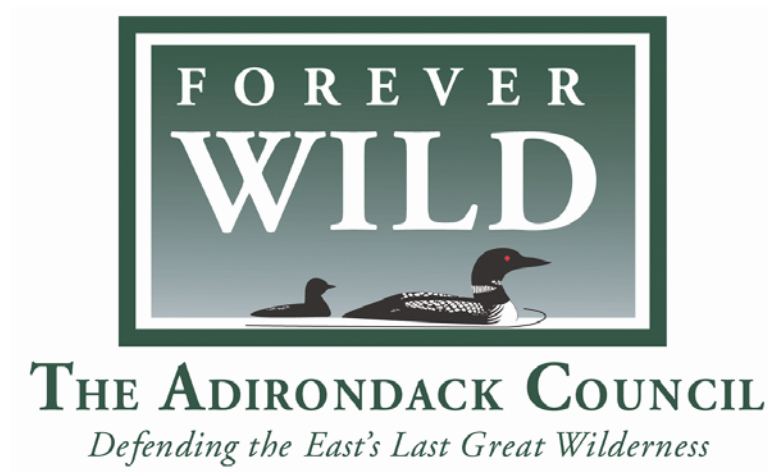


# Swept Under the Rug

The Truth about Environmental Enforcement in the  
Adirondack Park

An Update on the Adirondack Park Agency's Enforcement Programs



December 2006

*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 ensuring the ecological integrity and wild character of the Adirondack Park through research, education, advocacy and legal action.*

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## EXECUTIVE SUMMARY

This publication is the third in a series of reports issued by the Adirondack Council on the status of enforcement within the Adirondack Park Agency (APA). The first two reports, *After the Fact* (1999) and *Falling Further Behind* (2001) detailed how a backlog of thousands of enforcement cases had built up over time, due to a lack of adequate staffing and regulations that limited the Agency's ability to enforce the laws. The disposition of those cases often resulted in few, if any, consequences for the offenders.

Over the last five years since we issued *Falling Further Behind*, the APA has made some improvements to the program. APA hired new enforcement staff and by the end of 2001, they claimed to have closed over 2,600 cases that year alone. However, once you look beyond the raw numbers of cases opened and closed, you will see many of the APA's enforcement problems have not gone away. Many of the cases that were closed were done so by questionable methods. The APA still lacks the staff to actively pursue violations, except those brought to their attention by neighbors or unwitting property owners seeking new permits. Even without actively seeking out violators, APA's overworked staff cannot keep up with the caseload, let alone work on needed policy updates. The backlog of cases is once again mounting. Through the first ten months of this year, 75 more cases have been opened than closed.

Changes in both staffing levels and public policy are required to correct the way that enforcement is handled at the APA. Not only is more staff desperately needed, but the Agency staff must also be given the necessary tools to adequately and actively seek out violators and to resolve cases with legitimate penalties in an equitable manner.

Our six previous recommendations remain in place for improving enforcement at the APA:

- Add new enforcement staff
- Revise enforcement laws and regulations
- Restore State funding for local planning assistance
- The Attorney General should create an Adirondack Park enforcement team
- APA Commissioners need to make enforcement a top priority
- Give the APA the authority to collect fees and fines

We believe that some of the recent recommendations provided by the enforcement staff at the Agency are also worthwhile. These include:

- A single procedure for all types of enforcement cases
- A career track for enforcement staff
- Helping to prevent future violations before they occur

This report also details some of the efforts in the last few years to reform the enforcement program via legislation. These attempts would have done little to change the Agency's practices, except for absolving some violators of previous wrongdoings. We found these proposals to be inadequate.

We also provide case studies which demonstrate some of the problems with enforcement which occur on a daily basis at the Adirondack Park Agency. All of the cases were settled after the new enforcement regulations went into effect.

With new administrations about to take over in Albany, we are hopeful that Governor-elect Spitzer, along with Attorney General-elect Cuomo will work with the APA to provide the necessary resources to make these recommendations into reality and create a truly legitimate enforcement division at the APA.

**TABLE 1 ADIRONDACK PARK AGENCY ENFORCEMENT ACTIVITY  
2001-2006**

<b>YEAR</b>	<b>CASES OPENED</b>	<b>CASES CLOSED / RESOLVED / NO VIOLATION</b>
2001	246	2,607 <sup>1</sup>
2002	268	293
2003	246	1,101 <sup>2</sup>
2004	390	420 <sup>3</sup>
2005	388	402 <sup>4</sup>
2006 ( <i>through 11/30/06</i> )	435	380
<b>Total</b>	<b>1,973</b>	<b>5,203</b> <i>Minus 3,295 (previously resolved or closed administratively)</i> <b>Actual Total = 1,908</b>

Table 1 below shows how the level of cases opened vs. cases closed has been artificially shifted towards the closed side since the issuance of our last enforcement report. Over 3,000 of the cases were creatively resolved to sweep the problem under the rug. Almost 2,500 closed cases were considered to be an updating of computer records. Another 800 were Agency staff waving the white flag of surrender and deciding they would not investigate the cases.

<sup>1</sup> Including 2,474 cases “previously resolved but not recorded on computer”

<sup>2</sup> Including 770 that were closed administratively

<sup>3</sup> Including 50 that were closed administratively

<sup>4</sup> Including 1 that was closed administratively

## IMPROVEMENTS TO ENFORCEMENT

Since our last report in early 2001, some improvements have taken place to make enforcement at the APA a smoother and more equitable process. The enforcement regulations have undergone substantial revisions, new enforcement staff was added and several high-profile court decisions have upheld the orders and fines imposed by the Agency's enforcement division. In that same time, over 5,100 cases have been taken off of the books. The number of cases currently open is slightly over 400, when just a few years ago the backlog reached into the thousands.

The years 2001, 2003 and 2006 were important years for the enforcement program at the APA. Early in 2001, two new staff members were hired by the Agency to work on enforcement cases. The first was an enforcement officer, who increased the team's staff by 25 percent. An attorney was also added, boosting the Agency's legal department by 20 percent at the time. The new staff was a much-needed enhancement to the program, who, along with the addition of several interns, were able to remove over 2600 cases from active status by the end of the year through various means.

In the summer of 2001, the Agency also announced it would be substantially amending its enforcement regulations. According to a press release at the time, "Agency Chairman Richard Lefebvre acknowledged the overall goals of the Enforcement regulation revision efforts are to fulfill the Agency's statutory responsibilities, create more efficient mechanisms to resolve violations, and provide a full and fair opportunity for all parties to present information for Agency review and consideration."

By January 2003, the new enforcement regulations (see Appendix 1) were put into place after a comment period and consideration of public input by Agency staff. These amended regulations greatly improved upon their short

and incomplete predecessor that had been in place for over 20 years. The five-fold increase in the length of the rules more clearly explained how an enforcement proceeding would occur. For the first time, new language established a hearing procedure for actions that enforce the Freshwater Wetlands Act and those initiated to modify, suspend, or revoke an Agency permit. The first hearing to suspend, modify or revoke a permit was held on July 7, 2005, regarding the Spiegel property in Lake Placid. The new regulations also removed the reference to a 72 hour time limit on an initial Agency cease and desist order, although the staff is still practicing the limit.

Also in January of that year, the Agency adopted new General Enforcement Guidelines (Appendix 2) to help staff and the public know how the APA would handle cases and included objectives such as, "ensure that the environmental damage created by violations will be eliminated or minimized for the long term."

In 2006, the Agency took additional steps to improve its enforcement program. In September, APA staff gave a long-overdue presentation to the Board of Commissioners and general public about the state of affairs regarding enforcement. This presentation was straightforward and provided some eye-opening information, along with additional ideas for how to improve the program. At the same Agency meeting, the regulations were amended by adding language that would allow for an administrative law judge (ALJ) to conduct a hearing on disputed facts and violations before a case goes before the APA's Enforcement Committee. This action has two potential benefits for the Agency. First, it is designed to encourage an agreement between the parties so that the formal court hearing is not even necessary. Second, it would limit the need to argue finding of facts twice, once before the Enforcement Committee, and potentially again in front of a judge, if the case was taken to court.

## SUBSTANTIAL SETBACKS IN ENFORCEMENT

For decades, enforcement at the Adirondack Park Agency was almost non-existent. Internal and external reports made a point of this fact throughout the last decade. The *Task Force on Expediting Adirondack Park Agency Operations and Simplifying its Procedures* from May 1994, found, “The Agency’s present enforcement division is inadequately staffed to handle known violations” (p. 27). *The Adirondack Park in the Twenty First Century* report’s second volume (the technical report) stated, “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.” (p. 202)

The APA’s own Annual Reports best summed up the problem. In its 1993 edition, the report concluded, “With only three enforcement officers for the 3.5 million acres of private land, the Agency obviously lacks a credible enforcement program.” (p. 11). In 1994, the problems continued, “The lack of staff to resolve these often-complex cases quickly causes delays that, it is felt, discourage concerned citizens and damage the credibility of the enforcement effort; as a consequence, many violations may go unreported.” (p. 9) Today, staff still acknowledge that they are facing an uphill battle when dealing with enforcement cases. A memo in September 2006 concluded, “there remains much we can do to have a truly effective Adirondack Park Agency enforcement and compliance program.”

The two main areas of concern remain the staffing levels and the regulatory framework for dealing with violators, particularly those who may not be willing to settle. Staffing levels are an obvious and quantifiable need. Four

enforcement officers and one attorney cannot physically do much more work than what has been accomplished since 2004. However, they know that many more violations almost assuredly exist throughout the Park and could easily be discovered “simply by looking at tax maps and shorelines, or by driving through Resource Management or River Areas.” (staff memo, Sept. 6, 2006) The shortage of staff was also made evident in the enforcement report given by staff in September.

### By the Numbers

Through APA’s own reports and our own investigating, several numbers clearly point out the deficiency of the APA’s enforcement division. The first is 816, the number of cases that have been closed administratively. The phrase “closed administratively” is a term of art and one that is found in APA’s enforcement regulations only when referring to settlement agreements. The regulations read, in part,

#### **§ 581-2.5 Administrative resolution of violations.**

- (a) Violations may be resolved administratively by agreement(s) entered into with any person(s) responsible for a violation.
- (b) An administrative resolution may include a compromise of penalties, injunctive relief, and such other measures or actions as the Agency, the Enforcement Committee, or the Executive Director, deems necessary or appropriate.

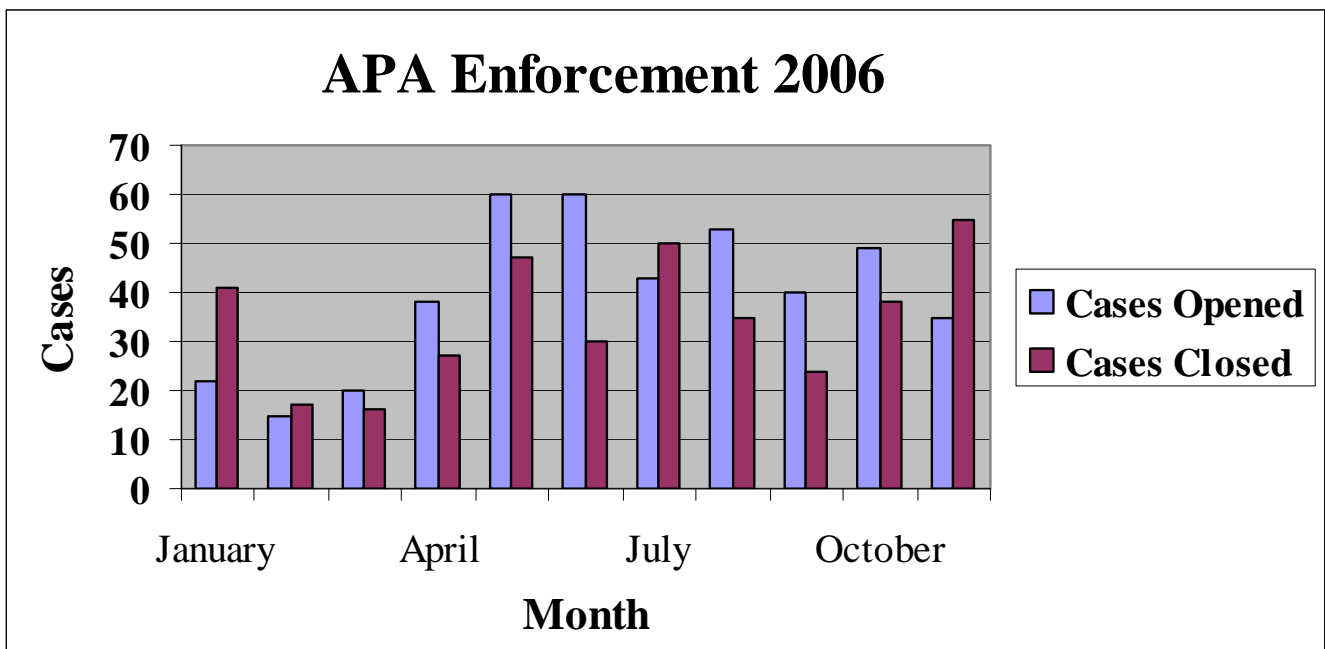
Allowing cases to be dismissed without any corrective measures or penalties is not the intention of the regulations, nor is it explicitly mentioned. However, in 2003, staff, including the Executive Director and General Counsel,

determined that these 800-plus cases were too old to legitimately pursue or that there appeared to be a lack of environmental impact. Staff recently asserted that these cases were never formally investigated. APA said the cases could be reopened as new cases if the landowner applies to the APA for a permit in the future. Other staff members have indicated that former employees made notations on many of the cases such as “too complicated” or “applicant won’t cooperate.” When we issued our previous reports, this is not how we had envisioned that cases would be resolved. Simply pretending those cases no longer exist is not the proper protocol and should never happen again.

In addition, there were 2,474 cases that were closed as a result of ongoing case review in 2001. This action was described with the following statement by the APA: “Most of these cases were investigated and found not to involve violations or were otherwise resolved years ago and their closing now is simply an administrative exercise intended to update our computer records and to provide a more accurate reflection of the number of open enforcement cases.”

(Enforcement report memorandum, August 1, 2001) Again, this seemed to be a papering over of the enforcement problem and a simple way to be able to demonstrate positive results by having fewer open enforcement cases. When we asked the Agency for the documentation of these cases, we were told it would take over five months to produce the files. It is not clear whether these cases had been properly investigated and closed in the past or if the APA had simply changed the computer database to list them as closed. In November, we were given a list of 2,741 cases with names, case numbers and dates. Most of the cases were closed in 2001. Of these, 807 cases appeared to have involved violations, with the notation “V,” while another 1,680 appeared not to have a violation (NV). About 250 did not indicate either way.

The next important number is 55. This is the increase in the enforcement case backlog that has occurred so far during 2006. In seven of the 11 months, more cases were opened than closed. There are currently over 400 open cases, and that number is continuing to grow by the day.





The next figure is 600, which is the low estimate for cases on which compliance work has yet to be completed. APA staff is not checking on these violators to make sure they have lived up to their end of a settlement agreement and implemented the corrective measures (such as wetlands repair, revegetation of shorelines, etc). While settlements have been reached in all of these cases, no one knows for sure if the required work has been completed. Essentially, the Agency has not fulfilled its commitment to see its own enforcement cases through to the end after a settlement is reached.

The final figure is 115. This is the number of outstanding settlement offers in cases where violations have been found. While there may be some lag time between offers and signed settlements, the revolving door effect seems to be slowing down when it comes to the return of signed agreements back to the Agency. Through November 2006, 91 more settlements have been mailed out this year than returned. In 2005, 73 more were sent than received. If there is little or no consequence for failing to return a settlement agreement, this trend will only continue to worsen and will become an additional backlog that the Agency is not currently capable of handling. This, along with the incomplete compliance follow up, demonstrates that while new settlements are being reached, the current staff is not able to keep up with the work at the end of the process to ensure settlements are signed and returned and that necessary corrective measures are being taken by the violators.

## **The Paper Tiger**

The enforcement shortcomings are not due to a lack of effort or professionalism on the part of the staff. Staff is hamstrung by the regulations when violators do not voluntarily agree to settle the case. They usually make several attempts at settlement before any further action is taken. In October of 2006, one case was referred to the Attorney General's office. This is the first case to be referred there in nearly two years. While one could argue that staff is now capable of

handling all of the cases themselves thanks to the new regulations, it is probably more accurate to suggest that APA officials do not want to add work to the load of the already heavily burdened staff of the Environmental Protection Bureau of the Attorney General's office; thus they are trying diligently to keep all cases in-house whenever possible.

While the changes to the enforcement regulations were much needed, they did not do enough to address the problems that the staff faces on a daily basis. Staff is often at the mercy of a violator, who must be convinced it is in their best interest to voluntarily settle. Even when settlements do occur, follow up on securing signed agreements and ensuring that compliance work happens in a timely fashion remain issues that a staff of four officers and one attorney cannot adequately handle.

In contrast to the APA's enforcement team, the Catskill watershed, which is protected by New York City's Department of Environmental Protection (DEP), has 60 inspectors and 10 dedicated attorneys for an area one-fifth the size of the Adirondack Park. Appendix 3 shows the region given to each of the four enforcement officers employed by the Agency.

The General Enforcement Guidelines need further improvement. While this document received a much needed updating in 2003, some of the modifications clearly indicate that cases should be resolved at the staff level, even if actions, such as civil penalties are avoided. The 1991 version stated, "The Agency shall, except in de minimis or hardship cases, require the payment of a penalty for the mere violation of the law...An additional civil penalty shall be imposed in every case where environmental damage has resulted from the violation...A penalty may also be imposed for willful or deliberate non-compliance, and to eliminate the profit obtained by the violation." (p.2) The previous version also sought to consider "whether the violator is a repeat offender;" (p. 3) when establishing the amount of civil penalties, something not taken into consideration in the new guidelines.

The new guidelines only state that, “The imposition of civil penalties in appropriate cases also creates a significant deterrent effect...the Agency will seek actions that eliminate the economic benefit derived from violations.” (p.3) It seems that the Agency, in its attempts to resolve more cases quickly is taking a step backwards and lowering the standard for settlement and may be removing civil penalties in many cases as an incentive to settle, instead of using civil penalties as a true deterrent for future enforcement cases.

The new document also lists some specific guidelines for permit compliance, civil penalties, settlement standards and environmental benefit projects, which may be adopted in the future. After almost four years, Agency staff has not yet finalized any of these documents to the satisfaction of the Enforcement Committee. Some progress has been made on the civil penalties and environmental benefit projects guidelines, but neither has been approved and developing these guidelines appears to have been given a low priority by staff who cannot keep up with the flood of new enforcement cases.

## RECOMMENDATIONS AND UPDATES

In our two previous reports, the Adirondack Council outlined six recommendations which we believe would substantially improve the ability of the APA to handle enforcement cases. Below is a summary of the recommendations, which are still needed, along with an update on changes since 2001.

### 1. ADD NEW ENFORCEMENT STAFF

**Recommendation:** Double the number of enforcement officers from three to six in the APA's budget and increase attorneys from three to six.

**Update:** Shortly after the release of *Falling Further Behind*, a new enforcement officer and attorney were added to the Agency staff in early 2001. Legal interns have also been used to help with the enforcement work, but they are no substitute for full-time professional employees. Other staff has been "borrowed" as a stop-gap measure to assist the enforcement program as well.

**Action Needed:** Governor-elect Spitzer should increase the Adirondack Park Agency's SFY 2007-08 budget by \$400,000 in order to hire two additional enforcement officers and two additional attorneys. This will alleviate the growing backlog of cases and allow staff to examine other potential violations, in addition to those that are brought to their attention by neighbors or project review officers.

### 2. REVISE ENFORCEMENT LAWS AND REGULATIONS

**Recommendation:** The Agency should revise its cumbersome regulations to allow it to act swiftly and directly with violators.

**Update:** After a lengthy process lasting several years, the Agency finalized its newly revised enforcement regulations in January 2003 (see

Appendix 1). The old regulations were extremely vague and did not provide much clarity into how the process for handling apparent violations worked. With the new changes in place, the regulations are much more explicit about the steps to be taken by the Agency and the rights of the apparent violators. They also set up a process for an adjudicatory hearing for violations of the Freshwater Wetlands Act or to modify, suspend, or revoke an Agency permit. In September of 2006, the Agency continued to fine-tune the regulations by adding language that would allow an administrative law judge (ALJ) to conduct a hearing on disputed facts and violations before a case goes before the APA's Enforcement Committee.

**Action Needed:** More changes are still needed. The New York State Legislature should give the Agency the ability to be more proactive and enforce the laws by issuing administrative orders, summons and fines. The Department of Environmental Conservation (DEC), in Article 71 of the Environmental Conservation Law, already has these abilities. Its sister agency should also be granted this and other similar authority.

The regulations should be amended to include a timeframe for the signing and returning of a settlement agreement to the Agency and list actions that may be taken if an agreement is not returned to the Agency within a specified amount of time.

### 3. RESTORE STATE FUNDING FOR LOCAL PLANNING ASSISTANCE

**Recommendation:** Only 15 of the 105 towns and villages within the Adirondack Park have approved local land use programs. The lack of planning assistance burdens the staff and Commissioners with minor development projects, and frustrates the intent of the law.

Additional funding is necessary to enable every locality to develop its own land use program and relieve some of the burden from the APA.

**Update:** One additional municipality, Chesterfield, gained APA approval of its local land use plan since 2001, while Johnsbury is in the process of doing so. Funding and professional staff is still greatly needed to assist municipalities with this endeavor. The APA currently has a very limited amount of staff time to conduct such assistance efforts.

**Action Needed:** Governor-elect Spitzer should dedicate \$200,000 for two staff to work exclusively on local planning assistance. These positions could be used to reinstate the “circuit rider” program, which would assist local governments to carry out local planning activities that empower communities with the authority to plan, while ensuring the protections afforded the Park under the APA Act remain in place. Such positions could be based out of the APA, or perhaps assigned from another agency. This could be funded as part of the Quality Community line in the State’s Environmental Protection Fund (EPF).

#### **4. THE ATTORNEY GENERAL SHOULD CREATE AN ADIRONDACK PARK ENFORCEMENT TEAM**

**Recommendation:** The NYS Attorney General should develop a team that would assist Adirondack Park Agency staff with the tremendous backlog of cases that have been amassing. This team would take action to speed the referral of cases to the Attorney General.

**Update:** While the backlog of cases has been greatly reduced by the staff at APA, no enforcement team at the Attorney General’s office has been created.

**Action Needed:** Attorney General-elect Cuomo should increase the amount of staff that is available to work on cases that are referred to them by the APA. Currently, APA staff limits itself on the number of cases it refers to the AG’s

office in a given year based on the overall workload of the AG’s staff. While the Attorney General’s office has many environmental cases it must work on, they should be available to handle more enforcement cases, if the APA staff deems it necessary to refer additional cases to them.

#### **5. APA COMMISSIONERS NEED TO MAKE ENFORCEMENT A TOP PRIORITY**

**Recommendation:** APA Commissioners must be the first to take on the problems with enforcement, and become the Agency’s chief lobbyists for reforms, or the enforcement program and the backlog of cases will only continue to worsen. After-the-fact permits should be a rarely used exception and violators should be fined. In some cases, environmental benefit projects should be substituted for all or part of a fine if a violator agrees to perform some valuable service that will result in a direct benefit to the Park’s environment.

**Update:** Commissioners recently listened to a long-overdue presentation given by Agency enforcement staff at the September, 2006 Agency meeting and asked appropriate questions.

**Action Needed:** Commissioners, especially those on the Enforcement Committee, should resolve themselves to helping staff ensure that the enforcement process is not only more efficient, but also more equitable by providing a sense of justice that violations have been properly corrected and remediated, including significant fines, if necessary. Commissioners must also continue to call for needed reforms to increase staff and produce the necessary guidance documents.

#### **6. GIVE THE APA THE AUTHORITY TO COLLECT FEES AND FINES**

**Fees Recommendation:** The Governor should propose and the 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 borne solely by taxpayers. Applicants pay nothing for the review of projects they may eventually profit from or even abandon.

The Adirondack Park Agency may be the only major regulatory agency in New York that does not charge a fee. Application fees are charged by local governments throughout the state and even within the Adirondack Park. 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 could be exempt. Developers should bear the cost of legal notices, accommodations for public hearings and for stenographic hearing transcripts.

In fact, the revenue collected from major projects will defray the costs of minor project applicants, most of whom are 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 and can afford to pay a reasonable fee.

**Fines Recommendation:** 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 directly to the Agency, rather than to the general fund of the State. These funds could be used to improve service to the general public. This proposal was not taken up by the Senate and the Governor in the final budget negotiations, but it has merit and deserves to be adopted into law.

**Update:** While the Adirondack Council has continued to call for the imposition of fees for projects, particularly large-scale ones that take up years' worth of staff time, no action has been taken. Instead, the Adirondack Park Agency continues to give away its services to wealthy developers, while many of the municipalities in the Park charge at least nominal fees. The best

example of this is the Adirondack Club & Resort, planned for Tupper Lake. By some estimates, it has taken up to a year's worth of work time, divided between two staff members to review the voluminous submittals and resubmittals that the Agency has received for this project.

**Action Needed:** Governor-elect Spitzer should include in his SFY 2007-08 Executive budget proposal fees and fines provisions as a way to defray the cost of providing additional services at the Agency.

## APA STAFF RECOMMENDATIONS

A number of good recommendations came from the staff presentation to the Board of Commissioners, which occurred on September 14, 2006. Included among them is a single procedure for all enforcement cases, based upon the model of wetlands cases; retaining enforcement officers by creating a career track at the Agency for them; and preventing violations before they occur.

Having a single procedure would be helpful in further streamlining the process and making it simpler for all parties involved in cases, from APA staff to potential violators. They would work under the same format on all cases all of the time, instead of having parallel processes, depending on which law or regulation was violated. One format makes sense for all involved.

A career track is also critical for the enforcement division. Since the time of our last report, the entire staff working on enforcement cases has turned over. It is necessary to attract and retain qualified people in these positions in order to maintain institutional and professional knowledge and reduce the amount of time spent training new personnel on enforcement procedures. Current APA Chairman Dick Lefebvre called enforcement officers “entry-level jobs for some of the most sophisticated jobs at the Agency.” Good employees need to be rewarded for their hard work, which should include keeping them within the enforcement division at the Agency. This option would reduce turnover and keep talented people in these positions for a longer period of time.

Agency staff has outlined several steps to be taken in order to better prevent violations before they happen. One such effort is to create a check box on property transfer forms indicating whether or not the APA has jurisdiction over a subdivision. This idea has been put forward by Agency staff for nearly two years, but little

progress has been made. A similar idea could also be taken to the local level and require all building applications to show that the APA had been contacted to determine if an APA permit is required.

Staff also recognizes that having better working relationships with contractors, planning boards and code enforcement officers will also help them perform their job and should reduce the number of violations. Local officials are more aware of what is happening within their jurisdiction than APA staff, but may lack the expertise or resources to prevent violations from occurring.

## RECENT ATTEMPTS AT REFORM

Enforcement at the APA has become an issue of regional importance in the last few years, and several proposals have been put forward. In 2003, Adirondack representatives Senator Betty Little and Assemblywoman Teresa Sayward sponsored legislation that would create a statute of limitations for violations enforced by the APA. As originally drafted, the bill read in part, “An action to enforce violations of the rules and regulations of the Adirondack park agency within the Adirondack Park shall be commenced by such agency within ten years after the *discovery* (emphasis added) of such violation, or in the exercise of reasonable diligence should have been discovered by a public servant who has the responsibility to enforce such provisions.” On its face, this seems fairly reasonable. If the APA could not gather the evidence and invest the time to pursue an enforcement action within ten years of noticing a violation, then the case should be dropped. One problem with this proposal is that there is no definition of what is reasonable diligence on the part of a public servant to discover violations.

Apparently, this proposal was too reasonable for the sponsors, who later amended the bill in January 2004 and replaced *discovery* with *occurrence*. This subtle change would have a major impact if the legislation were ever to become law. Any homeowner could simply claim that their violation had occurred ten years and one day prior, thereby avoiding any enforcement action from the Agency. The bill has never moved from the Codes Committee in either house since it was first introduced.

As part of the follow-up from the APA’s Thirtieth Anniversary Conference, the APA was itself proposing legislation that would reform some of the ways that it operates, which were discussed in 2004 and 2005. One of the changes would have allowed “Any person who in good faith and with due diligence has purchased property which was in violation of any of the laws and regulations administered by the Adirondack Park Agency at the time of purchase, shall not be subject to civil penalties for such violation.” This proposal was more moderate than the statute of limitations bill in that it would only apply to new owners who did not commit the violation. In addition, it would eliminate the civil penalty only, so remediation and other necessary actions could still be demanded of the new owner. Unfortunately, it would be extremely hard to determine if “good faith” or “due diligence” had been carried out. It would also create a loophole where prospective buyers might encourage violations prior to buying property if no civil penalty could be imposed on them. This enforcement change, as part of a larger APA reform package, was never formally introduced as a bill in the State Legislature; and the notion of reform seemed to be on hold during Governor Pataki’s last year in office.

Neither of these efforts would have done much to resolve the enforcement crisis at the APA. Instead, they would have made life a little easier for some landowners with violations on their property, contractors who undertook the work that led to the violation and real estate developers who could also be implicated in a violation case.

## CASE STUDIES

All of the cases described below have been resolved by APA enforcement staff since the new enforcement regulations went into effect in 2003. These cases exemplify many of the weaknesses within the existing framework of enforcement laws and regulations that staff must try to use to settle cases. Voluntary settlements give a strong disadvantage to the Agency and allow the alleged violator to often say “no” without the fear of repercussions.

### **Raquette Lake Camps, Inc.**

(Enforcement File E2000-092)

The property in question is designated as Moderate Intensity Use in the Town of Long Lake, Hamilton County. The Respondents allegedly expanded a group camp by more than 25 percent without an Agency permit. According to the settlement agreement, a gym and three staff cottages were added to the existing facility.

The agreement enumerated several conditions to resolve the matter. Included in these conditions was a no-cut zone of 200 feet between the tennis courts and gym and 100 feet of no-cut zone from the mean high water mark to the tennis court/gym. Respondents also agreed to submit as-built engineering plans for the on-site wastewater treatment system (OSWTS) for the new gym and repair or replace the system, if required by the Agency. A detailed plan for the wastewater treatment system for the three cabins was also required.

A civil penalty of \$7,000 was to be paid to the State of New York.

**This settlement, while appropriate, was signed by the Respondents on September 22, 2003. By that time, at least four of the deadlines agreed to in the settlement had already expired because the Respondents waited for two months to sign the agreement after it was sent to them. A deadline should be given to respondents in order to receive signed settlements in a timely fashion and give them a reasonable timeframe to meet the settlement requirements.**

### **Finch**

(Enforcement File E2001-184)

The apparent violation occurred in the Town of Inlet, Hamilton County. The owners, Douglas and Michelene Finch, allegedly constructed a deck, retaining wall and septic system within the shoreline setback of Sixth Lake without an Agency variance. They also allegedly subdivided the property by renting the main house and living in the guest house without the necessary two principal building rights.

On December 12, 2002, Agency staff issued a notice of apparent violation (NAV) to the Respondents. On March 13, 2003, the Enforcement Committee met and heard from Agency staff, the Respondents and their attorney. It was alleged that the Respondent had been advised by the Town to seek a jurisdictional determination from the Agency, but never did. Commissioners were also informed that the Respondent cooperatively resolved violations on another property which involved a shoreline walkway and another septic system. Commissioners accepted most of the NAV and authorized staff to resolve the matter with some basic requirements.

In July of the same year, the Respondents' attorney requested reconsideration of the Enforcement Committee's decision, which was granted on August 14. Respondents provided new evidence showing that the current guest house was the same size it had been in 1971. Settlement conditions referring to removing additions to the sleeping cabin were then removed, as was language that would have required a \$4,000 escrow account to ensure completion of the terms of the settlement



agreement. Respondents' counsel indicated a willingness of his clients to then settle on the terms offered by the Agency.

To settle this case, the Respondents ultimately agreed to a deed covenant prohibiting the occupation of the property by two different parties at the same time. The agreement also stipulated that the Respondents would install an Agency-approved septic system, including an alarmed pump station, and remove the deck from the guest house. They further agreed to modify the retaining wall to more closely conform to the pre-existing shoreline. A civil penalty of \$1,000 was also imposed. This case was officially resolved on September 26, 2003.

**This is a relatively good settlement, where the Respondents were active participants in the process and given ample opportunity to present their case and provide evidence to support their claims. However, the fine should have been much more substantial, since the Respondents intentionally failed to contact the APA about a jurisdictional determination after being advised to do so, profited from the rental of their house and were also involved in another similar enforcement case. There was never a discussion in the written record as to why the \$4,000 escrow account was removed from the final settlement.**

## **Phillips**

(Enforcement File E90-325)

This case involved a wetlands project without an Agency permit. The Respondent, Dennis Phillips, an attorney familiar with the Adirondack Park, filled wetlands on his property which is located in the Town of Indian Lake, Hamilton County. Based on the settlement agreement, it appears the violation was discovered in the course of examining a permit application, which the Respondent filed with the Agency on May 30, 1998. An initial settlement offer was mailed to the Respondent on April 3, 1998. On April 29, 1998, the respondent returned a signed settlement agreement, along

with a letter and requested a civil penalty of \$1,000. However, the settlement agreement was revised by the Respondent. The counteroffer was not agreed to by the Agency and a second amended proposed settlement agreement was sent by the Agency on June 22, 1998.

Some time in the fall of 2002, the Respondent asked for additional changes to the settlement agreement, which led to the Agency sending another draft settlement on January 6, 2003. The Respondent then requested even further changes to allow for modifications to a proposed house and boardwalk on the site. Finally, the Agency sent another settlement offer on February 28, 2003 and it was signed by the Respondent on March 14, 2003, and returned to the Agency.

Final settlement involved removal of fill from the wetlands, a civil penalty of \$1,000 and construction of a single family dwelling with conditions. Conditions included limiting the size of the house to 1248 square feet with a minimum 7 feet setback from the wetlands, installation of a septic system according to the site plan, and limiting two boardwalks across the wetlands to 4 feet in width.

**This case exemplifies the back-and-forth that can go on when a Respondent is in no hurry to settle. The Agency noted that correspondences were also exchanged on December 28, 2001; July 24, 2002; September 5, 12, and 23, 2002; and November 8, 2002. If not for the fact that the Respondent was seeking an Agency permit to build on the property, this case may have never been resolved voluntarily. The Agency has no "teeth" to its enforcement. Its only recourse besides asking the violator to settle is to refer the case to the Attorney General's office, which while usually successful, is a time consuming process.**

## **Hunt Lake Land Holding Company, Inc.**

(Enforcement File E2003-014)

Pursuant to Agency Permit 98-175, issued on July 16, 1999, a 31-lot subdivision was created in the Town of Hadley, Saratoga County. One of the conditions of the permit was that no further subdivision would occur without first receiving another APA permit. However, the alleged violation involved the creation of a new 6-lot subdivision without a permit and the conveyance of four of the newly created lots.

The resolution of this case involved submitting an after-the-fact permit for the subdivision. Included in this permit would be detailed site plans for each lot; a proposal for combined driveways; a one hundred foot vegetative buffer along the right-of-way; and a report from the New York State Historic Preservation Office. No civil penalty was imposed. The signed settlement agreement was received by the Agency on November 5, 2003.

**While all of the above listed items are good additions to the permit application, none of them vary greatly from what would be asked of an applicant seeking a permit before the fact. While an after-the-fact permit allows staff to seek additional information and visit the property to help assess environmental impacts, it is not enough. Having a deterrent factor of a civil penalty would also be beneficial to help prevent similar actions in the future. This settlement would not cause any landowner to think twice about subdividing first and asking questions later.**

## **NYCO Minerals, Inc.**

(Enforcement File E2005-075)

This is not the first time that NYCO Minerals has been questioned by the Adirondack Park Agency. In 1999, NYCO sought an Agency permit to expand its operation at its Seventy Road mine, P99-91. The Adirondack Council and three individuals petitioned the APA to

suspend or revoke the permit for P96-76, an expansion of its Oak Hill mine for numerous reasons, including the belief that these projects were both large-scale and should have a master plan and have their impacts considered cumulatively, not in a piecemeal fashion. (the process for a hearing to suspend or revoke an Agency permit did not exist until the regulations were amended in 2003) In addition, NYCO had indicated that the Seventy Road mine would be closing in the near future. Instead, P99-91 actually sought to expand the mine by 30 acres so that extraction of wollastonite could continue. It also allowed the applicant to extend its hours of operation by one-half hour to 5:30 p.m. on weekdays and increase its mining season by one month, ending November 30, instead of October 31.

The enforcement case listed above is for alleged violations at the company's Seventy Road mine in the Town of Lewis. The Agency alleged that NYCO was in violation of permit P99-91 for mineral extraction activities outside of the eight-month season, from April 1 to November 30, per its permit. APA stated such violation included blasting and other related extraction operations. The signed settlement agreement makes no mention of how long during the four month quiet period extra work had taken place.

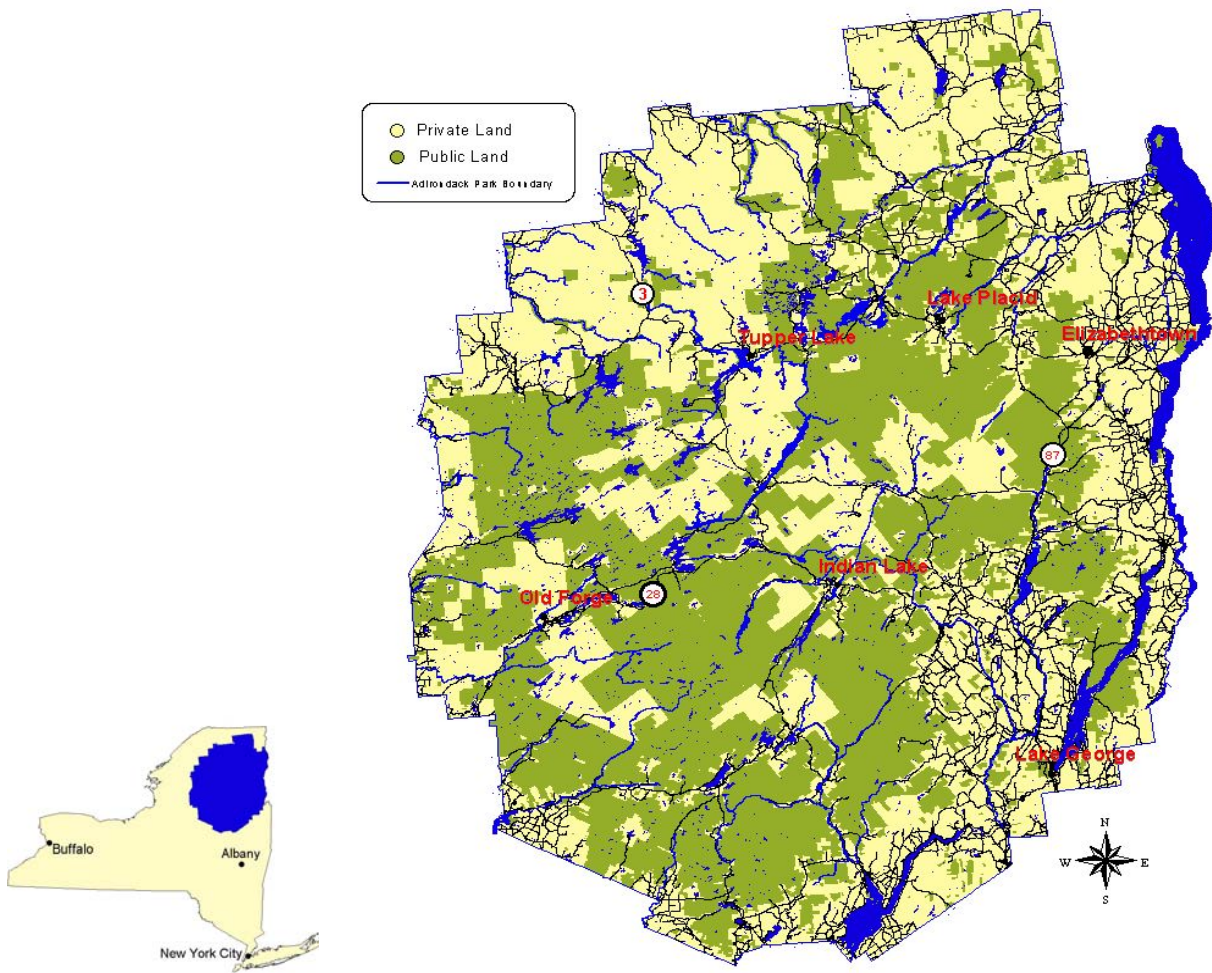
Without admitting to the allegations, NYCO agreed to pay a civil penalty of \$2,500 and fully comply with its permit conditions. The agreement also notes that NYCO had already applied for an amendment to its permit so it could continue to mine longer than the original eight month season it had been granted. The signed settlement was received by the Agency on October 5, 2006. As of this writing, APA had just granted an amendment to the permit, P99-91E, which now allows for an extension of removal and stockpile of overburden from November 30 through April 1, essentially allowing year-round operations.

**One could safely assume that NYCO's profits for its alleged violation of the permit exceeded the \$2,500 it paid to settle the enforcement case and could easily be written off by the**

company as “the cost of doing business.” More substantial fines should be levied against those who willingly violate permits, especially those who make a profit from their activities and are repeat “bad actors.” It appears that the Agency did not follow its own enforcement guidance here, which states in part, “Violators should not profit from the

undertaking of a violation. To that end, the Agency will seek actions that eliminate the economic benefit derived from violations. Where intentional or knowing violations occur, the Agency’s objective will be to make the cost of noncompliance greater than the cost of compliance would have been.” (see Appendix 2)

# BACKGROUND INFORMATION



## 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 (over 9,000 square miles) 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.

The Adirondack Park is also unique in that it is a patchwork of public and private lands, where communities of people and wilderness exist side by side. More than half of the Adirondack Park is private land. These 3.4 million acres or 57 percent are devoted principally to hamlets and to agricultural, forestry, and recreational uses.

The Park is home to 130,000 residents, and hosts ten million visitors yearly.

The remaining 43 percent of the Park is publicly owned Forest Preserve, protected as “Forever Wild” by the NYS Constitution since 1894. One million acres of these public lands are protected as Wilderness, where non-mechanized recreation may be enjoyed. The majority of public lands (more than 1.3 million acres) is classified as “Wild Forest,” where motorized use is permitted on designated waters, roads and trails.

Plants and other wildlife abound in the Adirondack Park, many of them found nowhere

else in New York State. Ninety percent of all plant and animal species in the northeastern United States can be found within the Park. The Adirondacks are home to bald eagles, peregrine falcons, Canada lynx, timber rattlesnakes, beaver, loons, black bear, and moose. 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.

## **What is the Adirondack Park Agency?**

*The Adirondack Park Agency maintains a website on the Internet (<http://www.apa.state.ny.us>) which provides this description of the Agency and its functions:*

The Adirondack Park Agency is responsible for maintaining the protection of the forest preserve, and overseeing development proposals of the privately owned lands. The Agency prepared the State Land Master Plan, which was

signed into law in 1972, followed by the Adirondack Park Land Use and Development Plan in 1973. Both plans are periodically revised to reflect the changes and current trends and conditions of the Park. The mission of the APA is to protect the public and private resources of the Park through the exercise of the powers and duties provided by law. This mission is rooted in three statutes administered by the Agency in the Park, they are:

1. The Adirondack Park Agency Act
2. The New York State Freshwater Wetlands Act and
3. The New York State Wild, Scenic, and Recreational Rivers System Act.

The Adirondack Park Agency is an independent, bipartisan state agency responsible for developing long-range Park policy. 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 2.6 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 3.4 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 1999, when the Adirondack Council released its first report on the status of the APA's enforcement program, *After the Fact: The Truth About Environmental Enforcement in the Adirondack Park*, the Adirondack Park Agency had a total budget of \$3,492,800, with a full time (equivalent) staff of 60 people. In the FY 2006-2007 New York State Budget, the APA's budget was \$5,157,000, with a full time (equivalent) staff of 59 people.

## **What is Supposed to Happen When There is a Violation?**

When a violation is reported to the Agency one of the four 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 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 all cases, the enforcement officer must make a preliminary determination as to whether a violation has occurred, what options exist to remedy any damage and what steps are needed to solve the violation.

Preliminary determinations are based not only on the professional judgment 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 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 and then the officer and the assigned attorney 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 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. This can be relatively simple or a time-consuming and arduous task. In most cases, the motivation of the violator determines whether a quick settlement can be reached.

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 and staff time to resolve just one dispute when multiple landowners are affected.

## What is an 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 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, which can prevent future purchasers from unknowingly violating Agency standards in the Park.

## 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 goes 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 the 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 3.4 million acres of private land in the Park. By themselves, they may seem to be insignificant. 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.”

# APPENDICES

## Appendix 1: Revised Enforcement Regulations

APA's enforcement regulations, effective January 29, 2003

From [http://www.apa.state.ny.us/Documents/Laws\\_Regs/RulesRegs200510\\_2.pdf](http://www.apa.state.ny.us/Documents/Laws_Regs/RulesRegs200510_2.pdf)

THIS DOCUMENT IS AN UNOFFICIAL COMPILATION OF THE REGULATIONS OF THE ADIRONDACK PARK AGENCY. FOR OFFICIAL COPY, PLEASE REFER TO 9NYCRR, SUBTITLE Q (PART 570 ET SEQ.)

### PART 581 ENFORCEMENT

(Statutory authority: Executive Law, § 813; Environmental Conservation Law, § 15-2723; Part. 71, titles 11 and 23)

Sec.

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581-1.2 Definition of terms

581-2.1 Authority and duties of Enforcement Committee

581-2.2 Authority and duties of the Agency with respect to enforcement

581-2.3 Authority and duties of Executive Director

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581-2.5 Administrative resolution of violations

581-2.6 Enforcement proceedings

581-2.7 Agency review of permit or variance applications involving violations

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581-3.1 Grounds for permit modification, suspension, revocation

581-3.2 Commencement of proceedings to modify, suspend, or revoke an Agency permit

581-3.3 Permit holder response to notice of intent

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Agency action

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581-4.11 Evidence

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581-4.13 Stipulations and administrative resolution of violations during hearing process

581-4.14 Conduct of the hearing

581-4.15 Record of the hearing

581-4.16 Final Agency determination

#### § 581-1.1 Applicability.

(a) Any violation of the Adirondack Park Agency Act, the New York State Freshwater Wetlands Act within the Adirondack Park, the New York State Wild, Scenic and Recreational River Systems Act on private lands within the Adirondack Park, the Agency's regulations, the terms or conditions of any permit or order issued by the Agency, or of the terms or conditions of any agreement administratively resolving a violation, shall be grounds for enforcement in accordance with the provisions of this Part.

(b) Any Agency proposal to modify the terms or conditions of any permit or variance issued by the Agency shall be undertaken in accordance with the provisions of this Part.



**§ 581-1.2 Definition of terms.**

The following terms shall have the stated meanings when used in Part 581:

(a) *Act* means the Adirondack Park Agency Act, Executive Law, Article 27.

(b) *Agency* means the Adirondack Park Agency as defined in Executive Law 803.

(c) *ECL* means the New York State Environmental Conservation Law.

(d) *Executive Director* means the Executive Director of the Agency or his designee.

(e) *FWA* means the Freshwater Wetlands Act, ECL Article 24.

(f) *Hearing officer* means an officer, employee or other designee of the Agency who presides over administrative enforcement hearings and related proceedings.

(g) *Order* means any order issued by the Agency or its designated agent.

(h) *Permit* means any permit or variance issued by the Agency or its designated agent.

(i) *Permit holder* means any person or state agency that has been issued an Agency permit or variance pursuant to the Act, the FWA, or the Rivers Act or any person or state agency that has assumed the benefits and obligations of an Agency permit or variance pursuant to law, regulation, permit condition or property ownership.

(j) *Person* means any individual, corporation, partnership, association, trustee, municipality or other legal entity but shall not include the state or any state agency except for matters considered pursuant to the FWA and the Rivers Act.

(k) *Respondent* means any person receiving a notice of apparent violation, a notice of hearing or a notice of intent, a cease and desist order, or any other order pursuant to this Part, or who resolves a violation by agreement with the Agency.

(l) *SAPA* means the State Administrative Procedure Act.

(m) *Rivers Act* means the Wild, Scenic & Recreational River Systems Act, ECL Article 15, Title 27.

**SUBPART**

**581-2 General Information Process**

**§ 581-2.1. Authority and duties of Enforcement Committee.**

(a) An Enforcement Committee consisting of three or more Agency members to be appointed by the Agency's chairman will act for the Agency in enforcement actions undertaken by and on behalf of the Agency. The chairman of the Agency may sit as a voting member of the Enforcement Committee at any time.

(b) The Enforcement Committee shall provide guidance to the Executive Director in his actions relating to alleged violations and make recommendations to the Agency regarding enforcement policies, operation of the enforcement program, and rules and regulations related to enforcement.

(c) Any alleged violation or any other particular matter may be considered by the Enforcement Committee upon (i) a referral by the Executive Director or (ii) a request by a majority of Enforcement Committee members.

(d) The Enforcement Committee may determine whether a violation has occurred and decide on an appropriate disposition of any enforcement action it considers.

**§ 581-2.2. Authority and duties of the Agency with respect to enforcement.**

(a) Any alleged violation may be considered by the Agency upon (i) a referral by the Enforcement Committee prior to a determination by the Enforcement Committee; or (ii) a request by a majority of the Agency members made prior to consideration of the alleged violation by the Enforcement Committee.

(b) The Agency may determine whether a violation has occurred and decide on an appropriate disposition of any enforcement action it considers.

(c) The Agency may hold hearings and issue determinations and orders as provided for in Subparts 581-3 and 581-4.

**§ 581-2.3 Authority and duties of Executive Director.**

(a) The Executive Director shall have authority and responsibility to take the following actions under this Part:

(1) oversee Agency staff investigations of alleged violations;

(2) resolve violations by agreement with landowners and other persons responsible for such violations;

(3) issue cease-and-desist orders;

(4) request immediate remediation of any land on which there has been or is continuing any illegal construction, land use or development or subdivision of land;

(5) serve notices of apparent violation and refer enforcement cases to the Enforcement Committee and advise Enforcement Committee members and/or Agency members of the status of investigations and of recommendations for their disposition;

(6) commence administrative enforcement hearings to enforce the FWA;

(7) serve notices of intent for purposes of modifying, suspending or revoking Agency permits; and

(8) refer alleged violations to the Attorney General in accordance with Section 581-2.8 of this Subpart.

(b) The Executive Director shall prepare periodic reports for the Agency on the status of open enforcement cases, administrative resolutions, and litigation related to enforcement.

(c) The Executive Director may delegate any or all authority provided for in this Subpart to other Agency staff with the advice and consent of the Enforcement Committee.

**§ 581-2.4 Cessation of illegal development or subdivision; immediate abatement and remediation.**

(a) In the case of an apparent violation involving ongoing construction, land disturbance or subdivision of land, the landowner and all lessees, contractors, builders, and other agents may be ordered in writing to cease and desist such activities until the apparent violation is resolved according to the provisions of this Part or by a Court. When there is a danger that the elements may cause irreparable damage to a partially completed use or structure, the order or a modification thereto may allow measures to prevent such damage provided that such authorization shall not substitute for any required permit or variance.

(b) In the case of an apparent violation involving ongoing or threatened damage to the resources of the Adirondack Park, the landowner and all lessees, contractors, builders, and other agents may be requested in writing to take immediate measures to redress such ongoing or threatened damage.

**§ 581-2.5 Administrative resolution of violations.**

(a) Violations may be resolved administratively by agreement(s) entered into with any person(s) responsible for a violation.

(b) An administrative resolution may include a compromise of penalties, injunctive relief, and such other measures or actions as the Agency, the Enforcement Committee, or the Executive Director, deems necessary or appropriate.

**§ 581-2.6 Enforcement proceedings.**

(a) The Executive Director may initiate an enforcement proceeding to be held by the Enforcement Committee for a determination whether a violation has occurred and a decision on an appropriate disposition of an enforcement action. Whenever this section refers to the Enforcement Committee, it shall mean the Agency where the Agency considers an alleged violation pursuant to Section 581-2.2 of this Subpart.

(b) To initiate enforcement proceedings, the Executive Director shall serve a notice of apparent violation upon the respondent reciting the material facts and documentary evidence, and the provisions of law upon which the notice is based. The notice may also include a recommendation for resolution of the enforcement action. The notice shall include:

(1) the date and place the Enforcement Committee will consider the matter;

(2) a statement that any written response to the notice shall be signed by the respondent or his attorney and served upon the Executive Director within 30 days of the date of the notice; and

(3) a statement that the respondent may appear before the Enforcement Committee either in person or by counsel, and be heard concerning any disputed matter of fact or law or with respect to the nature of any proposed resolution. The notice shall state that a respondent may authorize a person other than an attorney to speak on his behalf so long as the respondent appears in person before the Enforcement Committee.

(c) Within 30 days of the date of the notice of apparent violation, the respondent may serve a written response upon the Executive Director signed by the respondent or his attorney, including all material facts and documentary evidence, and any affirmative defenses. If the respondent fails to respond to the notice of apparent violation within such 30 day period, the Enforcement Committee may accept as correct the allegations of fact and law set forth in the notice of apparent violation.

(d) Following the enforcement proceeding, the Enforcement Committee shall consider the alleged violation in executive session, and may make a determination as to whether a violation has occurred. The Enforcement Committee may also decide on an appropriate disposition of the enforcement action, or may decide to adjourn the matter for additional investigation or consideration or for any other reason it deems appropriate.

(e) A copy of any determination made by the Enforcement Committee shall be served upon the respondent within 15 days of the date of the Enforcement Committee determination.

(f) Service of the notice of apparent violation and the Enforcement Committee's determination shall be by certified mail or other means designed to provide actual notice. Service of any other papers connected with an enforcement proceeding may be by ordinary mail or hand-delivery.

**§ 581-2.7 Agency review of permit or variance applications involving violations.**

(a) Where the Executive Director determines that there is reasonable cause to believe that a violation has occurred, an application involving an unresolved violation on the proposed project site shall not be processed and the time periods of Section 809 of the Act shall not run until the alleged violation is resolved in accordance with the provisions of this Part or by a court. The Executive Director shall notify the applicant of such determination and action in writing.

(b) Local government officials of the municipality which is the location of the proposed project site and alleged violation, and the Adirondack Park Local Government Review Board, shall be notified of the receipt of an application which involves such alleged violation.

**§ 581-2.8 Referrals to the Attorney General.**

An alleged violation of the statutes and regulations administered by the Agency, of any permit or order issued by the Agency or its designee, of any agreement administratively resolving a violation, or a refusal to comply with a request for access to property or information involving a violation or to redress ongoing damage to the natural resources of the Adirondack Park, may be referred to the Attorney General pursuant to Section 63 of the Executive Law and Section 813 of the Act or the relevant provisions of the ECL as follows:

- (a) by the Executive Director with the advice and consent of the chairperson(s) of the Enforcement Committee; or
- (b) by the Enforcement Committee or the Agency.

## **SUBPART**

### **581-3 Permit Modifications, Suspensions and Revocations**

#### **§ 581-3.1 Grounds for permit modification, suspension, revocation.**

The Agency may propose to modify, suspend or revoke an Agency permit on any of the grounds set forth below:

- (a) The filing of materially false or inaccurate statements in the permit application or supporting papers or false or misleading testimony in any Agency hearing on the application;
- (b) Activities exceeding the scope of the project or varying the project as described in the permit; or
- (c) Noncompliance with the terms and conditions of an Agency permit or order, or noncompliance with any provision of the Act, ECL, or Agency regulations, related to the permitted activity.

#### **§ 581-3.2 Commencement of proceedings to modify, suspend, or revoke an Agency permit.**

(a) The Executive Director, on his own initiative or at the direction of the Enforcement Committee or the Agency, may commence proceedings to modify, suspend or revoke an Agency permit pursuant to this Subpart.

(b) To commence such proceedings, the Executive Director shall serve a notice of intent to modify, suspend or revoke an Agency permit on the permit holder reciting the grounds for the Agency's action, and identifying the material facts, documentary evidence, the provisions of law upon which the notice is based, and the requested Agency actions. The notice may identify alternative actions to be considered and decided by the Agency. The notice shall include:

- (1) the date and place the Agency will consider the matter;
- (2) a statement that any written response to the notice of intent shall be signed by the permit holder or his attorney and served upon the Executive Director within 30 days of the date of the notice;
- (3) a statement offering the permit holder an opportunity for a hearing in accordance with the hearing procedures set forth under Subpart 581-4; and
- (4) a statement that the permit holder may appear at the hearing either in person or by counsel, and be heard concerning any disputed matter of fact or law or with respect to the nature of any proposed resolution. The notice shall state that a permit holder may authorize a person other than an attorney to speak on his behalf so long as the permit holder appears in person at the hearing.

#### **§ 581-3.3 Permit holder response to notice of intent.**

Within 30 days of the date of the notice of intent, the permit holder may serve a written response upon the Executive Director signed by the permit holder or his attorney giving reasons why the permit should not be modified, suspended or revoked, including the material facts, documentary evidence, and the provisions of law upon which such statement is based, and if desired, requesting a hearing. If the permit holder fails to respond to the notice of intent within such 30 day period, the Agency may accept as correct the allegations of fact and law set forth in the notice of intent.

#### **§ 581-3.4 Agency action.**

- (a) If the permit holder requests a hearing, the Executive Director shall appoint a hearing officer and a hearing shall be held and an Agency determination shall be made in accordance with the hearing procedures set forth under Subpart 581-4.
- (b) If the permit holder does not request a hearing, the Enforcement Committee shall consider the notice of intent and any written response from the permit holder and shall make a recommendation to the Agency for consideration.
- (c) In reaching its determination, the Agency shall either:

- (1) rescind the notice of intent; or
- (2) issue a final determination and order.

(d) Any Agency determination made pursuant to this subsection shall be served upon the permit holder within 30 days of the date on which the Agency considers this matter.

(e) When the Agency proposes to modify, suspend or revoke a permit, the terms and conditions of the original permit will remain in effect until the Agency has issued a final determination under this section or pursuant to Section 581-4.16, provided that nothing in this Subpart shall preclude or affect the Agency's authority to commence other proceedings or to refer a violation to the Attorney General for legal action.

#### **§ 581-3.5 Service of paper.**

Service of the notice of intent and the Agency's determination upon the permit holder shall be by certified mail or other means designed to provide actual notice. Service of any other papers connected with a proposal to modify, suspend or revoke a permit under this Subpart may be by ordinary mail or hand-delivery.

### **SUBPART**

#### **581-4 Adjudicatory Hearings**

##### **§ 581-4.1 Applicability.**

This Subpart is applicable to Agency hearings arising out of the following circumstances:

- (a) All administrative enforcement hearings brought to enforce the Freshwater Wetlands Act; and
- (b) All hearings pursuant to Subpart 581-3 where the Agency has initiated proceedings to modify, suspend, or revoke an Agency permit. The notice of intent and permit holder response provided by Sections 581-3.2 and 581-3.3 shall satisfy the requirements of Sections 581-4.3 and 581-4.4 in such hearings.

##### **§ 581-4.2 Definitions.**

Whenever used in this Subpart, unless otherwise expressly stated, the following terms will have the meanings indicated in this section:

(a) *Discovery* means disclosure of facts, titles, documents, or other materials which are within the knowledge or possession of a party and which are necessary to the person requesting the discovery as a part of the requester's case.

(b) *Evidence* means the sworn testimony of a witness, physical objects, documents, records or photographs representative of facts which have been admitted into the record by a hearing officer.

(c) *Motion* means a request for a ruling.

(d) *Party* means the Executive Director, the respondent(s), permit holder(s) and any other person granted intervenor status.

(e) *Relevant* means tending to support or refute the existence of any fact that is of consequence or material to the Agency's determination.

(f) *Stipulation* means an agreement between two or more parties to a hearing, and entered into the hearing record, concerning one or more issues of fact or law which are the subject of the hearing.

##### **§ 581-4.3 Commencement of an administrative enforcement hearing.**

(a) The Executive Director may commence an administrative enforcement hearing to enforce the FWA by service upon the respondent of a notice of hearing and a complaint. The notice of hearing shall include the following:

- (1) a statement that a hearing date will be set by the hearing officer;

(2) a statement that any answer shall be signed by the respondent or his attorney, and that any affirmative defenses, including exemptions to permit requirements, will be waived unless raised in the answer; and that the failure to answer or to appear at the hearing will result in a default and a waiver of respondent's right to a hearing; and

(3) a statement that the respondent may appear at the hearing either in person or by counsel, and be heard concerning any disputed matter of fact or law or with respect to the nature of any proposed resolution. The notice should state that a respondent may authorize a person other than an attorney to speak on his behalf so long as the permit holder appears in person at the hearing.

(b) The complaint shall recite the grounds for the Agency's action, and shall identify the material facts, documentary evidence, and the provisions of law upon which the complaint is based, and the requested Agency relief.

**§ 581-4.4 Answer.**

(a) Within 30 days of the date of the notice of hearing and complaint, the respondent shall serve upon the Executive Director an answer signed by the respondent or his attorney.

(b) The respondent's answer shall specify which allegations he admits, which allegations he denies, and which allegations he has insufficient information upon which to form an opinion regarding the allegation, and must also explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds of each affirmative defense asserted. Whenever the complaint alleges that the respondent conducted an activity without a required permit, a defense based upon the inapplicability of the permit requirement to the activity shall constitute an affirmative defense. Affirmative defenses not pled in the answer may not be raised in the hearing unless allowed by the hearing officer. The hearing officer shall only allow such defense upon the filing of a satisfactory explanation as to why the defense was not pled in the answer and a showing that such affirmative defense is likely to be meritorious.

**§ 581-4.5 Parties.**

(a) Parties to the hearing shall include the Executive Director and the respondent(s) and/or permit holder(s).

(b) At any time after the institution of a proceeding and prior to close of the hearing, the hearing officer may permit a person to intervene as a party where it is demonstrated that there is a reasonable likelihood that the petitioner's private rights would be substantially affected by the result sought by the Executive Director or within the authority of the Agency to determine and that those rights cannot be adequately represented by the Executive Director, the respondent and/or permit holder, and any other parties to the proceeding. In addition, the hearing officer may permit a person to intervene as a party with amicus status upon a finding that the petitioner has identified a legal or policy issue that should be addressed in the hearing and in the final determination of the Agency and that the petitioner has a sufficient interest in such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue.

(c) A party has the right to participate at the hearing in person or through an attorney licensed in the State of New York to present relevant evidence, to cross-examine witnesses, to present argument on issues of law and fact, and to exercise any other right conferred on the parties by this Subpart or SAPA. A party with amicus status has the right to file a brief at the conclusion of the hearing.

**§ 581-4.6 Service of paper.**

Service of the notice of hearing and complaint and the Agency's determination upon the respondent shall be by certified mail or other means designed to provide actual notice. Service of any other papers connected with hearings under this Subpart may be by ordinary mail or hand-delivery.

**§ 581-4.7 Appointment of hearing officer.**

(a) At the request of any party, the Executive Director shall appoint a hearing officer to preside over a hearing brought pursuant to this Subpart.

(b) The appointment of a hearing officer shall be in writing and served on the parties to the hearing. The appointment letter shall specify:

- (1) whether a hearing report is requested by the Agency; and
- (2) the means by which testimony at the hearing shall be recorded verbatim.

(c) Not later than 10 days after the date of the appointment letter, any party may file with the chairman of the Agency a motion, together with a supporting affidavit, in support of a request that the hearing officer be removed. Any decision by the chairman of the Agency regarding the removal of a hearing officer shall be final.

**§ 581-4.8 Powers of the hearing officer.**

The hearing officer shall conduct the hearing in a fair and impartial manner. The hearing officer shall have the power to take the following actions:

- (a) Rule upon procedural motions and requests;
- (b) Set the time and the place of the hearing and any recesses and adjournments;
- (c) Administer oaths and affirmations;
- (d) Regulate discovery as reasonable and necessary to promote full disclosure and administrative efficiency;
- (e) Issue subpoenas requiring the attendance and testimony of witnesses and the production of records and other evidence upon request of a party not represented by counsel admitted to practice in New York State;
- (f) Upon the request of a party, quash and modify subpoenas except that in the case of a non-party witness the hearing officer may quash or modify a subpoena regardless of whether or not a party has so requested;
- (g) Summon and examine witnesses;
- (h) Admit or exclude evidence;
- (i) Take official notice of all facts of which judicial notice could be taken and of facts within the specialized knowledge of the Agency;
- (j) Hear oral argument on facts and law so long as it is recorded;
- (k) Direct the convening of any conference required for administrative efficiency;
- (l) Preclude irrelevant or unduly repetitious, tangential or speculative testimony or argument;
- (m) Limit the length of cross-examination, length of briefs and similar matters;
- (n) Do all acts and take all measures necessary for the maintenance of order and efficient conduct of the hearing;
- (o) Act as custodian of hearing exhibits until such time as the hearing record is forwarded to the Agency;
- (p) Prepare a hearing report if requested; and
- (q) Exercise any other authority available to presiding officers under Article 3 of SAPA.

**§ 581-4.9 Motions.**

(a) Motions made at any time shall be part of the hearing record. Every motion must clearly state the requested relief and the facts upon which it is based and may present legal argument in support of the motion.

(b) Prior to, and after the hearing but prior to the close of the hearing record, any motions shall be submitted in writing to the hearing officer.

(c) During the hearing, motions may be made orally, except where otherwise directed by the hearing officer. All parties may respond orally to such motions, except where otherwise directed by the hearing officer.

(d) The hearing officer shall rule promptly on any motion and must rule on all pending motions prior to the close of the hearing record. Any motions not ruled upon at that time will be deemed denied.

(e) Any motions made after the close of the hearing record shall be in writing and submitted to the Agency's chairman for a ruling by the Agency.

(1) Any such motion shall be served on all parties no more than 10 days after the close of the hearing record.

(2) The Agency shall rule on any such motion prior to making its determination with regard to the hearing.

(f) Copies of all written motions shall be served on all parties. All parties have at least 10 days after a written motion is served to serve a response.

#### **§ 581-4.10 Discovery.**

(a) There shall be full and complete discovery within the guidelines of this section.

(b) A party, upon receipt of notice to produce documents and materials from any other party, shall furnish all such requested items relevant to the proceeding within 10 days of the date of such notice, or within such other period as a hearing officer shall direct.

(c) Depositions and written interrogatories will only be allowed with permission of the hearing officer upon a finding that they are likely to expedite the proceeding. Bills of particulars are not permitted.

(d) A party who is served with a notice to produce documents and materials may move for a ruling from the hearing officer denying or modifying such notice within 10 days of the date of the notice and shall specify his objections thereto. Such ruling may also be made by the hearing officer on his own initiative. Any such ruling shall be designed to avoid unnecessary delay of the hearing or to prevent unreasonable annoyance, expense, embarrassment, or prejudice to any party.

(e) If a party fails to comply with a discovery demand without having made a timely objection, the proponent of the discovery demand may apply to the hearing officer to compel disclosure. If a party fails to comply with the ruling of a hearing officer compelling discovery, the Agency may accept as correct the allegations of fact made by the opposing party as to which the undisclosed material would be relevant as evidence.

(f) Subpoenas may be issued consistent with Article 23 of the Civil Practice Law and Rules as follows:

(1) any attorney of record in a hearing has power to issue subpoenas as provided by that article;

(2) a party not represented by an attorney admitted to practice in New York may request the hearing officer to issue a subpoena, stating the items or witnesses needed by the party to present its case;

(3) service of a subpoena is the responsibility of its sponsor; and

(4) all subpoenas shall give notice that the hearing officer may quash or modify the subpoena pursuant to the standards set forth under that article.

#### **§ 581-4.11 Evidence.**

(a) The rules of evidence shall not be strictly applied, provided, however, the hearing officer will exclude irrelevant, immaterial or unduly repetitious evidence and must give effect to the rules of privilege or confidentiality recognized by law.

(b) All parties shall have a fair opportunity to present their evidence, to cross-examine witnesses, and to make opening and closing statements.



(c) Each witness shall, before testifying, be sworn or make affirmation. Prefiled written testimony may be presented by any party with permission of and subject to the discretion of the hearing officer or may be required upon motion of any party by written directive of the hearing officer. Such permission shall be freely granted in the interest of expediting the proceeding. Pre-filed testimony shall be sworn to by the witness and subject to cross-examination.

**§ 581-4.12 Ex parte rule.**

(a) Except as provided below, a hearing officer must not communicate, directly or through a representative, with any person in connection with any issue that relates in any way to the merits of the hearing without providing notice and an opportunity for all parties to participate.

(b) A hearing officer may consult on questions of law or procedure with any Agency staff provided such staff have not been engaged in investigative or prosecutorial functions in connection with the adjudicatory hearing under consideration or a factually-related adjudicatory hearing.

(c) A hearing officer may communicate with any person on ministerial matters, such as scheduling or the location of a hearing.

(d) Parties and their attorneys must not communicate with the hearing officer or the Agency, or any person advising or consulting or eligible to advise or consult with the hearing officer or Agency, in connection with any issue without providing proper notice to all other parties.

**§ 581-4.13 Stipulations and administrative resolution of violations during hearing process.**

(a) At any time prior to the close of the hearing record, the parties may enter into a stipulation to resolve an issue of fact or law pending in a hearing brought under this Subpart.

(b) At any time prior to the submission of the hearing record to the Agency pursuant to Section 581-4.14(h), the Executive Director may resolve a violation by agreement with the respondent on specified terms and conditions.

**§ 581-4.14 Conduct of the hearing.**

(a) The hearing officer shall set the time, date and place of a hearing brought pursuant to this Subpart at the request of the Executive Director.

(b) The hearing officer shall notify the parties in writing of the time and place for the hearing.

(c) After a date has been set for the hearing, adjournments may be arranged by agreement of the parties or will otherwise be granted only for good cause and with the permission of the hearing officer. Except for adjournments by agreement, a request for an adjournment prior to commencement of the hearing must be in writing and filed with the hearing officer and all parties. Adjournments must specify the time, day and place when the hearing will resume or specify the time and day on which the parties will advise the hearing officer of the status of the case.

(d) The hearing officer will determine the sequence in which the issues will be tried and otherwise regulate the conduct of the hearing in order to achieve an efficient and fair disposition of the matters at issue.

(e) If requested by the parties or the hearing officer at the concluding session of the hearing, the parties shall have the opportunity to submit briefs on a schedule set by the hearing officer.

(f) At the concluding session of the hearing, the hearing officer shall set a date for the close of the hearing record.

(g) At any time before the close of the hearing record, the hearing officer may reopen the record and/or the hearing to consider significant new evidence.

(h) The hearing officer shall submit the hearing record to the Agency within 15 days of the close of the hearing record, unless a hearing report is requested, in which case the hearing officer shall submit the hearing record to the Agency within 45 days of the close of the record.

(i) After the close of the hearing record but prior to the issuance of any final

determination, the Agency may direct the reopening of the record and/or the hearing to consider significant new evidence upon a showing that the new evidence could affect the Agency's determination and that there is a justifiable excuse why the evidence was not produced prior to the close of the hearing record.

**§ 581-4.15 Record of the hearing.**

(a) The hearing record shall include the following, as applicable: the notice of hearing and complaint; notice of intent and response; any other pleadings; the appointment letter; motions and requests filed, and rulings thereon; the transcript of testimony taken at the hearing; pre-filed testimony; exhibits admitted into evidence; any stipulations between parties; a statement of matters officially noticed except matters so obvious that a statement of them would serve no useful purpose; and briefs.

(b) The hearing record shall also include a hearing report, if requested by the Agency. Unless otherwise specified, the hearing report shall include proposed findings of fact, conclusions of law and recommendations on all issues to be decided by the Agency.

**§ 581-4.16 Final Agency determination.**

(a) Upon the Agency's receipt of a hearing record pursuant to Section 581-4.14(h), the Enforcement Committee shall review the record and make a recommendation to the Agency for consideration.

(b) In reaching its determination, the Agency shall review the record and committee recommendations and make a final determination. The Agency's final determination will be embodied in an order which contains findings of fact and conclusions of law and may provide for:

- (1) a finding of liability or dismissal of the charges;
- (2) an assessment of penalties or other sanctions consistent with the applicable provisions of the Act or the ECL;
- (3) injunctive relief including abatement or restoration activities, and provision for financial security to assure completion of such activities;
- (4) modification, suspension or revocation of an Agency permit;
- (5) a combination of any or all of the foregoing; and
- (6) any determination deemed appropriate under the circumstances and consistent with applicable provisions of the Act, the ECL and/or the rules and regulations of the Agency.
- (7) the final determination of the Agency shall be issued on or before 60 days after the receipt by the Agency of a hearing record.
- (8) a copy of the final determination and order shall be served on the parties.

## Appendix 2: General Enforcement Guidelines

<b>Adirondack Park Agency Policy, Procedures &amp; Guidance System</b>	<b>LEGAL - 1</b>
<b>Topic: General Enforcement Guidelines</b>	
<b>Cecil Wray, Chairman, Enforcement Committee</b>	<b>Effective Date: January, 2003</b>

### I. Purpose and Applicability

These General Enforcement Guidelines establish the Agency's objectives and approach for the investigation and resolution of violations of the Adirondack Park Agency Act (APA Act), the Wild, Scenic and Recreational Rivers System Act (Rivers Act) and the Freshwater Wetlands Act (FWA). Failure to obtain necessary Agency permits under these laws, or to undertake a project pursuant to the terms and conditions of an issued permit, would constitute violations to which these guidelines apply.

These Guidelines are the first in a series of guidelines intended to address issues relating to the Agency's enforcement program. Other specific enforcement guidelines may be adopted such as:

- a. Substantive Standards for Settlements
- b. Civil Penalty Guidelines;
- c. Environmental Benefit Project Guidelines;
- d. Permit Compliance Guidelines.

### II. Statutory and Regulatory Enforcement Authority

#### Adirondack Park Agency Act

The APA Act establishes land use controls for the private lands within the six-million-acre Park. The purpose of the APA Act is to "insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack Park."

Executive Law, Section 813(1) provides that any "person"<sup>5</sup> who violates the APA Act or Agency regulation or permit or order issued by the Agency is liable for a civil penalty up to \$500 per day for each day the violation continues. Penalties are recoverable in an action by the Attorney General.

The Attorney General may also institute an action to prevent, restrain, enjoin or correct any violation, and may join in the action any appropriate person or the person responsible for the violation to take such affirmative actions as are necessary to correct the violation (Executive Law, Section 813[2]).

Any civil penalty may be released or compromised by the Agency before referral to the Attorney General, or after referral, by the Attorney General with the consent of the Agency (Executive Law, Section 813[3]).

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<sup>5</sup> "Person" includes individuals, businesses or other private entities, and municipalities, but not the State or State agency.

### New York State Freshwater Wetlands Act

The Agency implements the FWA within the Adirondack Park (Environmental Conservation Law, Articles 24 and 71). The purpose of the FWA is to preserve, protect and conserve freshwater wetlands and their benefits, consistent with the general welfare and beneficial development (ECL Section 24-0103). Any loss of wetlands causes a loss of important wetland benefits, such as protection of surface and ground water, flood control, wildlife habitat, recreation, open space and aesthetic appreciation, and other values (ECL Section 24-0105).

Pursuant to ECL Section 71-2303, the Agency can impose penalties up to \$3,000 for each violation of the FWA after notice and opportunity for hearing, and can order remediation and restoration of wetlands by the violator after a hearing.

### New York State Wild, Scenic and Recreational Rivers System Act

The Legislature has determined that certain of the State's rivers and their environs possess outstanding natural, scenic, historic, ecological and recreational values, and enacted the Rivers Act so that the designated rivers would be preserved in their free-flowing condition for the benefit and enjoyment of present and future generations (Environmental Conservation Law, Article 15, Title 27). For private lands in the Park, the Rivers Act is implemented by the Agency.

Section 15-2723 of the Rivers Act provides that any person who violates any provision of or order issued pursuant to the Rivers Act may be compelled to comply and shall pay a civil penalty of not less than \$100 and not more than \$1,000 per day for each day of the violation.

### Agency Enforcement Regulations

Agency regulations (9 NYCRR Part 581) effective January, 2003, provide the process for implementation of the Agency's enforcement authority under the APA Act, FWA, and the Rivers Act. The regulations provide for issuance of administrative cease and desist orders, requests to redress damage to environmental resources, opportunity to resolve violations by agreement, and an administrative process to be implemented when a Notice of Apparent Violation has been issued by staff. For violations of the FWA, the Agency may impose penalties after notice and opportunity for hearing, and can order remediation and restoration of wetlands after a hearing. In all cases involving permit violations, the Agency may, after an opportunity for a hearing, revoke, suspend or modify the permit. The Agency will not process an application for a permit or variance for property involved in a violation. An unresolved case may be referred to the Attorney General for civil action.

### **III. Agency Enforcement Objectives**

The Agency regulates land use and development on private lands within the Adirondack Park through a permitting program. Effective enforcement of the Agency's laws, regulations, permits and orders is fundamental to the meaningful regulation of land use and development in the Park and to the fulfillment of the Agency's statutory mandate to protect the natural resources of the Park.

In any case where there is on-going environmental damage, the Agency will seek cessation of the on-going actions and immediate remediation of the damage.

The primary objective of the Enforcement Program is to obtain compliance with regulatory environmental requirements. The Agency will require actions to ensure that the environmental damage created by violations will be eliminated or minimized for the long term.

A further objective of the program is to deter additional violations, either by that landowner or other landowners, or the public. The consistently applied requirement that properties in violation be brought into compliance with regulatory environmental standards has a significant deterrent effect. The imposition of civil penalties in appropriate cases also creates a significant deterrent effect. Violators should not profit from the undertaking of a violation. To that end, the Agency will seek actions that eliminate the economic benefit derived from violations. Where intentional or knowing violations occur, the Agency's objective will be to make the cost of noncompliance greater than the cost of compliance would have been.

Agency enforcement efforts will be calculated to encourage prompt, voluntary cooperation resulting in the firm, but fair resolution of violations. It is the Agency's intention to generally provide an incentive to violators who voluntarily and promptly agree to a binding obligation to achieve resolution of the violation, both with respect to remediation and the payment of any civil penalties. Prompt and voluntary remediation is far more effective to environmental protection than adjudication. Prompt resolution also contributes to the Agency's efforts to address other violations by allowing staff to use its time on other cases.

Finally, the Agency's enforcement process should be efficient, fair, and consistent, taking into account particular facts and circumstances and the need to ensure environmental protection.

#### **IV. Preventive Measures**

The most effective enforcement tool is the prevention of violations before they occur. Voluntary compliance by the people who live, work or recreate in the Park is the key to the future of the Park and the protection of its resources. In order for the people of the Park to both appreciate the basis for and comply with Agency regulations, relevant information must be readily available.

Therefore, the Agency will promote public awareness and understanding of the value of the Park resources and of proper design and technique in executing development projects. The Agency will make every effort to prevent violations by continuing to provide assistance to the public in jurisdictional matters, and by ensuring that the project review process is timely and permitting requirements are clear, based on specific and accurate development plans. The Agency will continue to establish and participate in various outreach and training programs, and to enhance communications and the sharing of information between the Agency and local governments. All these actions are designed to apprise the public and local officials of the potential for Agency jurisdiction, perhaps preventing some violations.

The Agency has for thirty years been the subject of considerable public scrutiny and press coverage. Therefore, the Agency expects that landowners, developers, attorneys, purchasers, real estate agents and local government officials are aware of the potential for Agency jurisdiction. The Agency has, since its inception, maintained staff available to answer questions relating to its jurisdiction, the permit process, and other Agency matters. Hence, the Agency anticipates that the public and professionals practicing in the Park will take advantage of the service offered and ascertain the legal status of a parcel or whether there is Agency jurisdiction over a proposed action prior to purchase or action.

#### **V. Enforcement Procedures**

##### Investigation

The Agency receives complaints about possible violations from the public and staff. Complaints will be investigated by staff and no determination of violation will be made unless and until there is sufficient proof. Investigations will be prioritized according to the potential for significant environmental damage and the need for prompt action.

Agency enforcement officers will undertake the investigation of the alleged violations assigned to them, including obtaining information to determine the legal and factual history of the site and its use, whether a violation has in fact occurred, and options for resolution. A staff attorney is assigned to each case to ensure legal guidance. Agency project review and resource analysis staff are consulted on issues which require more expertise. Once all the necessary legal and factual information has been obtained, and if a violation has been demonstrated, the enforcement officer and assigned attorney will prepare a recommendation for resolution of the violation.

##### Administrative Resolution of Violations by Staff

The Executive Director or his designee will make all reasonable efforts to resolve violations with the voluntary cooperation and/or consent of the violator(s) and landowners. Almost all violations should be resolved at this level of the enforcement process to ensure the most efficient use of staff resources, and timely compliance and/or remediation of environmental damage. In developing proposed resolutions, input from appropriate executive, legal, technical, and project review staff must be obtained. Resolutions of violations should generally be consistent in similar cases, while also taking into account the specific facts and circumstances of each case. When applicable, proposed resolutions should be consistent with guidelines subsequently developed in this enforcement guideline series.

Settlement agreements entered into to resolve a violation are not permits and are not a means to bypass or circumvent the legal process and protections created by the permit system. Enforcement staff does not have the benefit of the statutory requirement that a project applicant provide all necessary information; they cannot compel production of the detailed information and plans usually required for a project to be evaluated for approval. Moreover, enforcement staff will not have the benefit of the public comment provided for in the project review process. The resolution of many violations will therefore include a requirement that the individuals involved apply for a permit for the project which has already been undertaken. However, the referral of a violation to the after-the-fact permit process will not be allowed unless or until all necessary site stabilization and restoration has occurred and the appropriate civil penalty has been paid.

When violations cannot be resolved at the staff level, they may be referred to the Enforcement Committee for resolution or, in the case of violations of the Freshwater Wetlands Act or of an Agency permit, to the Agency for a determination and order.

#### Administrative Resolution of Violations by the Enforcement Committee

The Enforcement Committee shall consider violations of the APA Act or the Rivers Act upon staff referral or at its request. The Agency may consider such violations instead of the Enforcement Committee upon a referral by the Committee or a request by a majority of Agency members. A determination shall be made as to whether a violation has occurred and include an appropriate disposition of the matter. Such disposition may include a proposal to resolve the violation administratively, referral of the violation to the Attorney General, or adjournment of the matter. Where contested factual issues exist, the Enforcement Committee or the Agency may request that a fact-finding hearing be held before making its determination. The Enforcement Committee or the Agency, in reaching a determination based on the relevant facts and circumstances of the matter, will also take into account staff efforts to resolve a violation with the voluntary cooperation and/or consent of the individuals involved.

#### Agency Determinations in Freshwater Wetlands Act or Permit Suspension, Modification or Revocation Proceedings

The Agency may make a determination and order in matters involving violations of the FWA Act or permit violations requiring suspension, modification or revocation of an Agency permit. The Agency's decision will be based on a record after an opportunity for an adjudicatory hearing, and will also take into account any Enforcement Committee recommendation concerning the matter. Proceedings leading to a determination and order in such matters will generally only occur after staff have made a reasonable effort to resolve the violation(s) with the voluntary cooperation and/or consent of the individuals involved.

#### Civil Action by the Attorney General on behalf of the Agency

Where violations cannot be resolved at the administrative level, or where judicial involvement is appropriate to obtain access to property, cooperation in the investigation process, or the immediate cessation of ongoing environmental damage, the Attorney General may be asked to initiate appropriate civil action on behalf of the Agency. In such cases, all prior settlement offers and negotiations shall be inadmissible as evidence in such proceedings consistent with the Civil Procedure Law and Rules.

## **VI. Legal Effect**

The guidance and procedures set out in this document are intended solely for the use of Agency staff. They are not intended to create any substantive or procedural rights, enforceable by any party in administrative or judicial litigation with the State of New York. The Agency reserves the right to act at variance with these guidelines and each case will be evaluated as to its particular facts and circumstances.

# Appendix 3: APA Enforcement Regions

