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To be argued by: Julie M. Sheridan
Time Requested: 20 minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

In the Matter of LEWIS FAMILY FARM, INC.,

Plaintiff-Appellant,

- against -

NEW YORK STATE ADIRONDACK PARK AGENCY,

Defendant-Respondent.

Essex County
Index No. 498-07

(Case No. 1)

In the Matter of LEWIS FAMILY FARM, INC.,

Petitioner-Respondent,

- against -

ADIRONDACK PARK AGENCY,

Respondent-Appellant.

Essex County
Index No. 315-08

(Case No. 2)

ADIRONDACK PARK AGENCY,

Plaintiff-Appellant,

- against -

LEWIS FAMILY FARM, INC., SALIM B. LEWIS, and BARBARA LEWIS,

Defendants-Respondents.

Essex County
Index No. 332-208

(Case No. 3)

BRIEF FOR RESPONDENT APA - CASE NO. 1
REPLY BRIEF FOR APPELLANT APA - CASES NO. 2 AND NO. 3

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Dated: April 28, 2009

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PRELIMINARY STATEMENT

The Adirondack Park Agency ("APA") submits this brief in response to the brief filed by appellant Lewis Family Farm, Inc. ("Lewis Farm") in Case No. 1, and in further support of the APA's appeals in Case No. 2 and Case No. 3. Point I of this brief responds to Lewis Farm's argument in Case No. 1 that Agriculture and Markets Law § 305-a bars the APA from imposing the permit requirements in the Adirondack Park Agency Act ("APA Act") (Executive Law § 801, et seq.) and the Wild, Scenic and Recreational Rivers System Act (the "Rivers Act") (ECL § 15-2701, et seq.). In Point II of this brief, the APA counters Lewis Farm's argument that the APA does not have regulatory jurisdiction over Lewis Farm's new single family dwellings under the APA Act or the Rivers Act. In Point III, the APA establishes that neither article XIV, § 4 of the N.Y. Constitution nor Agriculture and Markets Law article 25-AA bars the APA's assertion of jurisdiction here.

ARGUMENT

POINT I

AGRICULTURE AND MARKETS LAW § 305-a DOES NOT SUPERCEDE THE APA'S JURISDICTION UNDER THE APA ACT OR THE RIVERS ACT OVER LEWIS FARM'S NEW SINGLE FAMILY DWELLINGS

In Case No. 1, Lewis Farm sought judgment declaring that the APA lacked jurisdiction to enforce the permit requirements in the APA Act and the Rivers Act and, accordingly, enjoining the APA from interfering with the construction of Lewis Farm's new single family dwellings. Supreme Court granted the APA's motion to dismiss the proceeding, correctly rejecting Lewis Farm's argument that the APA had no regulatory authority (R8-9).[1] The court also stated, correctly, that Agriculture and Markets Law § 305-a, which protects "farm operations" from unreasonable restrictions and regulations imposed by laws, ordinances, rules, or regulations enacted and administered by "local governments," did not limit the APA's regulatory authority in this case because the APA is not a local government (R10). The court therefore dismissed the proceeding as "not ripe for judicial intervention" because the APA had not completed its administrative proceeding (R10-11). This Court should affirm the order in Case No. 1 in its entirety.

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[1] References in parentheses to "R" followed by a number are to pages in the Record on Appeal.

Our main brief to this Court in Case No. 2 and Case No. 3, as supplemented by the arguments made in Points II and III of this brief, establishes that the APA has regulatory jurisdiction in this case. Moreover, the court below correctly stated that Agriculture and Markets Law § 305-a does not supercede that jurisdiction. According to its terms, section 305-a applies to laws, rules, and regulations enacted by "local governments."[2] Agriculture and Markets Law § 305-a(1)(a). The APA is not a "local government." The New York Legislature created the APA as a state executive agency when it enacted the APA Act in 1971. See Executive Law §§ 801, 803. Thus, as even the Department of Agriculture and Markets recognizes, "[s]ection 305-a, by its express terms, does not apply to State agencies such as the APA" (R408).

Lewis Farm's contention that the term "local government" in section 305-a should be construed broadly to encompass the APA because the APA has "no more power than a local government" (Br. at 48) to control development in the

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[2] Lewis Farm's quotation of the text of section 305-a(1)(a) on page 47 of its brief omits a significant exception to the statutory ban on unreasonable regulation of farm operations. That section, in its entirety, reads as follows: "Local governments, when exercising their powers to enact and administer comprehensive plans and local laws, ordinances, rules, or regulations, shall exercise these powers in such a manner as may realize the policy and goals set forth in this article, and shall not unreasonably restrict or regulate farm operations within agricultural districts in contravention of the purpose of this article unless it can be shown that the public health or safety is threatened." Thus, to the extent that any "farm operation," including the construction of farm worker housing, threatens public health or safety, it is subject to regulation by local governments as well as any appropriate state agency.

Adirondack Park is mistaken. As the Court of Appeals has stated, the very purpose and effect of the APA Act is to "prevent localities within the Adirondack Park from freely exercising their zoning and planning powers" because the Legislature's motive is to "serve a supervening State concern transcending local interests," namely "preserving the priceless Adirondack Park through a comprehensive land use and development plan." Wambat Realty Corp. v. State of New York, 41 N.Y.2d 490, 494-495 (1977). See also Matter of Hunt Brothers, Inc. v. Glennon, 81 N.Y.2d 906, 909 (1993) (characterizing the APA as a "superagency" to regulate development in the Adirondack Park); Matter of Long v. Adirondack Park Agency, 76 N.Y.2d 416, 421 (1990) (APA is "charged with an awesome responsibility and the Legislature has granted it formidable powers to carry out its task"). Accordingly, the APA's powers with respect to land use and development planning within the Park, which reflect the State's transcendent interest, exceed those of local governments. Indeed, the APA's powers include reviewing and, when necessary, undoing zoning variances granted by local governments. See Executive Law § 808.

Moreover, Lewis Farm's reliance on Town of Lysander v. Hafner, 96 N.Y.2d 558 (2001), to support its argument that section 305-a prohibits the APA from asserting jurisdiction in this case is misplaced. The issue in Lysander was whether a zoning ordinance enacted and applied by the Town of Lysander -

- a local government - - was superceded by section 305-a. The zoning ordinance prohibited one-story single family dwellings with living areas less than 1100 square feet. The Town had disapproved a commercial farmer's application to site mobile homes on his property to house migrant farm workers, relying on the zoning ordinance. The Court held that the Town's application of the zoning ordinance violated section 305-a because it unreasonably restricted "farm operations," a phrase that is defined in Agriculture and Markets Law § 301(11) (but does not appear in the APA Act or the Rivers Act) to include "on-farm buildings" that contribute to the production of crops. The Court concluded that farm residential buildings, including mobile homes, fell within the broad definition of "farm operations." The Court also noted that the Town failed to show that the exception in section 305-a(1)(a) applied, i.e. that prohibiting the siting of the mobile homes was necessary to avert a threat to public health or safety.

Lysander involved a conflict between section 305-a and a zoning ordinance enacted and applied by a local government. Thus, the Court did not address whether section 305-a could supercede another state law, or a rule or regulation enacted or administered by a state agency, that regulates farming - - which it clearly does not. Thus, Lysander, and section 305-a, are inapposite here, where

the alleged conflict is between section 305-a and state laws and regulations implemented by a state agency.

POINT II

THE APA HAS REGULATORY JURISDICTION UNDER THE APA ACT AND THE RIVERS ACT OVER THE NEW SINGLE FAMILY DWELLINGS LEWIS FARM CONSTRUCTED ON THE RESOURCE MANAGEMENT AND RECREATIONAL RIVER AREA PORTION OF ITS PROPERTY

As the APA establishes in its main brief, it has regulatory jurisdiction over Lewis Farm's new single family dwellings under the APA Act and the Rivers Act because those laws require a private landowner to obtain a permit from the APA before undertaking construction of a new "single family dwelling" in a resource management land use area or a designated recreational river area. See Executive Law §§ 809(2)(a), 810(2)(d)(1); 9 N.Y.C.R.R. §§ 577.4(a), 577.5(c)(1). In its responsive brief, Lewis Farm misstates the APA's arguments and position in this case, and mischaracterizes the basis of the APA's determination.

First, contrary to Lewis Farm's contention (Br. at 22), the APA has never argued that the definition of "principal building" in the APA Act is the source of its regulatory jurisdiction in this case. As the APA's main brief explains (at 6-8), the source of the APA's regulatory jurisdiction here is Executive Law § 810(2)(d), which lists the specific kinds of structures, land uses, development, or

subdivisions that require an APA permit as a Class B project in a resource management land use area. "Single family dwellings" are listed in section 810(2)(d) and are therefore subject to the permit requirement. A "principal building" is not listed anywhere in section 810(2)(d) or elsewhere in section 810 as a Class A or Class B project subject to the permit requirement. The definition of "principal building" in Executive Law § 802(50) comes into play only after the APA determines that it has regulatory jurisdiction over a particular proposed project that involves a type of structure that is listed in section 810, including a "single family dwelling." Once the APA determines that it has jurisdiction, it then applies the definition of "principal building" to determine compliance with the overall density guidelines described in Executive Law § 809(10).

Thus, Lewis Farm's focus throughout its brief on the definition of "principal building" and the APA Act's overall density guidelines misses the mark. The statutory definition of "principal building" has a much more limited purpose than Lewis Farm suggests. Moreover, contrary to Lewis Farm's argument (Br. at 16-17), the definition of "principal building" does not establish that the Legislature intended to insulate all structures on a farm from any regulation by the APA.[3] Had that been the Legislature's intent, it could have

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[3] Lewis Farm's contention (Br. at 16, 17, 23) that the APA Act insulates "agricultural use structures" as defined in Executive Law § 802(8) from all regulation by the APA is simply wrong. Executive Law § 806 imposes shoreline

done so expressly. If anything, as explained in the APA's main brief (at 30), the statutory definition of "principal building" evinces the Legislature's intent to distinguish single family dwellings, including those occupied by farm employees, from "agricultural use structures," because it separately states the terms "single family dwellings," "agricultural use structures," and "mobile homes" in the same sentence. See Executive Law § 802(50)(g). This strongly suggests that the Legislature viewed them as entirely different types of structures.

Second, the APA does not and has never questioned the validity of Lewis Farm's asserted need to provide high quality housing for its farm workers and other staff. On the contrary, in its March 25, 2008 determination, the APA explicitly states that it "agrees that farm worker housing is important to the enhancement of farm operations" (R866). Moreover, Lewis Farm's concern (Br. at 4, 27, 42) that compliance with the APA's permit requirements will jeopardize its ability to continue farming is overstated. The APA staff has consistently advised Lewis Farm that it would recommend approval of an after-the-fact permit application, subject to appropriate conditions (R70, 76-80, 120-

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restrictions on agricultural use structures on farmland. Furthermore, Lewis Farm's contention that the Legislature, in Executive Law § 815(4)(b), "instructed" (Br. at 17, 32) the APA not to regulate farming at all is also wrong. Section 815 was an interim provision of the APA Act that expired on August 1, 1973, as noted in the final sentence of section 815(1). Its only purpose was to authorize the APA to exercise certain regulatory authority from 1971 to 1973, until the Adirondack Park Land Use and Development Plan was effective.

121, 967).[4] Indeed, the APA's determination expressly directed staff to "review the application for the three dwellings and the subdivision promptly, towards the goal of issuing the after-the-fact permit in time for farm worker occupancy of the dwellings for the 2008 growing season" (R870).

Third, contrary to Lewis Farm's contention (Br. at 30-31), the APA has never questioned Lewis Farm's assertion that it intends to use its new single family dwellings to house farm workers. Indeed, for purposes of establishing the APA's regulatory jurisdiction under the APA Act and the Rivers Act, it does not matter how Lewis Farm intends to use its new single family dwellings. As the APA establishes in its main brief, if the fundamental nature of a structure is such that it falls within the definition of a "single family dwelling," it retains that classification regardless of who lives in it.

But the fact remains that farm worker housing is not an "agricultural use structure" under the APA Act or the Rivers Act. Rather, depending on the type of the structure, it is either a "single family dwelling," "multiple family dwelling," or "mobile home," and Lewis Farm, like any other private landowner, must comply with the relevant permit application requirements.[5] Each of those

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[4] The record shows that on at least four occasions in the past, the APA has issued permits to farm owners to construct farmer and farm worker housing on resource management lands (R508).

[5] There is an exception to the permit requirement if a new structure is constructed "on the same foundation or in the same location" as a pre-existing structure, provided that the pre-existing structure was in existence on August 1,

types of dwellings is specifically defined in the APA Act, demonstrating that the Legislature intended them to be discrete classifications. See Executive Law § 802(37), (39), (58). And "agricultural use structure" has its own specific definition. See Executive Law § 802(8); 9 N.Y.C.R.R. § 577.2(b). Lewis Farm's argument (Br. at 18-19) that the Legislature intended for there to be overlap in these definitions in the case of on-farm housing is contradicted by its own concession that "under New York law"(Br. at 23), the on-farm house that is occupied by the Lewises is a "single family dwelling" and not an "agricultural use structure" (Br. at 23, 42).

Fourth, both Lewis Farm and the amicus Farm Bureau misstate the language in and the grounds for the APA's determination. Contrary to their assertions (Lewis Farm Br. at 17-19, Farm Bureau Br. at 4, 17), the APA's determination was not based on an interpretation of the statutory term "accessory structure," which is defined in Executive Law § 802(5). Rather, the determination was based on the definition of "agriculture use structure" and "single family dwelling." The APA stated in passing that the types of structures listed in the statutory definition of "agriculture use structure" were "accessory

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1973 for APA Act purposes, or April 19, 1976 for Rivers Act purposes, and is removed prior to construction of the new dwelling. See 9 N.Y.C.R.R. §§ 573.6(a), 577.7(b). As the APA stated in its determination (R868), none of the three new single family dwellings that Lewis Farm constructed met these requirements. Lewis Farm's assertions to the contrary (Br. at 2, 6) are not supported by the record. See R1241, 1417, 1421.

in nature" (R865-866). But it did not use the phrase "accessory structure" or rely on the statutory definition of that term anywhere in its determination. Nor did it conclude that the statutory term "accessory structure" limits the meaning of the term "agriculture use structure."

Finally, contrary to Lewis Farm's assertions, it is not the APA's "sole contention" (Br. at 2, 43-46) that it has regulatory jurisdiction over Lewis Farm's new single family dwellings because they constitute a subdivision. Nor was the APA's subdivision jurisdiction the sole basis for the APA's March 25, 2008 determination that Lewis Farm violated the APA Act and the Rivers Act, as the amicus recognizes (Farm Bureau Br. at 4-5). Rather, the fundamental basis for the APA's regulatory jurisdiction here is its jurisdiction over the construction of new single family dwellings in resource management land use areas under Executive Law § 810(2)(d)(1) and designated recreational river areas under 9 N.Y.C.R.R. §§ 577.4(a) and 577.5(c)(1). The third and fourth violations in the March 25, 2008 determination were specifically based on that jurisdiction. For those violations, the APA found that Lewis Farm violated the APA Act and the Rivers Act, respectively, "by failing to obtain a permit from the Agency prior to constructing three new single family dwellings on its property" (R868-869).

The APA has unequivocal jurisdiction over single family dwellings, distinct from its jurisdiction over subdivisions. See Executive Law §§ 810(1)(e)(3),

810(2)(d)(1); 9 N.Y.C.R.R. § 577.5(c)(1). Thus, the APA's decision not to press its subdivision jurisdiction has no effect on its arguments with respect to its jurisdiction over single family dwellings and, contrary to Lewis Farm's argument, is not "fatal" (Br. at 43-47) to the APA's appeal in Case No. 2 and Case No. 3. The APA has simply chosen to focus this Court's attention on the unassailable argument that the APA has regulatory jurisdiction over the construction of new single family dwellings in protected resource management and recreational river areas, including the dwellings Lewis Farm constructed.

POINT III

THE APA'S ASSERTION OF REGULATORY JURISDICTION OVER LEWIS FARM'S NEW SINGLE FAMILY DWELLINGS DOES NOT VIOLATE THE NEW YORK STATE CONSTITUTION OR AGRICULTURE AND MARKETS LAW ARTICLE 25-AA

Requiring Lewis Farm to apply for and receive a permit before constructing new single family dwellings on the resource management and recreational river areas of its farmland is consistent with the Conservation Article of the New York Constitution, as amended in 1969 (N.Y. Const., article XIV, § 4). Enforcement of the permit requirement also comports with Agriculture and Markets Law article 25-AA ("article 25-AA"), which is commonly referred to as the "Agricultural Districts Law."

A. The APA's Assertion of Regulatory Jurisdiction Here Is Consistent with Article XIV, § 4 of the N.Y. Constitution.

Lewis Farm's contention that article XIV, § 4 of the N.Y. Constitution precludes the APA from asserting regulatory jurisdiction over Lewis Farm's new single family dwellings because the Constitution prohibits the APA from regulating "farm development" (Br. at 34) is wrong. Article XIV, § 4 identifies two different, but complementary, public policies of the State of New York: "to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands" (emphasis supplied). The Legislature created the APA and enacted the APA Act and the Rivers Act to promote the environmental concerns in the first stated public policy, and enacted article 25-AA and gave the Commissioner of the Department of Agriculture and Markets certain powers to promote the second. Neither public policy trumps the other, and the APA Act, the Rivers Act, and article 25-AA do not supercede each other. They are coequal laws serving equally important public policy concerns.

Moreover, the two state agencies that implement those laws - - the APA and the Department of Agriculture and Markets - - have complementary jurisdiction, with different spheres of expertise. Accordingly, where, as here, the two public policies overlap, the two agencies often consult with each other before taking administrative action (R409). Indeed, Agriculture and Markets Law

§ 308(1)(b) requires the Commissioner of Agriculture and Markets to "consult appropriate state agencies" before issuing an opinion that a proposed construction or use of a farm structure is a sound agricultural practice.

Here, the record establishes that the APA consulted with the Department of Agriculture and Markets and considered its views before issuing its March 25, 2008 determination that Lewis Farm violated the APA Act and the Rivers Act by failing to obtain the necessary permit (R409). The two agencies exchanged correspondence in mid- to- late 2007 regarding the APA's jurisdiction over farms in the Adirondack Park, and over Lewis Farm's new single family dwellings in particular, and discussed these issues at an August 2007 meeting (R1355-1367). The Department of Agriculture and Markets asked the APA when a permit would be required to construct a structure associated with an agricultural use of land, such as farm worker housing or a temporary greenhouse (R1366-1367). In subsequent correspondence, the Commissioner specifically asked the APA whether the Lewis Farm housing project was subject to the permit requirement (R1358-1360). In response, the APA explained its jurisdiction over agriculture and related activities and, specifically, the contours of its regulatory jurisdiction over on-farm employee housing and single family dwellings. The APA also explained that despite the various benefits and privileges the Agriculture and Markets Law provides to farm worker housing, the APA's jurisdiction over single

family dwellings in resource management land use areas and designated recreational river areas is unambiguous, and farm worker housing is not given any special privilege exempting it from the applicable permit requirements (R1355-1356, 1361-1365).

As Lewis Farm points out (Br. at 40-41), on February 1, 2008, shortly after this exchange of correspondence, the Commissioner of Agriculture and Markets issued an advisory opinion to Lewis Farm upon its request made pursuant to Agriculture and Markets Law § 308(4) (R409, 1389-1391). The Commissioner concluded that Lewis Farm's new housing project was "agricultural in nature" for purposes of Article 25-AA of the Agriculture and Markets Law. But the Commissioner's opinion did not address or interpret the APA Act or the Rivers Act.[6] And, as discussed below, the Commissioner's interpretation of certain unique statutory terms in the Agriculture and Markets Law in no way constrains the APA from concluding that the three new dwellings Lewis Farm had constructed were appropriately classified as "single family dwellings" subject to the permit requirements in the APA Act and the Rivers Act, which it is charged with enforcing.

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[6] Lewis Farm's contention (Br. at 11, 40-41) that the Commissioner's February 1, 2008 opinion was binding on the APA absent a successful article 78 challenge is meritless. The Commissioner's opinion was issued to Lewis Farm, not the APA, and as the Department of Agriculture and Markets itself acknowledges, was merely advisory in any event (R409).

B. The APA's Assertion of Regulatory Jurisdiction Here Is Consistent With Agriculture and Markets Law Article 25-AA.

Contrary to Lewis Farm's argument, article 25-AA is not a "wide statutory sanctuary" or "safe harbor" that bars "any land use regulation" (Br. at 35) by the APA of any on-farm buildings. The unique benefits and protections that are afforded to "on-farm buildings" under article 25-AA, and the statutory definitions contained therein, do not restrict the APA's exercise of regulatory jurisdiction under the APA Act or the Rivers Act.

Lewis Farm argues (Br. at 13, 49) that the term "agricultural use structure" in the APA Act should be construed to mean the same thing as the term "farm building" in article 25-AA because both statutes were enacted at the same time. But as explained above, the fact that the Legislature adopted the APA Act and article 25-AA concurrently simply reflects the Legislature's desire to advance the two different, but equally important, public policies expressed in N.Y. Constitution, article XIV, § 4 - - protecting the environment and encouraging farming. Each statute contains unique terms and definitions, and the APA's interpretation and application of the statutory language in the APA Act is not controlled by the Department of Agriculture and Markets' interpretation of the different language in article 25-AA.[7]

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[7] Similarly, Lewis Farm's contention (Br. at 41-43) that a reversal by this Court in Case No. 2 and Case No. 3 would have adverse real property tax

Lewis Farm also argues that the fact that the Legislature generally excluded "agricultural use structures" from APA jurisdiction proves that the APA Act was written to exempt "farm buildings," including farm worker housing (Br. at 4, 37, 38). But the APA Act does not exempt "farm buildings" from regulation. Indeed, the term "farm building" is not found anywhere in the APA Act. Rather, the APA Act uses the terms "agricultural use structures" and "single family dwellings," specifically defines both terms, and exempts only the former from most, but not all, regulation.

Furthermore, Lewis Farm's argument (Br. at 37) that the APA Act violates Agriculture and Markets Law § 305(3) because it does not "encourage the maintenance of viable farming" is groundless. As the APA noted in its determination, the APA Act and the Rivers Act encourage farming by exempting "agricultural uses" and typical "agricultural use structures," such as barns, silos, and sheds, from most regulation (R867). The Legislature's decision not to exempt single family dwellings on farms from the permit requirements in the APA Act and the Rivers Act does not discourage farming. It merely takes into account the fact that all single family dwellings, whether constructed on

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consequences for its farm worker housing is misplaced. Real Property Tax Law § 483 specifically defines the types of "structures and buildings"that are entitled to a real property tax exemption, and whatever meaning this Court gives to the terms "agricultural use structure" and "single family dwelling" in the context of the APA Act and Rivers Act in this case would not be controlling for real property tax exemption purposes.

farmland or not, have the same potential to restrict visibility in open space lands and, if they have septic systems, to adversely impact nearby bodies of water. It also accounts for the fact that when farmland is sold, the single family dwellings on that land remain and revert to non-farm use, like any other single family dwelling in the Adirondack Park. Uniform application of the permit requirements to single family dwellings ensures that these impacts will be consistently reviewed, and avoids creating a loophole whereby single family dwellings could be constructed on farmland and then sold off without regulatory review and approval.

In short, the benefits and protections that article 25-AA affords to farm operations have never been at stake in this matter. Instead, what is at issue here is the APA's clear statutory responsibility to protect the state's invaluable natural resources. For it to fulfill this fundamental mandate, the APA must have the authority to require Lewis Farm to obtain a permit that imposes reasonable conditions on the single family dwellings that it is building in the resource management and recreational river areas of its farmland.

CONCLUSION

For the above-stated reasons, this Court should affirm the order of the court below in Case No. 1, reverse the order of the court below dated July 2, 2008 insofar as it dismissed Case No. 3 against the individual defendants, reverse the judgment of the court below entered November 21, 2008, dismiss the petition in Case No. 2, confirm the APA's March 25, 2008 determination, and grant the APA's motion for summary judgment in Case No. 3.

Dated: Albany, New York
April 28, 2009

Respectfully submitted,

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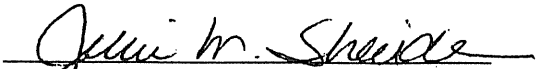
By: 
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