

STATE OF NEW YORK
ADIRONDACK PARK AGENCY

In the Matter of the Application of

UNCONVENTIONAL CONCEPTS, INC.
and MICHAEL HOPMEIER

For a Permit Pursuant to Section 809 of the
Adirondack Park Agency Act and
9 NYCRR Parts 573 and 574

**REPLY AFFIRMATION IN
SUPPORT OF
INTERVENORS' JOINT
MOTION AND IN
OPPOSITION TO THE
APPLICANTS'
CROSS-MOTION**

Project No. 2021-0276

CHRISTOPHER A. AMATO, an attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalty of perjury:

1. I am Conservation Director and Counsel for Intervenor Protect the Adirondacks (“PROTECT”). I submit this reply affirmation in further support of the joint motion by Intervenor Adirondack Council, Adirondack Wild: Friends of the Forest Preserve, Sierra Club, and PROTECT (collectively, “Intervenors”) to dismiss this adjudicatory proceeding and refer the pending application of Unconventional Concepts, Inc. and Michael Hopmeier (the “Applicants”) to the Adirondack Park Agency (“APA”) Board for final action. I also submit this affirmation in opposition to the Applicants’ cross-motion to bar the Intervenor from further participation in pre-hearing matters in this proceeding.
2. The Intervenor’s motion should be granted because the Applicants do not—and cannot—dispute the dispositive fact that they unjustifiably failed to submit pre-filed testimony as required by the Third Revised Scheduling Order (“Order”). Having been provided the opportunity for a hearing and having neglected to submit the testimony necessary to support their application, the Applicants have failed to sustain their required burden of proof in this

proceeding. The Applicants have not even attempted to establish good cause for this failure, nor have they given this tribunal any reason to retroactively extend their time. Thus, irrespective of the resolution of the issues in the cross-motion, there is no basis to continue this proceeding. No further proceedings are necessary and the record must be referred to the full APA Board for final action, which would also moot the cross-motion and resolve the entirety of the current motion practice.

3. Rather than address the merits of the Intervenors' motion, the Applicants cross-move to bar the Intervenors from further participation in pre-hearing proceedings. The cross-motion should be denied because it is barred by the doctrine of laches and is unsupported by any legal authority.

The Intervenors' Motion Should be Granted

4. The Applicants essentially concede that they have: (i) refused to acknowledge that the portion of the project site located at 87 Hale Hill Lane (the "missile silo site") is part of the application (indeed they persist in that claim in their opposition to the motion), *see* Affirmation of Matthew Norfolk, Esq. ("Norfolk Aff.") ¶¶ 24-26; (ii) failed to provide Intervenors and their experts access to the missile silo site or to the other project site parcel (Lots 29 and 31) as required by the Order;¹ and (iii) failed to submit pre-filed testimony in support of the application by August 12, 2026 as required by the Order, without offering any reasonable justification for that failure.
5. Nor do the Applicants dispute that the Intervenors have been prejudiced by the Applicants' continuing disregard for the Order and for the fair and orderly conduct of this proceeding, as

¹ The Applicants' argument that the APA regulations do not obligate them to allow a site inspection misses the point. Norfolk Aff. ¶ 22. The obligation to allow a site inspection was imposed by the Order. Moreover, both the APA hearing regulations and State Administrative Procedure Act allow for discovery as generally provided in the CPLR. CPLR § 3120(1)(ii) authorizes any party to be permitted "entry upon designated land or other property" owned by another party. *See* Order § II, SAPA § 305; 9 NYCRR § 580.14(a)(4).

described in greater detail in the prior affirmation submitted in support of the Intervenor's motion.

6. Most significantly, the Applicants do not dispute that they have failed to meet their required burden of proof in this proceeding as set forth in the Intervenor's motion. *See* Affirmation of Christopher A. Amato, Esq., dated August 17, 2026 ¶¶ 35-46.
7. Moreover, nothing in the Applicants' opposing papers suggest that allowing this proceeding to continue will produce the additional information the APA Board has deemed necessary to complete its review of the application. To the contrary, the Applicants confirm that they have failed to submit the required consent by the owner of the missile silo site. *See* Norfolk Aff. ¶ 25. The owner of the site is Diversified Upstate Enterprises, LLC, whose sole owner and principal officer is Michael Hopmeier. Both the application and the APA Board's November 14, 2025 Order identify the missile silo site as part of the project site and the Applicants' refusal to submit the required consent to APA provides a separate ground for granting the Intervenor's motion.
8. Indeed, by email dated July 13, 2026, APA Hearing Staff informed the Applicants that "the project as currently proposed is inextricably tied to both lot 29 and lot 31 . . . Should Diversified Upstate Enterprises, LLC refuse to sign such a consent, the Agency will be unable to continue processing the application as currently proposed and the hearing proceedings will be suspended."
9. In addition, the Applicants now contend that their project is exempt from *any* APA review or permitting requirements due to their speculative assertion that they will obtain a federal contract at some future date and that the as yet non-existent contract would provide a basis for preemption under the Supremacy clause of the U.S. Constitution. That position further

demonstrates that the Applicants have no intention of providing the required information to sustain their application or of participating in this proceeding in a responsible manner.

10. The Applicants' cavalier and dismissive attitude about this proceeding is further underscored by their statements to the press. Mr. Norfolk, the Applicants' counsel, reportedly stated that "Any argument or proof against the application is irrelevant" because "[t]he entire project is immune from state regulation." Mr. Hopmeier reportedly echoed that position. These statements make clear that the Applicants view this adjudicatory proceeding as a pointless exercise rather than as a process that must be taken seriously. *See* Zachary Matson, *Howitzer testing applicant: Project "immune" to state regulation, APA Act*, Adirondack Explorer (Aug. 31, 2026), available at <https://www.adirondackexplorer.org/communities/land-use/howitzer-testing-applicant-project-immune-to-state-regulation-apa-act/>.

11. Under these circumstances, referral of the application to the APA Board for final action is the only rational course. Such action is explicitly authorized by Section 301(5) of State Administrative Procedures Act ("SAPA"), which permits an administrative proceeding to be disposed of by default. Here, the Applicants inexcusably failed to submit pre-filed testimony by the deadline prescribed in the Order and are therefore in default. *See* CPLR § 3215(a) (authorizing default dismissal for "neglect to proceed").

The Applicants' Cross-Motion is Barred by the Doctrine of Laches and is Legally Unsupported

12. Rather than addressing the merits of the Intervenor's motion, the Applicants have cross-moved to bar the Intervenor from further participation in pre-hearing proceedings. The cross-motion should be denied because it is barred by laches and lacks any legal basis.

13. The doctrine of laches is "an equitable bar, based on a lengthy neglect or omission to assert a right . . . resulting [in] prejudice to an adverse party." *Saratoga Cty. Chamber of Commerce v.*

Pataki, 100 NY2d 801, 816 (2003). Here, the Intervenors, each of whom were granted party status by the Ruling on Petitions for Party Status dated January 12, 2026, have expended considerable time and financial resources participating in the pre-hearing proceedings including preparing and submitting petitions to intervene; preparing and responding to discovery requests; participating in conferences; and raising and responding to procedural and substantive issues. At no time during the more than ten months of this extensive pre-hearing process did the Applicants object to the Intervenors' participation.² To the contrary, not only have the Applicants demanded that the Intervenors participate in pre-hearing discovery, they have repeatedly responded to the Intervenors' submissions and discovery demands.

14. The Applicants offer no explanation or justification for waiting ten months to challenge the Intervenors' participation. The Intervenors have been substantially prejudiced by that delay. Indeed, the Applicants took advantage of Intervenors' participation as parties and added to Intervenors' prejudice by serving discovery requests, which they now claim had no procedural or legal basis. The Applicants' cross-motion is therefore barred by laches. *See Matter of Schulz v. State*, 81 NY2d 336, 348 (1993) (holding that "[b]ecause the effect of delay on the adverse party may be crucial, delays of even under a year have been held sufficient to establish laches.").
15. The Applicants' position is also contradicted by the APA's hearing regulations. The regulations governing intervention provide that "[a]ny person may seek to become a party in order to present evidence, cross-examine witnesses, *and otherwise participate in a public hearing*,"

² The Applicants opposed the petition to intervene by Adirondack Wild: Friends of the Forest Preserve but have since posed no objections and made no motions objecting to the Intervenors' participation in the pre-hearing proceedings.

thereby making clear that, once party status is granted, an intervenor is entitled to participate in all stages of the hearing process. 9 NYCRR § 580.(a); (emphasis added).

16. The regulations further establish that, once a petition to intervene has been granted, the intervenor is a full party to the hearing and is entitled to participate in pre-hearing conferences, the submission and receipt of pre-filed testimony and other matters in the administrative hearing process. *Id.* §§ 580.5(c), 580.9, 580.14(f).
17. The Applicants cite no statute, regulation or other authority supporting their contention that an intervenor who has been granted party status may nevertheless be barred from participating in pre-hearing proceedings. Indeed, the Applicants' reliance on SAPA undermines rather than supports their position. SAPA makes clear that pre-hearing procedures are an integral component of the administrative adjudicatory process. *See, e.g.*, SAPA § 304 (authorizing pre-hearing case management by the administrative law judge); § 305 (providing for pre-hearing discovery and depositions). None of the provisions cited by the Applicants suggest that intervenors who have been granted full party status may be excluded from the critical pre-hearing stages of an administrative proceeding.
18. Indeed, the Applicants themselves acknowledge that "SAPA itself demonstrates that the adjudicatory process encompasses more than merely the hearing;" that "SAPA affirmatively contemplates procedural conferences and case management activities ancillary to, and preceding, the hearing itself;" and that SAPA "contemplates pre-hearing discovery and depositions." Norfolk Aff. ¶¶ 10, 12, 13. These admissions directly undermine the Applicants' claim that the pre-hearing process is separate and independent from the evidentiary portion of the administrative hearing.

19. The Applicants' position is also impractical. The submission of pre-filed testimony is, by definition, part of the pre-hearing process. Excluding the Intervenor from that process would necessarily prevent them from submitting or receiving pre-filed testimony and would thereby impair their ability to participate fully in the evidentiary portion of the hearing. The Applicants' interpretation would thus render the granting of full party status to an intervenor largely meaningless.

20. For all of these reasons, the Applicants' cross-motion should be denied.

The Applicants' Federal Pre-emption Argument is Improperly Raised and Premature

21. The Applicants claim that, because the project will (supposedly) be conducted pursuant to a federal contract, the APA's review and permitting authority is pre-empted by the Supremacy Clause of the United States Constitution. Norfolk Aff. ¶¶ 27-31. This challenge to APA's jurisdiction should be raised, if at all, by a motion to dismiss for lack of jurisdiction. The Applicants have failed to make such a motion and the issue is therefore not properly before this administrative tribunal.

22. In any event, the Applicants' argument is premature because Mr. Norfolk conceded during the August 19, 2026, pre-hearing conference that the Applicants do not have a federal contract.

23. Even if the issue were properly raised and ripe for review, the Applicants could not prevail on the authorities they cite. The cases are either distinguishable, inapposite, or do not support the Applicants' position. For example, *United States v. Windsor*, 765 F.2d 16 (2d Cir. 1985) involved the expansion of an existing, security-classified submarine manufacturing plant on lands owned by the United States government. The Applicants' project, by contrast, is on private lands and is not subject to any comparable security classification. In *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), the United States Supreme Court upheld a workmen's

compensation award under state law to an employee working at a federally owned nuclear facility; the decision therefore does not support the Applicants' preemption argument. *Geo Group, Inc. v. Newsom*, 50 F4th 745 (9th Cir. 2022) is likewise inapposite because it involved a challenge to a California law prohibiting the use of private facilities in the State for immigrant detention; it did not concern the application of state land use and environmental permitting requirements to a project located on private lands. Finally, *United States v. State of Montana*, 699 F.Supp. 835 (D. Mont. (1988)) involved the application of state building code requirements to a federal military installation—not the application of state land use and environmental permitting requirements to a private entity operating on private lands, as is the case here.

24. In any event, as noted above, the issue is neither properly before Your Honor nor ripe for review because the Applicants do not have a federal contract. Intervenor reserve their right to make additional arguments in the event that the Applicants make a motion raising this issue.

The Intervenor Join APA Staff's Arguments But Do Not Support the Proposed Alternative Resolutions

25. The Intervenor are gratified that APA staff support the Intervenor's motion to dismiss and join in the legal arguments submitted by APA staff in support of that motion. *See* APA Hearing Staff Response to Intervenor's Joint Motion to Dismiss at 1-5.
26. The Intervenor agree with APA staff that "admonishment is proper" and that "dismissal and reversion to the Agency Board" is appropriate. *Id.* at 5.
27. The Intervenor, however, do not support the two alternative resolutions proposed by APA staff. *Id.* at 1.
28. The first alternative would permit the hearing to continue while precluding the Applicants from presenting testimony. The Intervenor oppose that alternative because the APA's hearing regulations expressly place the burden on the applicant in an adjudicatory hearing to establish

that the proposed project satisfies the statutory criteria for issuance of a permit. *See* 9 NYCRR § 580.14(b)(6)(i). If the Applicants are precluded from presenting testimony, they necessarily will be unable to meet that burden. Further proceedings would therefore serve no useful purpose and would unnecessarily consume the resources of this tribunal, APA staff, and the Intervenors, none of whom bear any burden of proof in this proceeding.

29. The second alternative would permit the Applicant to submit testimony subject to certain unspecified conditions. The Intervenors oppose that alternative because it would, in substance, reverse Your Honor's prior ruling denying the Applicants' request for additional time in which to submit their pre-filed testimony. Moreover, as fully explained above, Applicants have not provided – or even attempted to provide – good cause or any other legal basis for retroactively extending the long-passed deadline. There is simply no justification for allowing the testimony now.

30. Neither of APA staff's proposed alternatives to referral of the application to the APA Board would address the Applicants' continuing refusal to follow the APA Board's order making both parcels part of the project site or the Applicants' blatant disrespect for Your Honor's Order by denying the Intervenors access to the project site and failing to file pre-filed testimony. Only the APA Board can rule that the application is incomplete because of the Applicants' failure to include both of the parcels involved in the project. Only the APA Board can rule that the Applicants have failed to meet their burden of proof with respect to the criteria for permit approval in APA Act § 809(10). It is respectfully submitted that the Applicants have repeatedly demonstrated that they do not take these proceedings seriously and only the APA Board has the authority to take the necessary actions required.

WHEREFORE, the Intervenors respectfully request that the Applicants' cross-motion be denied; that this proceeding be dismissed; that the pending application be referred to the full APA Board for final action; and that Your Honor grant such other and further relief as deemed just and proper.

Dated: Albany, New York
September 3, 2026

A handwritten signature in black ink, appearing to read "Chris Amato", written in a cursive style.

CHRISTOPHER A. AMATO