

STATE OF NEW YORK: ADIRONDACK PARK AGENCY

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Matter of the Application to  
construct the Adirondack Club  
and Resort by

Summary of Conference  
held on October 24, 2007

Preserve Associates, LLC  
Applicant.

APA Project No. 2005-100

November 6, 2007

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I. Introduction

With respect to the captioned matter, the following is a brief summary of the discussion at the conference held in Tupper Lake, New York on October 24, 2007 at the Goff-Nelson Library. The conference was convened at the request of Preserve Associates, LLC (Applicant) to discuss the feasibility of using mediation to resolve disputes associated with the proposal pending before the New York State Adirondack Park Agency (APA) for the proposed Adirondack Club and Resort (the proposal). A list of attendees is attached to this summary as Appendix A.

The following summary is based on the notes that I took during the conference and the audio recording. Because a verbatim transcript will not be available, the conference attendees will have the opportunity to review this summary and submit written responses to correct any mischaracterizations and to provide any omitted information. A schedule to respond is provided below.

APA staff explained that the APA Board has received regular updates about the progress of the proceedings concerning this matter, and that the Board will be informed about Applicant's request for mediation as well as the conference held on October 24, 2007. To avoid *ex parte* communications, members of APA staff involved with the review of the proposal do not communicate directly with the members of the APA Board. APA staff supports Applicant's request for mediation and would participate with the consent of the other prospective parties.

The APA does not have any regulations or policy document related to mediation. Although APA staff would participate in the mediation and potentially sign any agreements, APA staff does not have final decision making authority. As a result, the APA Board would review any settlement or agreement developed during the mediation, and decide whether the settlement provides a sufficient basis for the Board to make the required

determinations about the proposal. To the extent that the Board needs additional information to make any requisite findings or conclusions, APA staff explained that the Board would remand the matter for further proceedings in the form of either additional mediation sessions or an adjudicatory hearing.

I asked APA staff whether I should advise the Board about Applicant's request for mediation. I explained that the Board's February 15, 2007 Order directed me to conduct an adjudicatory hearing rather than to mediate a settlement. I noted that the Order is silent about mediation, and that it would be helpful to know whether the Board, as the final decision maker, would be receptive to accepting a mediated settlement as the basis, either in whole or in part, for its final determination about the proposal.

APA staff said that an inquiry to the Board may be advisable for a number of reasons. For example, the Board may prefer that certain issues identified in its February 15, 2007 Order be resolved in a particular manner, such as by mediation or adjudication. In addition, given the recent appointment of new Board members, the Board may want to reconsider aspects of the February 15, 2007 Order, and as appropriate revise it.

## II. Participants

The April 2, 2007 Notice of Public Hearing outlined the requirements to participate in the pre-hearing conference and any subsequent adjudicatory hearing. The April 2, 2007 notice identified the parties-of-right, and outlined the additional information that interested parties must present in a petition to intervene in the proceeding. According to the April 2, 2007 notice, petitions to intervene were due by April 23, 2007.

Pursuant to 9 NYCRR 580.5, the parties-of-right to an APA adjudicatory hearing are: (1) the project sponsor; (2) the Adirondack Park Local Government Review Board; (3) the Chair of the County Planning Board in which the project would be located; (4) the County; (5) the Chair of the appropriate Regional Planning Board; (6) the Chief Executive Officer of the municipality in which the project would be located; (7) the Clerk and local Planning Board Chair; (8) any adjoining landowners; (9) the Clerk of any local government within 500 feet of the land involved; (10) Staff from any State Agency; and (11) any landowner within 500 feet of any border of the property (see also Executive Law § 809[3][e]). The information that interested parties must present in a petition is outlined in 9 NYCRR 580.7.

The following parties-of-right appeared and participated in the April 26, 2007 pre-hearing conference: (1) Applicant; (2) the Adirondack Park Local Government Review Board; (3) Franklin County; (4) the Town of Tupper Lake; (3) the Village of Tupper Lake; (5) the Town of Tupper Lake Planning Board; and (6) State Agency Staff from the APA and Department of Environmental Conservation (DEC).

In addition, the following individuals have identified themselves as either adjacent landowners, or property owners within 500 feet of the proposal: (1) Richard Abell; (2) J. Kyle Ackerman; (3) Edith R. Lamb, Graham McIlwaine, Melinda McIlwaine, Penelope McIlwaine, Sharon McIlwaine and Bayard G. Read - the owners of the Birchery Camp; (4) Scott and Mary Chartier; (5) William Crouse; (6) Peter and Rhoda Curtiss<sup>1</sup>; (7) Mary H. DeGarmo; (8) Charlcie Delehanty; (9) John and Susan Delehanty; (10) Timber Lodge [Don Dew Enterprises, LLC]; (11) John and Patricia Gillis; (13) Vincent Giuseffi; (14) Alex Haddad; (15) Jerrier A. and Carol J. Haddad; (16) Bob and Leslie Harrison; (17) Joyce Boden Hundley; (18) Kevin E. Jones; (19) Peter Littlefield and Elaine M. Yabroudy; (20); James R. and Judy McCartney, Jr.; (21) M. Dan McClelland; (22) Marilyn Oestreich; (23) Lawrence F. Orton; (24) Patrick and Gloria Orton; (25) Fortunata Plumley; (26) Susan H. Potterton; (27) Robert Ringrose; (28) Verne N. and Madeline Rockcastle; (29) Carol I. Richer; (30) Phyllis B. Thompson, PhD; (31) Paul Vidich; (32) Dennis I. and Brenda S. Zicha; and (33) Little Simon Properties, Inc.<sup>2</sup>

The following organizations timely filed petitions pursuant to 9 NYCRR 580.7: (1) the Tupper Lake Chamber of Commerce with a petition dated April 9, 2007; (2) the Adirondack Council with a petition dated April 20, 2007; (3) the Association for the Protection of the Adirondacks (the Association) with a petition dated April 17, 2007; (4) Natural Resources Defense Council (NRDC) with a petition dated April 18, 2007; and (5) the

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<sup>1</sup> A copy of their letter dated October 2, 2007 is attached to this summary as Appendix B.

<sup>2</sup> In its petition dated April 20, 2007, Little Simon Properties, Inc. (LSP) states that it is an adjacent property owner. LSP explains that during the adjudicatory hearing it would address several issues identified in the Board's February 15, 2007 Order. LSP also proposes an additional issue for adjudication, which is addressed below in Section IV (Scope of Mediation - Issues).

Residents' Committee to Protect the Adirondacks (the Residents' Committee) with a petition dated April 19, 2007.

The attendees to the October 24, 2007 conference agreed that the participants to the mediation as well as to the adjudicatory hearing, if one becomes necessary, need to be identified. Bob Harrison stated that issues remain about who could participate because the location of the proposed Orvis shooting school is not known. As a result, all potential participants cannot be identified with certainty at this time.

At the October 24, 2007 conference, Council member John Button from the Town of Tupper Lake read Resolution #36-2007 dated October 22, 2007. A copy of the resolution is attached to this summary as Appendix C. In the October 22, 2007 Resolution, the Town requests that the parties to the mediation and any subsequent adjudicatory hearing should be "limited to the organizations and individuals on which the Adirondack Club and Resort project would have a significant impact."

Applicant said that it would not object to participation by the parties-of-right. Applicant's counsel stated that he has received copies of the requests for party status, but as of the date of the conference, he had not thoroughly reviewed them. Applicant supports the consolidation of the parties given the numerous individuals and groups who are either parties-of-right, or have requested party status pursuant to 9 NYCRR 580.7.

APA and DEC staff do not object to any of the requests for party status. Staff of both agencies support consolidation. APA staff said it may seek clarification about individual property owners. For example, some parcels may be owned by one or two people, and other property may be owned by a group of individuals such as a family-formed limited liability corporation. DEC staff noted that the goals should be first to identify the participants to the mediation, and then focus on consolidation.

John Delehanty said that Staff from the New York State Departments of Health and State (DOH and DOS, respectively) did not appear at the April 2007 pre-hearing conference or at the October 24, 2007 conference. Mr. Delehanty observed that DOH Staff will need to review and approve various elements of the proposal. Several of the required DOH approvals are identified in APA staff's letter dated September 10, 2007. Mr. Delehanty explained that DOS Staff should review the structure of the limited liability corporations (LLC) or limited liability partnerships (LLP) that may be formed to operate various aspects

of the proposal after construction. For example, an entity would be formed to operate the proposed facility that would treat the wastewater from the portion of the proposal which is not directed to the municipal facility. According to Mr. Delehanty, a review by DOS staff is necessary to assure that the entity or entities responsible for the operation of non-municipally owned infrastructure will comply with applicable operating requirements, and can be held responsible if enforcement becomes necessary.

Two proposals were offered to identify the participants to the mediation. The first proposal was for Applicant to review all the requests for party status received to date, and to state whether Applicant objects to any of them. The second proposal was for me to rule on all requests for party status. Attendees who supported the second proposal recommended that prospective parties be provided with the opportunity to comment about the various requests and petitions for party status, and as necessary provide the prospective parties with the opportunity to respond to any objections made during the first round of comments.

*Recommendations:* It appears that the majority of individuals who wish to participate in the mediation would be parties-of-right to the adjudicatory hearing. As noted above, they include Staff from State Agencies and representatives from local municipal governments, as well as adjacent and nearby property owners. Adjacent and nearby property owners make up the largest group. For the most part, these individuals have identified the location of their property, and there does not appear to be an issue about the right of these individuals to participate in the adjudicatory hearing. Therefore, I request that Applicant review the various petitions for party status, and advise whether Applicant has any objections about the participants.

To identify the adjacent and nearby property owners, there needs to be additional consideration about whether the Orvis shooting school will be an element of the proposal and, if so, where the shooting school would be located. These individuals would be parties-of-right to the adjudicatory hearing, and may want to participate in the mediation.

With respect to consolidation, I request that landowners living near a particular element of the project consider whether their interests and views about the proposal are similar enough that they could consolidate. For example, one group of units on the plan (MP-2, dated March 29, 2005) is identified as "Sugarloaf North" off Country Club Road, and a second group of units is

identified as "Tupper Lake View North." Perhaps landowners located south of Route 30, west of County Club Road and adjacent to the location of these two proposed units could consider consolidating.

Alternatively, adjacent and nearby property owners could consider whether organizations such as the Adirondack Council, the Association, NRDC, or the Residents' Committee would adequately represent their interests in the mediation.

### III. Application Materials

On April 19, 2005, the APA received an application from Preserve Associates, LLC to undertake a Class A regional project. Applicant provided additional information to the APA on February 21, 2006 and October 30, 2006. Subsequently, on December 20, 2006, the APA determined that the application was complete.

On February 22, 2006, Applicant filed an application with the New York State Department of Environmental Conservation (DEC) for several protection of water permits and a federal Clean Water Act Section 401 Water Quality Certification (DEC Application No. 5-1620-00075/00003). After reviewing these materials, DEC staff issued a notice of incomplete application with a letter dated March 23, 2006. In a letter dated April 19, 2007, DEC Staff acknowledged receipt of application materials for State Pollutant Discharge Elimination System (SPDES) permits from Applicant for two proposed waste water treatment plants. One would be located on Ski Tow Road and the other would be located on Lake Simond Road. In a letter dated September 10, 2007, DEC staff stated that all the pending permit applications filed by Applicant for the proposal are incomplete. Consequently, DEC Staff is not able to complete its review of the applications, and cannot determine whether to refer the pending environmental permit applications for a public hearing.

On February 28, 2006, DEC staff received a water supply permit application from the Town of Tupper Lake. This permit application relates to the proposed expansion of Water District #27 to provide potable water for the proposal. In a letter dated March 23, 2006, DEC staff issued a notice of incomplete application.

In a letter dated March 27, 2007, Applicant identified elements from the original proposal that would be either eliminated or modified as mitigation. The mitigation includes eliminating the East Ridge subdivision; eliminating the second

on-site sewage treatment plant and directing the waste water that would have been treated there to the existing municipal facility that serves District 23; and moving the Orvis shooting school "off-site." Applicant has stated that the location of the Orvis shooting school is yet to be determined. According to the June 4, 2007 status report, Applicant may develop the Orvis shooting school one or more years after obtaining the regulatory approvals for the remaining elements of the project.

The discussion at the October 24, 2007 conference focused on both sets of application materials. The first set of materials relates to the pending approval before the APA Board. The second set relates to the permit applications pending before the DEC.

The conference attendees presented three different perspectives about the status of the APA application materials. First, prospective parties who attended the October 24, 2007 conference including the Adirondack Council, the Association, NRDC, the Residents' Committee, as well as some adjacent land owners, such as Phillis Thompson, John Delehanty, and Jerrier Haddad, stated that the application materials need to be updated or revised to reflect the mitigation outlined in Applicant's March 27, 2007 letter. These groups and individuals explained that the principal benefit associated with updating or revising the application materials to reflect the proposed mitigation is that the scope of the proposal will be accurately understood before the mediation process begins and focus the scope of the mediation.

The location of the proposed Orvis shooting school is of concern to the group of conference attendees identified in the preceding paragraph for the following reasons. Pursuant to 9 NYCRR 580.5(b) land owners within 500 feet of any border of the property including adjacent property owners (see Executive Law § 809[3][c] and 9 NYCRR 580.4[b][3][iv]) are parties-of-right to an adjudicatory hearing, and should be given the opportunity to participate in the mediation process. Because the location of the shooting school is not known, the land owners who would qualify for party status cannot be identified. Consequently, the position of the above identified conference attendees is that more details must be provided about the shooting school.

The second perspective is that the APA Board has determined that the pending application is complete, and that the mitigation outlined in Applicant's March 27, 2007 letter generally identifies discrete elements of the proposal that can be readily separated from the rest of the proposal. As a result, the

conference attendees supporting this perspective stated that the revised scope of the proposal can be rather easily defined. Furthermore, as the mediation process progresses and more specific information about a particular aspect of the project is needed, Applicant stated that it would provide that information. It is anticipated that the scope of any additional, required information would be limited and well defined because the information would relate to either a specific aspect of the project, or a particular issue. Conference attendees who have adopted this perspective include: Applicant; APA staff; the local municipal governments including the Town, the Town Planning Board, and the Village; Franklin County; and the Adirondack Park Local Government Review Board. Some property owners have also adopted this perspective and include J. Kyle Ackerman, who related his experiences with a process he described as "alpha contracting."

I understand that Bayard Read proposed a third perspective, which was for Applicant to provide a list of the elements of the proposal and to identify those application materials already filed with the APA, which relate to those elements. In correspondence dated August 28, 2007, the Residents' Committee recommended that Applicant provide a detailed list of all changes to the application since the time that the APA Board sent the proposal application to hearing. The Residents' Committee reiterated this recommendation during the October 24, 2007 conference.

With respect to the environmental permit applications pending before the DEC, DEC Staff stated that these applications are incomplete as outlined in the notices of incomplete application referenced above. Because the applications are incomplete, Staff said that neither final determinations about the permits nor decisions about whether to refer the environmental permits to a DEC public hearing could be made. Also, DEC staff cannot participate in a mediation about the pending environmental permits until Applicant provides the requested information. Staff noted that after Applicant provides the information that would complete the pending environmental permit applications, other participants, including APA staff, would need time to review this information. Staff suggested that the mediation could go forward in sections, without prejudice. As information becomes available about the environmental permits, disputed issues concerning those permits could be mediated.

*Recommendations:* At this point in the discussion, there appear to be two distinct points of view about whether revised or

supplemental information should be provided to reflect the mitigation outlined in Applicant's March 27, 2007 letter. Based on discussions held during the April 26, 2007 prehearing conference and the October 24, 2007 conference, it appears that at least some supplemental information should be provided before the mediation begins.

First, the environmental permit applications pending before the DEC are incomplete, and it is not clear whether and, if so, how the proposed mitigation relates to the pending DEC permit applications. Although DEC Staff's review of the pending environmental permits is independent of APA Staff's review of the proposal, the environmental permits relate to significant elements of the proposal and to issues identified in the APA Board's February 15, 2007 Order.

For example, Issue #4 of the Board's February 15, 2007 Order concerns the wastewater treatment facility on Lake Simond Road. Applicant's March 27, 2007 letter, however, does not expressly state which of the two wastewater treatment facilities has been eliminated from the proposal. On the one hand, if the proposed Lake Simond Road facility would remain part of Applicant's proposal, then conference attendees raised concerns about the design and location of this wastewater treatment facility, its proximity to the site of the proposed canoe launch, and the potential effects on the water quality of Lake Simond. To the extent that this proposed facility remains part of the proposal, a complete SPDES permit application for DEC Staff and others to review would help to address the concerns outlined in Issue #4. If, on the other hand, the mitigation proposed in Applicant's March 27, 2007 letter would eliminate the waste water treatment facility at this location, then Issue #4 may no longer be relevant.

I understand that the elimination of one of the proposed wastewater facilities would require the Town to file an application with DEC to modify its SPDES permit to provide for the treatment of wastewater from a portion of the proposed development. I believe that additional information about the nature of the SPDES permit modification would facilitate the mediation.

With respect to the pending environmental permits, the APA Board identified concerns about stormwater management in Issues #3, #8 and #9 of the February 15, 2007 Order. At the October 24, 2007 conference, Christopher Lacombe said that DEC Staff was required to conduct a stormwater review, but application

materials were incomplete. I believe that additional information concerning stormwater management, as it relates to Issues #3, #8 and #9 of the Board's February 15, 2007 Order would be informative.

Second, as noted above, there needs to be clarification about whether the Orvis shooting school will be an element of the proposal and, if so, where the shooting school would be located. Clarification and additional information are necessary to ensure that all potential participants have been identified and will have the opportunity to participate, as well as to address the concerns identified in Issue #2 of the Board's February 15, 2007 Order.

Finally, I believe that a description of how the elimination of the proposed East Ridge subdivision would effect the scope of the issues identified in the Board's February 15, 2007 Order would facilitate the mediation.

#### IV. Scope of Mediation - Issues

At the October 24, 2007 conference, Applicant said that the scope of the mediation should be limited to the issues identified in the Board's February 15, 2007 Order. Applicant also stated that if there is no agreement about the scope of the mediation, then the ALJ has authority, pursuant to the February 15, 2007 Order, to rule on other issues proposed in the prospective parties' petitions for party status.

The Town, the Planning Board, and the Village support Applicant's position with respect to the scope of the mediation. Franklin County recommended using the issues identified in the Board's February 15, 2007 Order as a starting point, and if necessary, the County said that additional issues could be considered with the consent of the parties.

The Adirondack Park Local Government Review Board said that the purpose of the adjudicatory hearing is to develop a record that will inform the APA Board so that it can make a final determination about the proposal. The Adirondack Park Local Government Review Board noted further that the APA Board's February 15, 2007 Order directed the ALJ to rule on other proposed issues for adjudication and, to the extent that the participants to the mediation cannot agree about other proposed issues, the ALJ should resolve those disputes with a ruling.

Don Dew favors the use of mediation if such a process will quickly resolve disputes. Otherwise, Mr. Dew would like the adjudicatory hearing to begin as soon as possible given the amount of time and other costs already expended. If there are disputes about the scope of the mediation, Mr. Dew recommended that the ALJ issue a ruling consistent with the direction outlined in the APA Board's February 15, 2007 Order.

The Adirondack Council maintained that the subject of the mediation is the project not the issues identified in the APA Board's February 15, 2007 Order. In other words, if the mediation goes forward, then the process needs to consider the entire proposal. The Adirondack Council stated further that its petition proposes additional issues for adjudication, which should be considered during the mediation. Marc Gerstman, who represents the Adirondack Council in this matter, also represented a party in the *Matter of Crossroads Venture, LLC* before the DEC.

A mediated settlement was recently reached concerning the Crossroads Venture matter, which is a proposed resort development in the Catskill Mountains. With respect to the Crossroads matter, the DEC Commissioner had issued an Interim Decision (dated December 29, 2007) after considering appeals from the ALJ's issues ruling. Even though the DEC Commissioner had issued an Interim Decision, Mr. Gerstman explained that the scope of the subsequent mediation concerning the Crossroads Venture matter was broader than the issues for adjudication identified in the DEC Commissioner's December 29, 2007 Interim Decision. Notably, the DEC's Office of Hearings and Mediation Services was not involved in the mediation process for the Crossroads Venture matter. Rather, the parties conducted settlement negotiations on their own and with assistance from the Governor's office.

The Association supports the Adirondack Council's position with respect to the scope of the mediation. The Association stated that it may want to supplement its petition for party status. The Association stated further that if it proposes additional issues for adjudication, then those additional issues should be considered in the mediation provided there is an offer of proof. In the Association's view, an issues ruling at this point could complicate the mediation process.

NRDC's position about the scope of the mediation is the same as the Adirondack Council's and the Association's.

APA Staff explained that the proposed mediation may not completely resolve all disputes associated with the proposal. Consequently, the unresolved disputes may need to be adjudicated before the Board can make a final determination. As noted above, the APA Board will review any mediated settlement before making a final determination.

DEC Staff recognizes the efficiency associated with having a well defined list of issues before the mediation begins. Staff noted, however, that many of the issues for adjudication identified in the Board's February 15, 2007 Order are broad, and include several sub-issues. At this point, DEC Staff stated that a formal issues ruling from the ALJ may unduly complicate the mediation process. Generally, DEC Staff supports a more expansive approach to the mediation rather than limiting the scope of the mediation to the issues identified in the February 15, 2007 Order.

Phyllis Thompson observed that the February 15, 2007 Order is silent about the proposed mediation. Dr. Thompson said that the proposal keeps changing and, therefore, favors a broad scope to the mediation.

*Recommendations:* Based on the discussion at the October 24, 2007 conference, the attendees seem to agree that a ruling from me, as the ALJ, that identifies the issues for adjudication would be unnecessarily time consuming. However, the conference attendees seem to disagree about the scope of the mediation. I understand that Applicant, among others, would limit the scope of the mediation to the issues identified in the Board's February 15, 2007 Order. Prospective parties, such as the Adirondack Council, among others, would prefer the option to include other issues that have been identified in the petitions for party status. Within the context of a mediation, the preference would be for the participants to the mediation to agree about the scope of the mediation.

In its April 20, 2007 petition, LSP proposes an issue for adjudication in addition to those identified in the Board's February 15, 2007 Order. LSP is concerned about the possibility that the APA would allow the transfer of development rights across private land. According to LSP's petition, the APA has not previously allowed the transfer of development rights across private land.

In its April 20, 2007 petition, the Adirondack Council proposes issues for adjudication in addition to those identified

in the Board's February 15, 2007 Order. The Adirondack Council argues that a record should be developed about the potential adverse aesthetic and visual impacts related to the roadways and driveways, which would be associated with the proposal. The Adirondack Council proposes an issue related to light pollution. The Adirondack Council is concerned about the impacts to the Town of Tupper Lake's drinking water supply and distribution system, as well as impacts to the Town's wastewater treatment facilities. With respect to the previously proposed issue, the Adirondack Council expressed concerns about the potential adverse environmental impacts as well as the potential fiscal impacts to the Town. The Adirondack Council proposes an issue about the potential adverse impacts associated with using Cranberry Pond as a source of water for snowmaking purposes when Cranberry Pond would also be the receiving water for treated wastewater. Finally, the Adirondack Council is concerned about the possibility that the APA would allow the transfer of development rights across private land, which the APA has not previously authorized.

In its April 17, 2007 petition, the Association states that at hearing, it would address the issues identified in the Board's February 15, 2007 Order. The Association states further that it is familiar with the other petitions for party status and supports the adjudication of the other proposed issues. During the October 24, 2007 conference, the Association explained that it may want to supplement its petition for party status.

In its April 18, 2007 petition, NRDC states that at hearing, it would address the issues identified in the Board's February 15, 2007 Order. NRDC states further that it is familiar with the other petitions for party status and supports the adjudication of the issues proposed in those petitions. In addition, NRDC argues that the record should be developed about regional impacts associated with the proposal. NRDC also asserted there is a need for additional wildlife inventories and an assessment of the potential adverse impacts on the Resource Management lands.

In its April 19, 2007 petition, the Residents' Committee states that at hearing, it would address the issues identified in the Board's February 15, 2007 Order, and proposes additional issues for adjudication. For example, the Residents' Committee proposes issues related to the precedential nature of the proposal and its potential impact on future development projects. The Residents' Committee also proposes to develop a record about alternatives and revisions to the proposal, as well as review the

marketing plan and economic impact to the tax base in the Town of Tupper Lake.

I recommend that Applicant review the additional issues for adjudication proposed in the petitions for party status, and consider whether these additional issues could be addressed during the mediation. In the meantime, I recommend that the prospective parties consider whether any of the additional issues proposed in their respective petitions for party status relate to issues already identified in the Board's February 15, 2007 Order. For example, the Adirondack Council's proposed issue concerning the impacts to the Town of Tupper Lake's wastewater treatment system appears to be an issue based on the Applicant's proposed mitigation (see Issue #5).

In the event that the conference attendees cannot agree about the scope of the mediation and I am requested to rule on the issues, the following process would occur. First, the pre-hearing conference would need to be reconvened to consider the petitions for party status. Only some preliminary matters were addressed at the April 26, 2007 prehearing conference. Second, after I review the petitions and the discussion from the reconvened prehearing conference, I would prepare a ruling on party status and issues consistent with the direction provided by the Board in its February 15, 2007 Order (see p. 11 of 12) and applicable regulations. Third, as provided for by 9 NYCRR 580.7(f)(1), the prehearing conference participants have the right to appeal the ruling to the Board. Finally, after considering the duly filed appeals, the Board would issue a directive about how to proceed further.

#### V. Selection of the Mediator

The conference attendees do not object to me serving as the mediator. If an adjudicatory hearing becomes necessary, the conference attendees would not object to me continuing as the administrative law judge.

#### VI. Time Table

In its September 10, 2007 letter, APA staff recommended that some thought be given to the timing of the mediation. Staff noted that the mediation may be as time consuming as a formal adjudicatory hearing, without any guarantee about the results. At the October 24, 2007 conference, APA staff said that it would be difficult to set a time limit on the length of the mediation now because the scope of the mediation has not been resolved yet.

If mediation proceeds, Staff recommended that one of the first steps would be for the group to consider a timetable for the mediation as well as other ground rules.

In its September 10, 2007 letter, the Adirondack Council also recommended that the schedule for any mediation include milestone dates to periodically evaluate the progress. At the October 24, 2007 conference, the Adirondack Council reiterated this recommendation. In addition, the Adirondack Council identified the need to develop a confidentiality agreement, as well as other ground rules prior to the commencement of the mediation. The Adirondack Council recommended that one of the preliminary steps to the mediation should be to develop a memorandum of understanding concerning the mediation. The Association and NRDC agreed with the Adirondack Council about the need for some time limits.

The Town Planning Board explained that it must review the proposal. So far, the Planning Board's review of the proposal has been concurrent with APA staff's review. In addition, the Planning Board's review will be contingent upon Applicant obtaining the pending APA approval. The Planning Board would like to see the review process move forward, and that mediation may facilitate an expeditious review and resolution.

The Adirondack Park Local Government Review Board recommended against imposing a strict time table on the mediation. It is important, however, to set goals to monitor the progress of the mediation.

DEC staff recommended that the mediation process should start in early December 2007. Staff further recommended that the issues be prioritized. If Applicant needs to supply additional information with respect to a particular issue, then Applicant should estimate how long it would take to provide that information, and the remaining participants would need to estimate how long they will need to review the information. Staff recommended that participants assess the effectiveness of the mediation process in March 2008 to determine whether the mediation should continue. Staff recognized the need for confidentiality during the mediation process. Staff explained the need to balance confidentiality with maintaining a level of public trust and confidence in the review process.

APA staff stated that the issues identified in the Board's February 15, 2007 order should be the focal point of the mediation, and that these issues should be prioritized. After

these issues are prioritized, then the participants could turn their attention to other proposed issues. Staff requested that the prospective parties identify and clarify any additional issues that they want incorporated into the scope of the mediation.

#### VII. Review and Comments

During the October 24, 2007 conference, I was able to correct some e-mail addresses on the Preliminary Service List and obtain additional e-mail addresses. Also, there are some additional revisions. A revised version of the Preliminary Service List dated November 5, 2007 is attached to this summary. I have included Mr. Sweeney's contact information. I was informed at the October 24, 2007 conference that Robert Plumley is deceased and revised the service list accordingly.

The conference attendees will have an opportunity to review and comment about the preceding summary and recommendations. I think there would be a benefit if the conference attendees have an opportunity to respond to the first round of comments. Under these circumstances, it does not appear likely that a conference could take place by December 10, 2007 as discussed during the October 24, 2007 conference.

#### VIII. Schedule

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| <b>November 28, 2007</b> | First round of comments are due. Conference attendees may correct any errors or omissions to the summary, and respond to the recommendations. Conference attendees may propose additional recommendations. |
| <b>December 19, 2007</b> | Second round of comments are due. Conference attendees may respond to the comments and any new recommendations filed on November 28, 2007.   |
| <b>January 2008</b>      | Conference in Tupper Lake. I would like to schedule a one-day conference in Tupper Lake in January 2008 to discuss whether to proceed with the mediation.  |

Conference attendees are encouraged to confer with each other about the summary, corrections and omissions, as well as

the recommendations as you prepare the November 28 and December 19 comments.

If there is agreement about continuing with the mediation, topics of discussion at the January 2008 conference would include, but not be limited to, the participants, the scope of the mediation, as well as the timetable and other ground rules that may be included in a draft memorandum of understanding. In the alternative, the discussion would focus on working out a schedule for the continuation of the pre-hearing conference and other steps preliminary to the adjudicatory hearing.

Please advise me of your availability for the January 2008 conference in writing by **November 28, 2007**. I understand there is a preference to convene on Mondays or Fridays. Given the time of year and potential weather conditions, I would prefer to travel to Tupper Lake the day before the conference rather than on the morning of the conference. Therefore, I would be available on January 10, 11, 17, 18, 24, 25, 31 and February 1, 2008.

I request that APA Staff inquire about the availability of the Goff-Nelson Library on the dates identified above.

In addition to sending a copy of the November 28, 2007 and December 19, 2007 comments and recommendations to me, the conference attendees should also send a copy of their respective comments to everyone on the service list. Given the expense associated with mailing, I will accept submissions via e-mail.

\_\_\_\_\_/s/\_\_\_\_\_  
Daniel P. O'Connell  
Administrative Law Judge  
Office of Hearings  
and Mediation Services  
NYS Department of Environmental  
Conservation  
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Dated: Albany, New York  
November 6, 2007

To: Enclosed Preliminary Service List, revised November 5, 2007

Attachments:

Appendix A List of Conference Attendees, October 24, 2007.  
Appendix B Letter dated October 2, 2007 from Peter and Rhoda  
Curtiss.  
Appendix C Town of Tupper Lake, Resolution #36-2007 dated  
October 22, 2007.