

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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ELDRED PRESERVE, LLC, ADIRONDACK
FISHERIES, INC., DELAWARE RIVERKEEPER
NETWORK, and MAYA K. VAN ROSSUM as Delaware
Riverkeeper,

ORAL ARGUMENT
REQUESTED

Index No.: _____

Petitioners,

VERIFIED PETITION

Index # E2019-1433

-v-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, REBECCA
CRIST, in her official capacity as Regional Deputy Permit
Administrator for DEC Division of Water, Region 3, BASIL
SEGGOS, in his official capacity as Commissioner of DEC
and AMYTRA DEVELOPMENT LLC,

Respondents.

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Petitioners Eldred Preserve, LLC, Adirondack Fisheries, Inc., Delaware
Riverkeeper Network and Maya K. van Rossum as Delaware Riverkeeper (“Petitioners”),
by and through their undersigned counsel, bring this special proceeding pursuant to
Article 78 of the New York Civil Practice Law and Rules, and allege the following:

INTRODUCTION

1. This Petition challenges the issuance of a State Pollution Discharge Elimination
System (“SPDES”) permit # NY0281239 (the “SPDES Permit”) by Respondents New
York State Department of Environmental Conservation, Rebecca Crist in her official
capacity as Regional Deputy Permit Administrator for Division of Water, Region 3 of the
agency and Bassil Seggos in his official capacity as Commissioner (collectively, “DEC”)

to Respondent Amytra Development LLC (“Amytra”), allowing discharge of huge volumes of inadequately treated domestic wastewater into pristine waters of the State without holding a public hearing, despite substantive and significant public comments on the application to do so.

2. Instead of holding a public hearing as requested by many, DEC dismissed the very serious concerns of 145 members of the public who commented, including all Petitioners, and lamely responded that “the Department wishes you to be aware that we have thoroughly reviewed the Eldred Preserve proposal,” thereby denying the public the opportunity to question the DEC decision-making process.

3. Instead of requiring on-site septic systems to avoid highly disfavored discharges of treated domestic sewage into a pristine body of water, or even requiring that the developer seriously consider load-reduction alternatives, DEC issued the SPDES Permit to allow Amytra the ability to discharge up to 17,000 gallons of inadequately treated wastewater each day into Halfway Brook, wastewater with contaminant levels one order of magnitude greater than those permitted by the applicable Best Demonstrable Technology standards, as set forth more fully hereinafter.

4. Halfway Brook is a pristine waterbody in Sullivan County that connects to Petitioners Eldred Preserve, LLC’s and Adirondack Fisheries, Inc.’s property via Stege Lake (a/k/a Sidwell Lake) and ultimately the Delaware River. The proposed daily discharges of 17,000 gallons of treated domestic sewage with inadequate treatment measures are highly disfavored by the statutes and regulations applicable to the project.

5. Petitioners and others who enjoy the pristine waters of Halfway Brook are entitled to a public hearing on this most egregious decision by DEC and an honest and scientifically robust explanation as to why non-discharge or load reduction alternatives could not be implemented.

6. Both the New York Environmental Conservation Law (“ECL”) and the federal Clean Water Act, 33 U.S.C. § 1251 et seq., as amended, require DEC to hold a public hearing where comments from Petitioners and other commenters could explore the substantive and significant issues about the SPDES Permit application.

PARTIES

7. Petitioners Eldred Preserve, LLC and Adirondack Fisheries, Inc. (collectively, the “Downstream Owner Petitioners”) are owners of approximately 1,200 acres of mostly undeveloped and pristine land that has been held by the family for more than fifty (50) years. As stewards of their land, the Downstream Owner Petitioners, who are several revocable and irrevocable trusts as well as individual family members, understand that their stewardship includes the responsibility to ensure that their land, including Stege Lake, remain unspoiled for future generations.

8. Petitioner Maya K. van Rossum (the “Delaware Riverkeeper” or “Petitioner van Rossum”) has been the Delaware Riverkeeper for more than twenty (20) years since her 1996 appointment by Petitioner Delaware Riverkeeper Network. Although her primary residence is in Bryn Mawr, Delaware County, Pennsylvania, which is located within the Delaware River Basin, she also owns a part time residence in Glen Spey, New York. This part time residence is also located within the Delaware River Basin, and is partly located

in the Town of Highland, Sullivan County, New York, in the vicinity of the proposed discharges contemplated in the SPDES Permit.

9. Petitioner Delaware Riverkeeper Network (“DRN”) was established in 1988. It is a nonprofit 501(c)(3) membership organization. DRN advocates for the protection of the Delaware River, its tributary streams, and the habitats and communities of the Delaware River watershed. The mission of DRN is to champion the rights of communities to a Delaware River and tributary streams like Halfway Brook that are free flowing, clean, healthy and abundant with a diversity of life. DRN, whose office is located at 925 Canal Street, Suite 3701, Bristol, Pennsylvania, includes a professional staff and volunteers who work throughout the four states of the Delaware River Watershed, including Pennsylvania, New Jersey, Delaware, and New York.

10. Each of the Petitioners, and their members and families, use and enjoy their respective water bodies referenced above for, among other things, recreational, aesthetic and scientific purposes, such as viewing wildlife, fishing, boating and swimming. The potential 17,000-gallon daily discharge of inadequately treated domestic sewage into Halfway Brook, which empties into Stege Lake, owned by Downstream Owner Petitioners, would lead to diminished water quality and thereby irreparably impairing all Petitioners’ use and enjoyment of these resources, as well as a depression of the Downstream Owners Petitioners’ property values. A public hearing is essential to examine DEC’s determination of the SPDES applicant’s alternatives, including on-site septic use, which was previously utilized for many years at the subject property without any reported failures.

11. Respondent DEC is an agency of the State of New York, established by Chapter 140 of the Laws of 1970, which administers the SPDES permit program pursuant to Article 17, Title 8 of the ECL. The principal office of DEC is located in Albany County, and it maintains a regional office, Region 3, in Ulster County, at 21 South Putt Corners Road, New Paltz, New York 12561.

12. Respondent Rebecca Crist is the Deputy Permit Administrator for the Division of Water at DEC Region 3. As she personally signed the SPDES Permit on May 22, 2019, she either alone or in concert with others decided that no public hearing was required. Her principal office is in DEC Region 3.

13. Respondent Basil Seggos is the Commissioner of DEC. His principal office is located in Albany County.

14. Respondent Amytra Development LLC is an active New York domestic limited liability company that transacts business in New York State. Amytra's principal office is located at 125 Patterson Plank Road, Carlstadt, New Jersey 07072. Amytra is the SPDES Permit applicant. Upon information and belief, Amytra owns hundreds of acres of land at and surrounding the proposed project, and is the corporate entity responsible for the construction of the proposed project and the wastewater treatment facility that will discharge domestic sewage into Halfway Brook.

STANDING

15. The Downstream Owner Petitioners have standing in this proceeding because the discharges into Halfway Brook will flow onto these Petitioners' property, including Stege Lake, and thus will have a harmful effect on these Petitioners, different in kind and

degree from community generally, and the interests asserted are arguably within the zone of interests to be protected by the ECL and the Clean Water Act. The discharges from Amytra's facility will directly affect the water quality in Halfway Brook, which is approximately 3,650 feet upstream of Stege Lake located on the Downstream Owner Petitioners' property.

16. Any impairments to Halfway Brook will result in the degradation of water quality in Stege Lake, thereby affecting Downstream Owner Petitioners' ability to use Stege Lake for its high-quality recreational activities such as fishing, boating, swimming and educational purposes, as well as depressing the value of their long-held property.

17. The Downstream Owner Petitioners' in-fact injuries are within the zone of interests or concerns sought to be protected by the ECL and the Clean Water Act.

18. As the Delaware Riverkeeper, and a member of the DRN, Petitioner van Rossum has personally enjoyed the downstream waters that will be impacted by the proposed discharges into Halfway Brook. Although her primary residence is in Bryn Mawr, Delaware County, Pennsylvania, which is located within the Delaware River Basin, she also owns a part-time residence in Glen Spey, New York. This part-time residence is located within the Delaware River Basin, and is partly located in the Town of Highland, Sullivan County, New York. The Delaware Riverkeeper enjoys and benefits from the aesthetic, environmental and recreational qualities and opportunities of the Halfway Brook and Delaware River waters located downstream from the proposed discharges contemplated in the SPDES Permit.

19. Petitioner Delaware Riverkeeper has visited the streams, wetlands, and adjacent forested areas in the downstream watershed, by herself, with her family, with friends, and with colleagues, for recreational, personal and professional reasons and has plans to return to these areas for recreational purposes, including among other things, kayaking, hiking, nature walks, wildlife observation and enjoyment as well as for professional purposes. She often includes her family in her enjoyment of the areas of the watershed as she finds them beautiful and unique natural areas important to share with her children for their personal and educational growth. In her capacity as the Delaware Riverkeeper, a mother, and a person who enjoys the pristine water quality of Halfway Brook, she will be personally and professionally harmed by the proposed discharges into Halfway Brook. She will always question the water quality of Halfway Brook due to the potential 17,000 gallons-per-day discharges of inadequately treated domestic sewage into Halfway Brook and her knowledge that the DEC failed to require Amytra to identify better treatment options or load-reduction alternatives; her use and enjoyment of Halfway Brook and the receiving waters of the Delaware River will be forever negatively impacted.

20. Petitioner Delaware Riverkeeper Network is the network of members that stands vigilant to protect the waters of New York, New Jersey, Pennsylvania and Delaware that empty into the Delaware River Basin. It has associational standing because at least one of its members, namely Petitioner van Rossum, would have standing to sue;¹ and because the interests of protecting the pristine tributaries of the Delaware River Basin are germane to the purposes of DNR. Furthermore, for associational standing, neither the

¹ It should be noted, however, that in addition to Petitioner van Rossum, DRN does in fact have other members local to the area and downstream of Halfway Brook that are concerned and would be adversely impacted and also support associational standing.

claim asserted nor the relief requested would require the participation of individual members.

21. DRN's membership provides irreplaceable participation in, and support for, DRN advocacy, restoration, scientific monitoring and data collection, education and litigation initiatives. DRN has more than 19,000 members, the vast majority of whom live, work and/or recreate within the Delaware River Basin, which includes the Eldred Preserve area in Sullivan County. They represent the recreational, educational, and aesthetic interests of its members who enjoy many outdoor activities in the Delaware River Basin, including camping, boating, swimming, fishing, birdwatching, hunting and hiking. Additionally, they represent the economic interests of many of its members who own businesses that rely on a clean river ecosystem, such as ecotourism activities, fishing, and boating. Furthermore, DRN also represents the health interests of those who use the Delaware River watershed's resources for drinking, cooking, farming, swimming, and/or gardening. And DRN supports the protection and restoration of the Delaware River, its tributaries and watershed, including respecting and honoring environmental rights throughout the watershed states and the nation, for the benefit of present and future generations.

22. DRN has members who use and enjoy Halfway Brook and other downstream portions of the Delaware River Basin. These members' use and enjoyment of Halfway Brook will be forever negatively impacted by the discharge of the 17,000 gallons-per-day domestic sewage wastewater into Halfway Brook and their awareness thereof.

JURISDICTION AND VENUE

23. This Court has subject matter jurisdiction to decide this Petition pursuant to CPLR § 7803(3), as the subject SPDES Permit was a final determination of the DEC and that determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, and was an abuse of discretion. Furthermore, Petitioners have exhausted all administrative remedies.

24. This Court also has subject matter jurisdiction to decide this petition pursuant to ECL § 17-0909(2).

25. This Court has jurisdiction over Respondent Amytra pursuant to CPLR § 302(a)(1) because Amytra is a New York domestic limited liability company, transacts business in the state of New York and is the beneficiary of the subject SPDES Permit. This court also has jurisdiction over Amytra pursuant to CPLR § 302(a)(4) because, upon information and belief, Amytra owns, uses or possesses the real property in Sullivan County that concerns the subject SPDES Permit.

26. Venue is proper in Sullivan County Supreme Court pursuant to CPLR §§ 506(b) and 7804(b) because the challenged determination by DEC was made in Ulster County, which is within the 3rd Judicial District of the New York State Unified Court System.

27. Venue is also proper because the property from where discharges under the SPDES Permit will be made from, and many of the properties that such discharges will affect, are in Sullivan County.

STATUTORY FRAMEWORK

28. Congress enacted the Federal Water Pollution Control Act, more commonly called the Clean Water Act, in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a).

29. The Clean Water Act created the National Pollutant Discharge Elimination System ("NPDES"), a mandatory permitting program for point-source discharges of water pollution to surface waters. *See* 33 U.S.C. § 1342. The Act prohibits discharges of pollutants from point sources to waters of the United States, except in accordance with a NPDES permit. 33 U.S.C. §§ 1311(a), 1342.

30. The Clean Water Act also provides that NPDES permits be issued "after opportunity for a public hearing" *See* 33 U.S.C. § 1342(a)(1); *see also* 33 U.S.C. § 1342(b)(3).

31. Indeed, "Congress *clearly intended* to guarantee the public a meaningful role in the implementation of the Clean Water Act" (emphasis added). *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 503 (2d Cir. 2005).

32. NPDES permits limit the level of pollution a source can lawfully discharge and impose operational, monitoring, recordkeeping, reporting, and other requirements. *See* 33 U.S.C. § 1342; *see also* 40 C.F.R. §§ 122.41, 122.44.

33. New York's version of the NPDES program is called the State Pollutant Discharge Elimination System, found in Title 8 of Article 17 of the ECL. It was created "upon condition that [any permitted] discharges will conform to and *meet all applicable requirements* of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq.) [a/k/a the 'Clean Water Act']" (emphasis supplied). ECL § 17-0801.

34. As such, DEC "operates the SPDES program as EPA's NPDES delegee and is bound to follow EPA's interpretation of the Clean Water Act." *Natural Resources Defense Council v. New York State Department of Environmental Conservation*, 25 N.Y.3d 373, 395, n.16 (2015).

35. In reviewing permit applications and considering requests for public hearings, DEC is charged with complying with the mandates of the ECL's Uniform Procedures, Article 70. In enacting the Uniform Procedures Act, the State legislature intended "to encourage public participation in government review and decision-making processes and to promote public understanding of all government activities." ECL § 70-0103(4). To that end, the State legislature enacted Section 70-0119 to impose requirements on the DEC when considering whether it should hold a public hearing on permit applications.

36. Furthermore, DEC is bound by its own regulations in Parts 621 and 624 of Title 6 of the New York Codes, Rules and Regulations ("6 NYCRR") governing determinations on when it is appropriate to conduct public hearings on applications, including SPDES permits.

37. Additionally, since Halfway Brook drains directly into the Delaware River Basin, DEC is also bound to comply with the policies and regulations of the Delaware River Basin Commission ("DRBC"), 18 C.F.R. Part 410 (the "DRBC Administrative Manual"), as incorporated into Part 860 of Title 21 of the New York Codes, Rules and Regulations . Furthermore, DEC is bound to comply with the terms set forth in the *Administrative Agreement Between Delaware River Basin Commission and the New York State Department of Environmental Conservation* (March 2016).

BACKGROUND

38. On or about April 25, 2018, Amytra filed an application (the “Application”) for a SPDES permit with the DEC seeking authorization to discharge up to 17,000 gallons of treated sanitary waste from its proposed facility into Halfway Brook in Sullivan County. *SPDES Application*, at 2. Affirmation of James J. Periconi, subscribed to on the 18th day of July, 2019 (“Periconi Aff.”), Exh. 1.

39. The project consists of the redevelopment of a motel, restaurant, and bar to a 4,000 square-foot (sq. ft.) restaurant and bar, 28 lodging units in nine buildings, and a 2,400 sq. ft. event space. *DEC Response to Comments* at 1. Periconi Aff., Exh. 2.

40. The project also involves the removal of several subsurface sewage disposal systems and the installation of a wastewater treatment plant with an anticipated design flow of 17,000 gallons per day, the wastewater of which will be discharged into the Halfway Brook. *DEC Response to Comments* at 1. Periconi Aff., Exh. 2.

41. The proposed discharge point from Amytra’s facility into Halfway Brook is located approximately 3,650 feet upstream of Stege Lake (a/k/a Sidwell Lake), which is owned by Petitioners. Discharges into Halfway Brook from Amytra’s proposed discharge point will necessarily flow into Stege Lake.

42. Halfway Brook is a pristine tributary that ultimately discharges into the Delaware River.

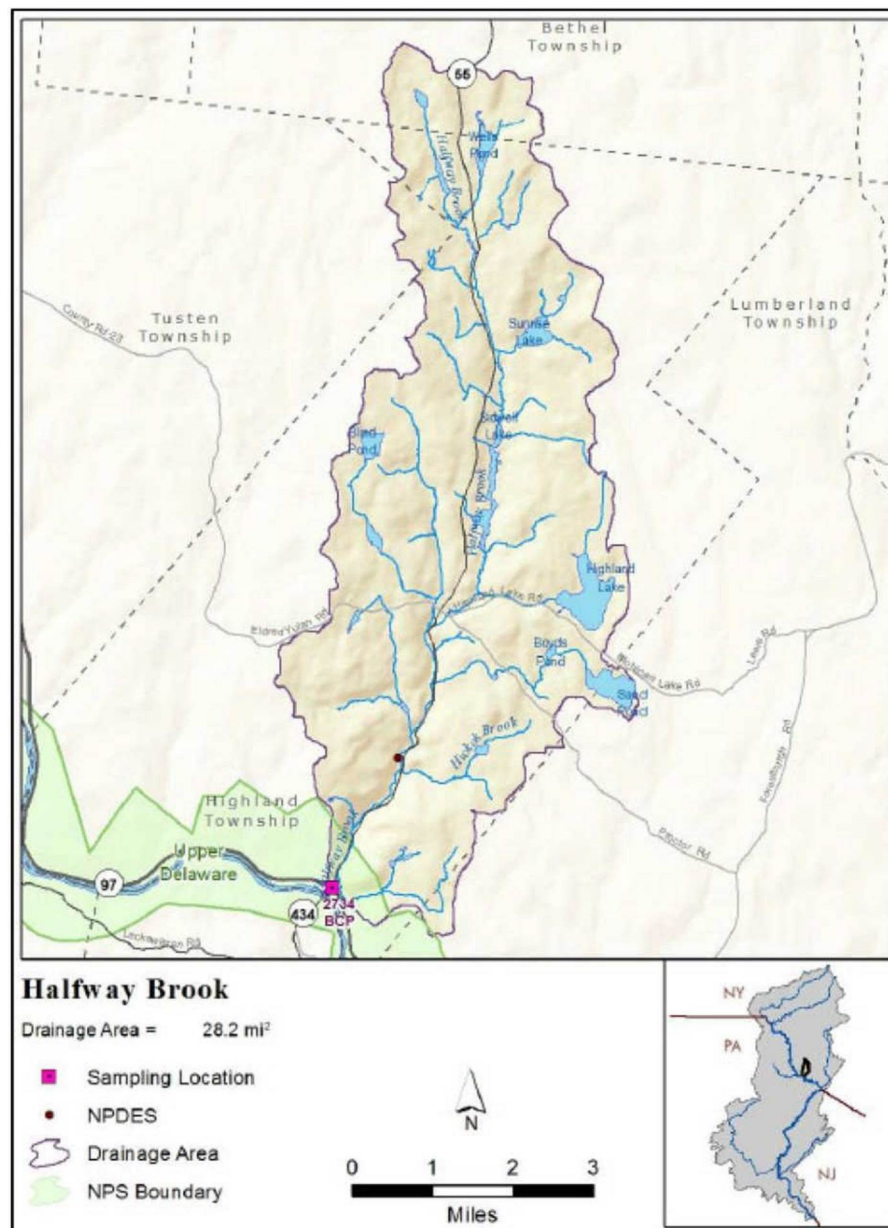


Image source: "Existing Water Quality Atlas of the Delaware River Special Protection Waters" at p. 97, Sept. 2016 Edition 1.0, Delaware River Basin Commission

43. Halfway Brook is designated by the DRBC to be an Outstanding Basin Water ("OBW") as a Special Protection Waters ("SPW"), as defined in the current DRBC Administrative Manual.

44. OBWs, specifically, are "interstate and contiguous interstate waters that are contained within the established boundaries of national parks; national wild, scenic and

recreation river systems; and/ or national wildlife refuges that are classified by the [DRBC] as recreational having exceptionally high scenic, recreational, and ecological values that require special protection.” *DRBC Administrative Manual* § 3.10.3.A.2.a.1. at 5. Periconi Aff., Exh. 3.

45. As such, direct discharges of wastewater to protected waters such as Halfway Brook are specifically discouraged by the DRBC, and applications to do so are thus entitled to heightened scrutiny.

46. Any SPDES permit issued for the discharge of wastewater to a special waterbody such as Halfway Brook must consider the fact that these waters have exceptionally high scenic, recreational, ecological and/or water supply values.

47. On or about February 21, 2019, DEC released a Notice and Draft SPDES Permit (the “Draft SPDES Permit”), indicating that it had “made a tentative determination to approve [the Application] for a new SPDES permit (SPDES # NY0281239) to allow the surface discharge of 17,000 gallons per day of treated wastewater to Halfway Brook...” *Draft SPDES Permit* at 2. Periconi Aff., Exh. 4.

48. In the Draft SPDES Permit, DEC indicated that comments for the proposed SPDES permit were to be submitted to DEC personnel no later than March 29, 2019.

49. On March 8, 2019, Petitioner van Rossum submitted a comment letter (the “Delaware Riverkeeper Network March 8, 2019 Comment Letter”) to DEC raising substantive and significant issues with the Draft SPDES Permit, urging “that the proposed wastewater discharge be rejected, and instead the applicant should be required to consider, propose and pursue a non-discharge alternative that will be most protective of water quality in Halfway Brook and most protective to downstream communities who

enjoy the many recreational and ecological values the stream provides.” *Delaware Riverkeeper Network March 8, 2019 Comment Letter* at 1. Periconi Aff., Exh. 5.

50. On March 23, 2019, Petitioner van Rossum wrote a supplemental letter to DEC concerning the widespread community interest and concern surrounding the Draft SPDES Permit, and asking for a sixty (60) day extension of the public comment period (the “Delaware Riverkeeper Network March 23, 2019 Comment Letter”). *Delaware Riverkeeper Network March 23, 2019 Comment Letter* at 1-3. Periconi Aff., Exh. 6.

51. On March 25, 2019, Periconi, LLC, counsel at the time only for Downstream Owners Petitioners, asked DEC via e-mail for an extension of the public comment period, as counsel had only recently been retained and needed additional time to prepare a formal comment on behalf of those Petitioners.

52. On March 26, 2019, DEC replied to Downstream Owner Petitioners’ counsel and to Petitioner van Rossum, granting the request for extension and extending the public comment period until April 12, 2019. *DEC Communications Granting Extension of Public Comment Period*. Periconi Aff., Exh. 7.

53. Between February 27, 2019 and April 12, 2019, DEC received 145 public comments from 134 different commenters regarding deficiencies in the Draft SPDES Permit. *DEC Response to Comments* at 1-7. Periconi Aff., Exh. 2.

54. On April 12, 2019, the Downstream Owner Petitioners, through their undersigned counsel, submitted a memorandum (the “Periconi, LLC Comment Letter”) to DEC reflecting these Petitioners’ opposition to the Draft SPDES Permit and requesting that DEC hold a public hearing to review these Petitioners’ “substantive and significant

objections and those of other commenters.” *Periconi, LLC Comment Letter* at 1. Periconi Aff., Exh. 8.

55. On April 12, 2019, Petitioner van Rossum wrote an additional supplemental letter to the DEC regarding the Draft SPDES Permit. *Delaware Riverkeeper Network April 12, 2019 Comment Letter* at 1-2. Periconi Aff., Exh. 9.

56. On May 22, 2019, DEC issued SPDES Permit NY0281239 (the SPDES Permit), to Amytra, purportedly “in compliance with Title 8 of Article 17 of the [ECL] and in compliance with the Clean Water Act, as amended, (33 U.S.C. §1251 et seq.)...” *SPDES Permit NY0281239* at 1. Periconi Aff., Exh. 10.

57. On May 24, 2019, DEC released its Response to 134 Commenters on the DEC Application for Eldred Preserve (“DEC Response to Comments”). *DEC Response to Comments*. Periconi Aff., Exh. 2.

HALFWAY BROOK, STEGE LAKE AND THE DELAWARE RIVER

58. Halfway Brook drains directly to Delaware River Basin Outstanding Basin Waters, also designated as an Upper Delaware Scenic and Recreational River. *Delaware Riverkeeper Network March 8, 2019 Comment Letter* at 1. Periconi Aff., Exh. 5.

59. Outstanding Basin Waters are those waterways with the most pristine quality in the Delaware River Basin and, as a result, have the highest level of antidegradation protection available in the DRBC’s Special Protection Waters Program. The Delaware River has these designations because of its high water quality and outstanding scenic and recreational values. The ongoing quality and beauty of this stretch of the Delaware River is directly dictated by the health of the tributaries that feed it. Harmful impacts to

Halfway Brook will have implications for the outstanding water quality, scenic, and recreational values of the Delaware River; Halfway Brook is a tributary that is vital for supporting fishing, swimming and boating, essential to the residential and recreational communities of this stretch of the mainstem Delaware River. *Delaware Riverkeeper Network March 8, 2019 Comment Letter* at 1. Periconi Aff., Exh. 5.

60. Halfway Brook “has outstanding water quality, with low nutrient concentrations and low fecal bacteria levels. Its relatively pristine water quality and cold water temperatures make it an excellent trout stream, with both resident and stocked trout populations. Yet, the high water quality also means the stream has very little buffering capacity (median alkalinity of only 9 mg/L in DRBC’s water quality monitoring), with little ability to accept and process point source loads of nutrients, BOD, and salts without impacting the water quality and the best uses of the stream and its associated lakes and wetlands.” (Citations omitted). *Delaware Riverkeeper Network March 8, 2019 Comment Letter* at 2. Periconi Aff., Exh. 5.

61. Halfway Brook is also designated as a “Class B(T)” water under the State’s Protection of Waters Program, pursuant to Part 608 of Title 6 of NYCRR. “All waters of the state are provided a class and standard designation based on existing or expected best usage of each water or waterway segment. Classification B indicates a best usage for swimming and other contact recreation, but not for drinking water. Waters with classifications A, B, and C may also have a standard of (T), indicating that it may support a trout population, or (TS), indicating that it may support trout spawning (TS). Special requirements apply to sustain these waters that support these valuable and sensitive

fisheries resources.” DEC, *Protection Waters Program, Classification of Waters*, <https://www.dec.ny.gov/permits/6042.html>.

62. For more than 50 years, Stege Lake has been a symbol of unspoiled natural land in the Catskills, intended by the family that makes up Downstream Owner Petitioners to be kept pristine.

63. The discharges from Amytra’s facility will directly affect the water quality in Halfway Brook and, consequently, Stege Lake, located on the Downstream Owner Petitioners’ property. The discharge point from Amytra’s facility into Halfway Brook is located approximately 3,650 feet upstream of Stege Lake and, as such, discharges into Halfway Brook will necessarily flow into Stege Lake. Carroll Aff. at ¶ 11.

64. As a result of Respondent Amytra’s discharges upstream of the Downstream Owner Petitioners, property rights are directly involved and will be adversely affected should Amytra be allowed to discharge up to 17,000 gallons of inadequately treated wastewater into Halfway Brook on a daily basis.

THE PUBLIC HEARING WOULD EXPLORE SUBSTANTIVE AND SIGNIFICANT ISSUES RAISED DURING THE PUBLIC COMMENT PERIOD

65. In response to the Draft SPDES Permit, the public, including all Petitioners, submitted 145 public comments raising various deficiencies with respect to the Application. *DEC Response to Comments* at 1. Periconi Aff., Exh. 2.

66. Many of the comments, including those of Petitioners, were technical in nature, raising substantive issues that required a more robust response from the DEC than what was or could have been provided in the DEC Response Letter.

67. The Downstream Owner Petitioners' (Periconi, LLC) Comment Letter, like those of more than two dozen other comments, also requested that a public hearing be held to address a number of technical defects in the Application and the proposed wastewater treatment plan at Amytra's facility. *Periconi, LLC Comment Letter* at 1. Periconi Aff., Exh. 8. A hearing on this SPDES Permit would allow the public to pose questions in real-time concerning the Amytra's proposed discharges into Halfway Brook and provide the public an opportunity to question DEC's analysis and decision-making process with respect to the SPDES Permit.

68. Such questioning would not be a theoretical exercise: among the substantive issues to be raised during a public hearing include the following:

a. Where are the results of the infiltration tests noted by DEC but nowhere to be found in the record; on what parts of Amytra's hundreds of acres of property were the infiltration testing undertaken, i.e., does it reflect the entirety of the areas present at and around the site appropriate for an infiltration treatment system?

b. If there were historically no failures associated with the existing infiltration system, and Amytra owns large tracts of land around the proposed development to site additional infiltration systems, what is the basis for the DEC's conclusion that no load reduction is possible?

c. Was a system, consistent with the DRBC regulations, that does not use chlorination considered as an alternative, especially when ultra violet treatment is as effective?

d. Was a system, consistent with DRBC regulations, with lower effluent limits, particularly fecal coliform and total suspended solids, considered as an alternative?

e. Why was there no copy of the Natural Treatment Alternatives analysis in the record?

Carroll Aff. at ¶ 19.

69. In accordance with the policies and regulations of the DRBC, the proposed discharge of wastewater from Amytra's facility should only be allowed after robust

analysis, including a Natural Treatment Alternatives (“NTA”) analysis. Specifically, under the DRBC Administrative Manual, any discharges to Special Protection Waters such as the Halfway Brook “may be approved *only after* the applicant demonstrates that it has fully evaluated all non-discharge/load reduction alternatives through an NTA analysis.” (Emphasis supplied) *DRBC Administrative Manual* § 3.10.3.A.2.a.1 at 5. Periconi Aff., Exh. 3.

70. Despite the DRBC’s regulations mandating an NTA analysis, nothing in the record of the Application to DEC suggests that an NTA analysis was conducted before the issuance of the SPDES Permit.

71. Additionally, the Downstream Owner Petitioners raised in their Comment Letter that under the DRBC regulations, Best Demonstrable Technology (“BDT”) minimum levels of wastewater treatment are appropriate for “all new wastewater treatment facilities... when the new ...facility discharges directly into Outstanding Basin Waters.” *DRBC Administrative Manual* § 3.10.3.A.2.d.5 at 11. Periconi Aff., *id.* As such, the SPDES Permit should have required the use of BDT requirements, which specify that “disinfections shall be ultraviolet light disinfection or an equivalent disinfection process that results in no harm to aquatic life, does not produce toxic chemical residuals, and results in effective bacterial and viral destruction.” *DRBC Administrative Manual* at 3.10.3.A.2.d.6 at 12. Periconi Aff., *id.*

72. However, SPDES Permit NY0281239 fails to require the use of BDT requirements because it indicates that chlorine will be used as a disinfectant and includes a limit for residual chlorine that is not consistent with the BDT requirements.

73. The BDT requirements also require wastewater treatment resulting in permissible contaminant levels that are *an order of magnitude lower* than those included in the instant SPDES Permit.

74. The levels permitted by DEC *were promulgated over 25 years ago* and technology has only advanced since that time. DEC does not provide sufficient explanation as to why these more stringent levels of wastewater treatment were not incorporated into the SPDES Permit. Carroll Aff. at ¶ 18.

75. Indeed, DRBC's regulations expressly indicate that "[d]irect discharges of wastewater to Special Protection Waters are discouraged." *DRBC Administrative Manual* §3.10.3.A.2.c.1 at 10. Periconi Aff., Exh. 3. This point has been lost and DEC has completely abdicated its responsibility to have the applicant seriously consider a non-discharge or load reduction alternative. Carroll Aff. at ¶ 14.

AS AND FOR THE FIRST CAUSE OF ACTION

DEC'S FAILURE TO HOLD A PUBLIC HEARING PRIOR TO THE ISSUANCE OF THE SPDES PERMIT WAS MADE IN VIOLATION OF LAWFUL PROCEDURE, WAS AFFECTED BY AN ERROR OF LAW, WAS ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION

76. Petitioners repeat and re-allege the allegations contained in the foregoing paragraphs.

77. DEC admitted "there has been substantial public interest in the application". *DEC Response to Comments* at 1. Periconi Aff., Exh. 2. However, instead of holding a public hearing, as Petitioners and about two dozen other commenters requested, DEC released a lame response to comments leaving the public with more questions than answers.

78. DEC also intentionally or negligently misled the public and confused the administrative record by indicating that “an *additional* legislative hearing is not required” (emphasis supplied). *Id.* No such hearing was ever held.

79. DEC failed to articulate a satisfactory explanation for its issuance of SPDES Permit NY0281239 without holding a public hearing. DEC’s response to the comments was preemptory, completely self-serving and in no way eliminated the need for public input at a hearing to resolve the substantive and significant issues raised by the public, including all Petitioners.

80. Pursuant to ECL § 70-0119, “where any comments received from members of the public or otherwise raise substantive and significant issues relating to the application and resolution of any such issue *may result* in denial of the permit or the imposition of significant conditions thereon, the department *shall hold a public hearing* on the application” (emphases supplied).

81. When a robust analysis of the kind that would take place in a public hearing “may result” – not “does” result – “in denial of the permit or the imposition of significant conditions,” as is the case here, the Department has no discretion or alternative: it *shall* hold a hearing. The reason is plain: you cannot know if the hearing will result in permit denial (or imposition of significant conditions) unless and until you hold the hearing.

82. Similarly, DEC’s Uniform Procedures regulations, Part 621 of 6 NYCRR, provide “where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue *may result* in denial of the permit application, or the imposition of significant

conditions thereon, the department *shall hold an adjudicatory public hearing on the application*” (emphases supplied). 6 NYCRR § 621.8(b).

83. “An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry.” 6 NYCRR § 624.4(c)(2).

84. “An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.” 6 NYCRR § 624.4(c)(3).

85. In cases where a Petitioner is advocating for a public hearing on an application for a permit, “[t]he burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant.” 6 NYCRR § 624.4(c)(4).

86. With respect to the “substantive” issues raised by the Periconi, LLC Comment Letter filed on behalf of the Downstream Owner Petitioners, the policies and regulations of the DRBC, which are applicable to this project, categorically discourage discharges to receiving waterbodies like the Halfway Brook.

87. As noted above, in its Response to Comments, DEC does not address the fact that an NTA analysis was apparently not performed by Amytra, nor does it address whether a load reduction alternative was considered. Carroll Aff. at ¶16. Furthermore, DEC does not provide sufficient explanation as to why the more stringent BDT requirements were not incorporated into the SPDES Permit. Carroll Aff. at ¶ 18.

88. There is serious doubt about the ability of Amytra, given the SPDES permit as approved, to meet the DRBC's regulatory criteria, which are applicable to its project.

Carroll Aff. at ¶ 20.

89. With respect to "significant issues" raised by the Periconi, LLC Comment Letter, an NTA analysis on this project would likely find that the existing or an enlarged non-discharge system can be a load reduction alternative to a 17,000 gallons per day discharge treatment system. Such a change would result in a "major modification to the proposed project or the imposition of significant permit conditions" in addition to those currently in the SPDES Permit.

90. Furthermore, the implementation of BDT technology into the SPDES Permit, such as the substitution, for chlorine, of ultraviolet light to disinfect the wastewater instead of chlorine, as suggested by the Downstream Owner Petitioners, would also result in a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the SPDES Permit.

91. The comments submitted to the DEC by the Downstream Owner Petitioners raised both substantive and significant issues that were relevant to the permitting process.

92. Finally, DEC did not even consider an alternative procedure to a public hearing, such as a meeting with Petitioners and Respondent Amytra to discuss in person the issues raised in the various comments.

93. As discussed, merely the possibility that such changes "may" result from a public hearing mandates the holding of one.

94. Therefore, the DEC's refusal to hold a public hearing under these circumstances, and its issuance of SPDES Permit NY0281239 without one, was made in violation of

lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, in violation of the ECL.


DEMAND FOR RELIEF

WHEREFORE, Petitioners demand judgment:

- a. Declaring that Respondent DEC abused its discretion, and acted arbitrarily and capriciously, and in violation of lawful procedure, by issuing the SPDES Permit to Respondent Amytra without first holding a public hearing, as requested by Petitioners and many other commenters;
- b. Nullifying SPDES Permit NY0281239, remanding the application for the SPDES Permit back to DEC and requiring DEC to hold an adjudicatory public hearing;
- c. Awarding Petitioners their reasonable costs and attorney's fees pursuant to CPLR Article 86 or other applicable authority; and
- d. Granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
July 18, 2019

PERICONI, LLC
James, J. Periconi, Esq.
Jose Almanzar, Esq.
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New York, NY 10016
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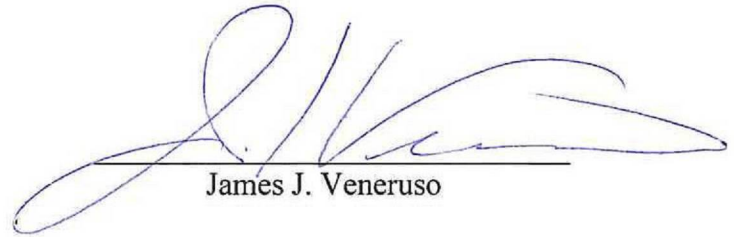
By: 

JAMES J. PERICONI
Attorneys for Petitioners

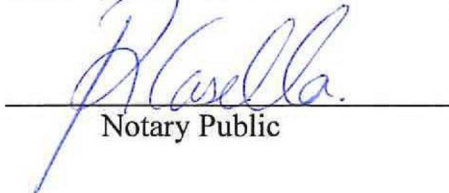
VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF WESTCHESTER)

James J. Veneruso, being duly sworn, deposes and says that he is a trustee of The Josephine Abplanalp Revocable Living Trust for Marie A. Holcombe, which owns Adirondack Fisheries, Inc., Petitioner in the above-titled action; that he is a Manager of Eldred Preserve, LLC, Petitioner in the above-titled action; that he has read the foregoing Verified Petition; and that the same is true to his own knowledge, except as to those matters stated therein to be alleged on information and belief, and as to those matters, he believes them to be true.


James J. Veneruso

Sworn to before me
18th day of July, 2019


Notary Public

Casella
RENATA GOLDSHTEYN
NOTARY PUBLIC STATE OF NEW YORK
WESTCHESTER COUNTY
LIC. #02G06210682
COMM. EXP. 2/10/22

VERIFICATION

STATE OF NEW YORK)
) ss.:
SULLIVAN COUNTY)

Maya K. van Rossum, being duly sworn, deposes and says that she is Delaware Riverkeeper, Petitioner in the above-titled action; that she is also an active member of the Delaware Riverkeeper Network, Petitioner in the above-titled action; that she has read the foregoing Verified Petition; and that the same is true to her own knowledge, except as to those matters stated therein to be alleged on information and belief, and as to those matters, she believes them to be true.

Maya K. van Rossum
Maya K. van Rossum

Sworn to before me
18 day of July, 2019

[Signature]
Notary Public

Jose A. Almanzar
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02AL6277648
Qualified in ~~Seneca~~ Columbia County
Commission Expires 3-18-21