 20, 1994.

When Agency staff first visited the site on January 3, 1996 the studio complex was complete. Staff members also found a new foundation for a dwelling to be built at the site of the former lodge and numerous other structures on the shore of Dexter Lake, in violation of the Adirondack Park Agency Act. This visit also found Lange had placed fill in, and constructed structures in, jurisdictional wetlands. It noted he had placed a septic system in a wetland and conducted major construction without a permit, including a 40-foot-tall-plus building that houses a recording studio.

The Agency and Lange settled the violations on November 16, 1998. For settlement Lange was required to remove certain small structures and the fill from the wetlands, pay a civil penalty, undertake an environmental benefit project, and seek a permit, after-the-fact for the studio complex and filled wetland.

The settlement over violations of the agency’s land use laws and water quality regulations included \$45,000 in fines and environmental benefit projects (\$20,000 fine and \$25,000 to an unspecified environmental project benefitting wetlands and shoreline protection). At the time, it was the largest penalty ever imposed by the APA.

Project number 99-18



## **D. New York State Department of Correctional Services, Camp Gabriels**

**Despite an executive order from two consecutive Governors that state agencies must comply with the rules for private developers in the Adirondack Park, the APA is powerless to deal with repeated violations by other state agencies.**

In March of 1982, the Agency recommended to the Department of Correctional Services (DOCS) that construction of Camp Gabriels minimum security correctional facility not be undertaken. In April 1982, DOCS advised the Agency that they would proceed and lawfully opened the facility in 1982 with 153 inmates. Since its opening, the facility has expanded by an additional 210 inmates to its current capacity of 363 inmates and to 156 employees.

Twenty-six new structures were constructed between 1983 and 1996. Improvements were also made to the infrastructure serving the facility including water storage tanks, new wells and improvements at the wastewater treatment plant. DOCS never submitted plans for the improvements and expansion.

The entire expansion and infrastructure development project was subject to review by the APA by virtue of Governor's Executive Order No. 150 "New Land Use and Development of State Agencies within the Adirondack Park." Executive Order 150 establishes, as State policy, that all agencies of the State will comply with the terms and conditions of decision documents issued by the Adirondack Park Agency following any comprehensive review of new land use or development by the APA. The Executive Order, issued first by Governor Mario Cuomo after the 1990 report, *The Adirondack Park in the Twenty-First Century*, and then again by his successor Governor George Pataki, seeks to bring the majority of state agency projects in the Adirondack Park under the review of the APA. Ironically, it was the creation of



Camp Gabriels over the objection of the APA that gave impetus to the development and issuance of the Executive Order.

“The Executive Order serves as a strong impetus towards collaborative planning, design and operation of State facilities consistent with the intent of the Adirondack Park Agency Act. Without it, a cohesive, intelligent approach to development in the Park would be lacking, imperiling the natural beauty and resources of the Park which fuel its economy to the benefit of the entire State. The double-standard existing prior to EO 150 -- whereby State agencies could choose not to conform their development activities to the environmental safeguards required of private property owners -- simply does not belong in a state intent on economic recovery and regulatory reform.” (From APA memo 3/28/95.)

Did Executive Order 150 really eliminate the double-standard? Local officials pointed to the Gabriels permit application as an indicator of whether the Agency would be fair-handed in its treatment of violations by public entities versus private entities.

The APA issued the permit, after the fact. No civil penalty was assessed. The NYS Department of Correctional Services was granted a conditional approval for additional construction at the minimum security facility. NYS DOCS proposed improvements consisted of enhancing its existing wastewater treatment plant, constructing a new wastewater treatment plant, adding onto an existing physical/heating plant and existing dining facility, and building a new maintenance building.

Project number 97-112

## E. Old Valcour and Snug Harbor Marinas

**While it is common for landowners to ignore the Agency, it is unusual for violators to ignore the denial of a permit for a project.**

Without an APA permit, the two owners of a marina complex in Clinton County expanded the facility far beyond what the law allowed, despite repeated warnings from the Agency. The Agency estimated that the owners had reaped huge profits from fees charged for illegal docking and mooring facilities. After negotiations, the APA levied what was then the largest civil fine in its history. A state court upheld the civil penalty and ordered the current owner to pay a fine of \$10,250. The former owner settled his case with the APA by paying a fine of \$7,500.

The excess docks and moorings present in 1990 are illustrated in table 4 (“Comparison of permitted docks, moorings, and total boats to actual docks, moorings and total boats present in 1990”). The data is taken from APA documents.

The violations represented a flagrant disregard for APA regulations. In 1976, Old Valcour Marina had requested (project 76-190) to expand the marina and a floating breakwater and bulkheads. The project was denied “because there was no way to accommodate sewage disposal at that time, lack of necessary engineering plans for bulkhead construction and impacts to aesthetic character of Route 9 corridor.”

The adjacent Snug Harbor Marina had a similar history of seeking approval but constructing additions without receiving approval. Project 86-184 had requested approval for the addition of two 8-by-300-foot docks to accommodate 50 boats “many of which are now moored.” APA responded by approving the additions but stated that the moorings were to be abandoned with no net increase in boats. Project 86-317, construction of two metal pole barns, was approved. No permit was issued in response to project 87-179 (two floating tire breakwaters) because the project was amended. Permission (87-416) for two floating tire breakwaters was requested again but not issued because the expansion had already occurred and it had become an enforcement issue.

After 87-416 was deemed an enforcement issue, APA and the applicant agreed on simultaneous review of the expansion of the two marinas.

	Old Valcour		Snug Harbor	
	<b>permitted</b>	<b>actual</b>	<b>permitted</b>	<b>actual</b>
<b>docks</b>	0	100	100	108
<b>moorings</b>	62	100	0	67
<b>total boats</b>	62	191	100	175

Enforcement number E90-129



## **F. Champion International**

**Sometimes the magnitude of the lack of information about violations available to the APA and its staff is stunning. Take the case of the proposed purchase of easements and fee lands from the Champion International paper company by the State of New York, the largest single land protection project ever undertaken by the State of New York in the Adirondack Park.**

The purchase involved several private corporations and the State of New York, a project which required the subdivision of the original Champion lands. It was only in the course of completing the subdivision permit application that the scale of on-going violations on the Champion lands became apparent. Excerpts from APA project review documents reveal the full story:

“During their long-standing ownership of the project site, Champion, and its predecessor, St. Regis Paper Company, have leased portions of the site to approximately 45 hunting clubs and individuals for hunting, fishing and other seasonal recreational activities. The lands are currently subject to numerous short-term hunting and fishing club leases and contain approximately 298 hunting camps and 14 accessory structures.

In addition, for a number of years, Champion has managed two “lease subdivisions” on its lands surrounding Soft Maple Reservoir in the Towns of Croghan and Watson, Lewis County. On May 28, 1973 the Agency issued Interim Permit 90 authorizing a 111-lot lease subdivision known as “Soft Maple Flow Lots” for seasonal-use camps on the north shore of the reservoir. No agency approval was applied for or issued for the lease subdivision on the south shore known as “Eagle Falls Camp Lots.”

Investigations by Agency staff, both prior to and during its review of the subject permit application, revealed that numerous apparent violations of other laws and regulations administered by the Agency had occurred on various portions of the subject landholding between the August 1, 1973 effective date of the Adirondack Park Land Use and Development Plan and the present. The apparent violations were associated both with the hunting camp use of the property and with the seasonal recreation camps on Soft Maple Reservoir.

Based upon information submitted by Champion and limited information obtained by Agency staff during site visits to selected portions of the project site, staff identified 148 “apparent” violations (staff had reasonable cause to believe violations occurred) and an additional approximately 146 “possible violations” (staff suspects noncompliance based on limited current information).

Apparent violations identified by staff included violations of each of the three statutes administered by the Agency (APA Act, Rivers Act and Wetlands Act) and are more specifically described as noncompliance with:

- (i) the minimum 100-foot shoreline sewage system setback restriction which applies by operation of law post-August 1, 1973 pursuant to §906(1)(b) of the APA Act;
- (ii) the minimum 100-foot shoreline structure setback restriction which similarly applies in Resource Management areas pursuant to §806(1)(2);
- (iii) the permit requirement for single family dwellings pursuant to §810(2)(d)(1);

(iv) the permit requirement for hunting and fishing cabins involving 500 or more square feet of floor space pursuant to §810.92(d)(4);

(v) the permit requirement for “Rivers projects” pursuant to 9 NYCRR 588.5;

(vi) the permit requirement for “Wetlands projects” pursuant to 9 NYCRR 587.3(n);

(vii) Conditions of Agency Interim Permit 90; and

(viii) various other statutory and regulatory provisions.

Champion agreed to the following terms of settlement. First, Champion agreed to conduct a further investigation of possible noncompliance of sewage systems with the legal requirement to setback at least 100 feet from water features and wetlands. Second, Champion agreed to conduct further investigation of the location and design of all post-1973 septic systems. Third, Champion agreed to post a financial guarantee in the amount of \$500,000. Fourth, the permit application may include some “non-building” lots, pending Agency approval. Fifth, Champion also agreed to pay a civil penalty of \$99,900 and to implement three environmental benefit projects.”

Enforcement number E99-025

# REFERENCES

The information compiled for this report was taken from a variety of sources including the monthly APA agendas and enforcement committee reports; *A Citizen's Guide to Adirondack Park Agency Land Use Regulations* by the APA; the APA website; Annual APA reports; *The Adirondack Park in the Twenty-First Century*; and, interviews with present and former staff and commissioners of the Adirondack Park Agency.