SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ESSEX

----------X

In the Matter of the Application of

ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE ; *et al.*,

Petitioners/Plaintiffs,

Index No. CV14-0358

for Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules, Declaratory Judgment, and Injunctive Relief

Oral Argument Requested

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY, *et al.*,

Respondents/Defendants.

----------X

PETITIONERS/PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR VERIFIED PETITION AND COMPLAINT, APPLICATION FOR A TEMPORARY RESTRAINING ORDER, AND MOTION FOR A PRELIMINARY INJUNCTION

John M. Delehanty
Todd F. Rosenbaum
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
666 Third Avenue
New York, NY 10017
212-935-3000

Deborah Goldberg
Hannah Chang
EARTHJUSTICE
48 Wall Street
19th Floor
New York, NY 10005
212-845-7376
dgoldberg@earthjustice.org

Attorneys for Petitioners/Plaintiffs

July 11, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

New York Constitution

New York Statutes

Regulations

Other Authorities

PRELIMINARY STATEMENT

This case presents an issue of first impression of enormous importance for the future of state Forest Preserve protected by the people of New York since 1885. That protection consists of multiple layers of legal safeguards in the New York Constitution and state statutes, management plans, regulations, and policy documents—all designed to ensure that the Forest Preserve within the Adirondack and Catskill Parks is husbanded with care for future generations. The best known and strictest protection is found in article XIV, section 1, of the state Constitution, which requires that the state Forest Preserve "be forever kept as wild forest lands" (the "Forever Wild Provision") and bars both the transfer of the land and the destruction of its trees. From time to time, the Constitution has been amended to allow development of portions of the Forest Preserve for various public purposes, notwithstanding the Forever Wild Provision, and the Legislature has implemented the amendment to provide facilities for public use or to consolidate a patchwork of private and public property.

Now, for the first time in its history, the State is claiming that a ballot measure passed by the voters in 2013 (the "Prop. 5 Amendment") not only suspends the Forever Wild Provision with respect to the relevant tract—an approximately 200-acre parcel in the Jay Mountain Wilderness Area, known as Lot 8—but also "implicitly repeals" every other layer of legal protection for that state Forest Preserve land. According to the State, constitutional language that previously has been implemented with enabling legislation should be interpreted differently now, leaving administrative agencies with unfettered freedom to implement the Prop. 5 Amendment—without regard for longstanding law and without detailing clear standards and guides for the exercise of their discretion. On that theory, the Wilderness guidelines set forth in the Adirondack Park State Land Management Plan ("SLMP"), as implemented in the Jay Mountain Wilderness Unit Management Plan ("UMP"); the protections for state lands in Adirondack Park

(most of which is Forest Preserve) in article 9 of the New York Environmental Conservation Law ("ECL"); the regulations promulgated to implement article 9 (the "Part 190 Regulations"); the Memorandum of Understanding ("MOU") between the Adirondack Park Agency ("APA") and the Department of Environmental Conservation ("DEC") governing their implementation of the SLMP and UMPs; APA's public comment policy; and DEC's policy governing temporary revocable permits ("TRPs") for activities on state lands (the "TRP Policy") have no application to Lot 8, leaving activities at that site subject only to the will of APA and DEC (the "Agencies").

In disregard of all of those laws, plans, regulations, and policies, APA issued a determination that the amendment of the Jay Mountain Wilderness ("UMP") to allow mineral sampling operations on Lot 8 conforms with the SLMP (the "Conformance Determination"), and DEC issued a determination that the proposed drilling by Respondent/Defendant NYCO Minerals, Inc. ("NYCO") did not carry the potential for even one significant adverse environmental impact (the "Negative Declaration"), approved the amendment of the Jay Mountain Wilderness UMP (the "Final UMP Amendment"), and approved a TRP for mineral sampling on Lot 8 (the "Final TRP"). Those determinations are inconsistent with more than a century of public investment in protecting the Forest Preserve. They also are grounded on a theory of implicit repeal that leaves the Agencies operating in a legal vacuum.

Contrary to their claim, the Agencies: (a) lack legislative authority for issuing the Conformance Determination, the Final UMP Amendment, and the Final TRP; (b) cannot lawfully authorize mineral sampling in the absence of any binding standards or guides; (c) remain bound by current law, until it is properly amended; and (d) cannot rely upon and must rescind the Negative Declaration. The Agencies are proceeding in an excess of jurisdiction, and their determinations were arbitrary and capricious, abuses of discretion and affected by errors of

law. For those reasons, Petitioners/Plaintiffs Adirondack Wild: Friends of the Forest Preserve; Atlantic States Legal Foundation; Protect the Adirondacks! Inc.; and Sierra Club (collectively, "Petitioners") challenge the foregoing actions of the Agencies under article 78 of the New York Civil Practice Law and Rules ("CPLR"); seek a declaratory judgment under section 3001 of the CPLR that their determinations are null, void, and of no effect; and ask the Court to enjoin NYCO from conducting any activities on Lot 8 until APA and DEC comply with the law.

LEGAL BACKGROUND

Petitioners respectfully refer the Court to paragraphs 22-65 of the Verified Petition and Complaint for a summary of the provisions of law relevant to this case.

STATEMENT OF FACTS

Petitioners respectfully refer the Court to paragraphs 66-136 of the Verified Petition and Complaint, and the exhibits thereto, for a summary of the facts relevant to this case. Here, Petitioners wish to highlight the practical implications of the Agencies' theory of "implicit repeal." These facts also are set out in in the Affirmation of Deborah Goldberg, dated July 10, 2014 ("Goldberg Aff.," a copy of which is annexed to the Verified Petition and Complaint as Exhibit 1), ¶¶ 4-7.

The immediate and unsurprising result of adopting a theory, whereby all applicable law is automatically repealed, is arbitrary, inconsistent, and lawless agency action. In February 2014, DEC secretly issued a TRP (the "February TRP") to NYCO, authorizing NYCO to conduct a boundary survey of Lot 8, including the cutting of vegetation on that Wilderness land. *See* Ex. 30 (February TRP).[1] DEC evidently did not publish notice of the February TRP in either the Environmental Notice Bulletin or on its website, and DEC definitely withheld the February TRP from its response to a Freedom of Information Law ("FOIL") request, submitted by Petitioners in

[1] "Ex. [number]" denotes an exhibit to the Verified Petition and Complaint in this case.

early March 2014, which specifically asked for permits related to NYCO's potential activities on Lot 8. *See* Ex. 19 (FOIL Requests). By violating its FOIL obligations, DEC very effectively concealed from Petitioners the plan to allow vegetation cutting in Lot 8 until it was too late to seek judicial relief. Moreover, DEC appears to have approved the February TRP without conducting any environmental review under the State Environmental Quality Review Act ("SEQRA"), and it certainly did not amend the Jay Mountain Wilderness UMP to permit vegetation cutting on Lot 8. DEC simply decided it had unfettered discretion to authorize activity in the Forest Preserve that obviously was prohibited by all of the "implicitly repealed" laws, plans, regulations, and policies.

The Agencies invented a new procedure for the TRP authorizing actual mineral sampling. For that purpose, they released a proposed amendment of the Jay Mountain Wilderness Area and a draft TRP for public review and comment. *See* Verified Petition and Complaint ¶ 28. In doing so, they ignored the usual procedures set forth in the MOU coordinating their respective roles in implementing the SLMP, including procedures for compliance with SEQRA, and disregarded APA's Public Comment Policy. *See id.* ¶ 97; Ex. 21 (Petitioners' Letter to APA, dated April 9, 2014, at 5-6). The Agencies have offered no explanation for the idiosyncratic procedures employed in approving mineral sampling on Lot 8 or for the wide divergence in the procedures employed for approval of the two TRPs. For the reasons explained below, the Agencies' acted in excess of their jurisdiction in approving mineral sampling on Lot 8, and their determinations were arbitrary and capricious, abuses of discretion, and affected by errors of law.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

To prevail on a motion for a preliminary injunction, a party "must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in his favor." *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840 (2005) (citing *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Schulz v. State Executive*, 108 A.D.3d 856, 856-57 (3d Dep't 2013). Such a showing also entitles a party to a temporary restraining order ("TRO") where it appears that immediate and irreparable injury would occur, absent restraint, before a hearing on the preliminary injunction can take place. *See* CPLR § 6301; *see also Crescentini v. Slate Hills Biomass Energy, LLC*, 13 A.D.3d 806, 807 (2d Dep't 2014). As is shown below, Petitioners meet the requirements for issuance of both a TRO and a preliminary injunction.

A. Petitioners Are Likely to Succeed on the Merits of Each of Their Claims for Relief.

To obtain preliminary injunctive relief, Petitioners "need only establish a prima facie case showing [their] right to relief, not a certainty of success." *Lowe v. Reynolds*, 75 A.D.2d 967, 969 (3d Dep't 1980) (citation omitted). Petitioners easily carry this limited burden. As is shown in Point II(A), below, Respondents are proceeding in excess of jurisdiction because the Agencies do not have statutory authority to permit industrial uses in the Forest Preserve, and the Prop. 5 Amendment does not contain any rules governing its implementation and therefore is not self-executing. Respondents' theory of "implicit repeal" makes matters worse, by leaving the Agencies without any standards whatsoever to guide their actions. As Petitioners show, the Agencies' attempt to exercise unfettered discretion is not only inherently arbitrary and capricious but also a violation of the doctrine of separation of powers. *See* Point II(B). Moreover,

Respondents' theory of implicit repeal has no application here, because the state can exercise the option granted by the Prop. 5 Amendment consistently with existing legal procedures and substantive law. *See* Point II(C). Finally, in approving mineral sampling on Lot 8, without preparing an environmental impact statement, Respondents have failed to take a hard look at the relevant areas of environmental concern or to justify their conclusion that industrial activity on Wilderness land carries no potential for significant environmental consequences. *See* Point II(D). Petitioners thus not only establish the prima facie case needed for a TRO and preliminary injunction but also demonstrate that they are entitled to a declaratory judgment and permanent injunctive relief on each of their claims under article 78 of the CPLR.

B. Absent a Temporary Restraining Order, Petitioners Will Suffer Immediate and Irreparable Harm.

If this Court does not grant preliminary relief, NYCO can begin its tree-clearing and preparation for drilling in Lot 8 as early as July 16, 2014. See Ex. 1 (Goldberg Aff., Ex. B at 4). That imminent intrusion into a forest untouched by humans since the late 1800s will result in the irreversible destruction of century-old trees and the permanent degradation of the wilderness character of Lot 8, for which money damages cannot possibly compensate. "Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient." *See McLaughlin, Piven, Vogel v. W.J. Nolan & Co., Inc*., 114 A.D.2d 165, 174 (2d Dep't 1986). The injury to Petitioners from NYCO's threatened mineral sampling thus is both immediate and irreparable.

Petitioners' members are individuals who treasure the long-protected Forest Preserve in New York State and have a deep and vital connection to the wild places of the Adirondack Park. See Ex. 6 (Affidavit of Peter Bauer, sworn to on July 9, 2014 ("Bauer Aff."), ¶¶ 4, 14); Ex.9 (Affidavit of Roger Downs, sworn to on July 9, 2014, ¶¶ 3, 11-12); Ex. 3 (Affidavit of David

Gibson, sworn to on July 8, 2014, ¶¶ 4, 19-20). Some individuals have lived in or visited the Adirondack Park for nearly their entire lives, see Ex. 17 (Affidavit of Evelyn Greene, sworn to on July 9 ("Greene Aff."), ¶¶ 8-9), and some have regularly visited the Jay Mountain Wilderness for years, see Ex. 3 (Affidavit of Daniel Plumley, sworn to on July 8, 2014, ¶ 7). Many of Petitioners' members are lifelong advocates for wilderness, who have devoted their professional and personal lives to protecting and preserving the Adirondack Park and the State Forest Preserve. See, Ex. 6 (Bauer Aff. ¶¶ 15-17); Ex. 8 (Affidavit of William Ingersoll, sworn to on July 9, 2014, ¶¶ 4-6); Ex. 5 (Affidavit of Charles C. Morrison, sworn to on July 8, 2014, ¶¶ 11-16). NYCO's impending clearing of trees within the Adirondack Forest Preserve and encroachment into wilderness protected for more than six generations is an assault on the interests of Petitioners' members, who cherish the ecological integrity and beauty of the Adirondack Park and the Forest Preserve and hope to bequeath to their children and future generations the opportunities for peace and solitude that they have enjoyed. The imminent injury also is irreparable, because no amount of money damages is sufficient to compensate for the harm to Petitioners' members caused by NYCO's degradation of Lot 8. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 25 (D.D.C. 2009) ("[E]nvironmental and aesthetic injuries are irreparable."); *Stand Together Against Neighborhood Decay, Inc. v. Bd. of Estimate of City of N.Y.*, 690 F. Supp. 1192, 1200 (E.D.N.Y. 1988) ("In a typical environmental case, the alleged harm is purely environmental and truly irreparable . . . ."). Petitioners thus have satisfied the second condition for obtaining preliminary injunctive relief.

C. The Balance of Equities Favors Petitioners.

The balance of equities favors Petitioners because mineral sampling on Lot 8 will cause them serious, irreversible, and irreparable harm, whereas a delay in tree cutting will have little effect on Respondents. *See Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 70 A.D.2d 1021, 1022 (3d Dep't 1979) (noting that, when "the irreparable injury to be sustained by the plaintiffs is more burdensome to it than the harm caused to defendant through imposition of the injunction," the balance of equities favors the plaintiff). The Agencies have no legitimate stake in expediting the destruction of state Forest Preserve land that they are charged with protecting, and NYCO not only is operating two mines in Essex County but also is actively engaged in efforts to expand both of them on private land that it owns. *See* DEC, ENB – Region 5 Notices 6/25/2014, *at* http://www.dec.ny.gov/enb/20140625_not5.html. Postponing all physical disturbance of Lot 8 until this Court can resolve the merits of Petitioners' Verified Petition and Complaint safeguards not only Petitioners' compelling aesthetic and environmental interests but also the huge public investment in protecting the Forest Preserve, with negligible consequences for the narrow private interests advanced by NYCO's proposed mineral sampling. For this reason, too, this Court should grant Petitioners' application for a TRO and motion for a preliminary injunction.

II. PETITIONERS' ARTICLE 78 PETITION AND COMPLAINT FOR A DECLARATORY JUDGMENT SHOULD BE GRANTED IN THEIR ENTIRETY.

A. Respondents Have Proceeded or Are about to Proceed in Excess of Their Jurisdiction.

The Agencies do not have statutory authority to permit industrial uses in the Forest Preserve, and Respondents cannot invoke the New York Constitution for that authority because the Prop. 5 Amendment lacks any rules for its implementation and therefore is not self-executing. The Agencies nevertheless have made a series of determinations allowing mineral

sampling on Lot 8, and the commencement of NYCO's operations at the site appears to be imminent. Respondents therefore have proceeded or are about to proceed without or in excess of their jurisdiction. For that reason, this Court should declare the Agencies' actions illegal, null, and void and enjoin Respondents from causing any physical disturbance on Lot 8.

1. The Agencies Have No Statutory Authority to Authorize Mineral Sampling in the Forest Preserve.

Administrative bodies, including the Agencies, are "creatures of the Legislature within the executive branch" and "can act only to implement their charter as it is written and as given to them." *Matter of Tze Chun Liao v. New York State Banking Dep't*, 74 N.Y.2d 505, 510 (1989); *see also Nicholas v. Kahn*, 47 N.Y.2d 24, 31 (1979) ("[A]dministrative agencies are but creatures of the Legislature and are possessed only of those powers expressly or impliedly delegated by that body."). APA's charter is set forth in the APA Act, N.Y. Exec. Law §§ 801 *et seq.*, and the SLMP, which has "the force of a legislative enactment." *Helms v. Reid*, 394 N.Y.S.2d 987 (Sup. Ct. Hamilton Cnty. 1977). DEC's responsibilities are set forth in the ECL and the SLMP. Neither agency has been delegated the power to permit industrial uses on Forest Preserve land.

The legislative enactments setting forth the Agencies' charters direct them to protect Forest Preserve land. APA's enabling statute seeks "to insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack park," and mandates, among other things, the development of the SLMP to govern "the preservation, management and use of [state lands within the Adirondack Park]." N.Y. Exec. Law §§ 801, 816.[2] DEC has been charged with "the administration and management of [state lands in the

[2] Nearly all of the approximately 2.4 million acres of state land in the Adirondack Park is part of the Adirondack Forest Preserve, with some minimal limited exceptions. *See* SLMP at 2.

Adirondack Park] in compliance with the guidelines and criteria laid down by the SLMP." SLMP at 12. The Legislature specifically directed DEC to carry out the policies of the ECL "in accordance with such existing provisions and limitations as may be elsewhere set forth in law." ECL § 3-0301. Those "existing provisions" include not only the SLMP but also article 9 of the ECL, which imposes upon DEC the duty to "[e]xercise care, custody and control" of the Forest Preserve and the Adirondack Park. *Id.* § 9-0105(1); *see also id.* § 3-0301(d) (authorizing DEC to "[p]rovide for the care, custody, and control" of the Forest Preserve). Neither the Executive Law nor the ECL authorizes the Agencies to permit mineral sampling within the Forest Preserve; nor does the SLMP.

The SLMP delineates a classification system with nine categories of state land in the Adirondack Park and specifies guidelines for and restrictions on permissible uses and activities within each category. The guidelines cover everything from pit privies to cross country ski trails, *see* SLMP at 20, but permit nothing remotely akin to mineral sampling on any state land in the Adirondack Park. Even "Intensive Use" lands—lands designated "for intensive forms of outdoor recreation by the public"—may be used only for public recreation "in harmony with the relatively wild and undeveloped character of the Adirondack Park." *Id.* at 37. Moreover, regardless of the specific category assigned to particular forest preserve lands, the SLMP unequivocally states that "no structures, improvements *or uses* not now established on the forest reserve are permitted by these guidelines and in many cases more restrictive management is provided for." SLMP at 14 (emphasis added). The SLMP thus offers no legal basis for the Agencies' approval of a new industrial use on Lot 8, and NYCO cannot commence tree clearance and other land disturbance in reliance on the Agencies' determinations.

The ECL provides no more authority for exploratory drilling within the Forest Preserve than does the SLMP. To the contrary, provisions of the ECL intended "to protect . . . state lands" expressly prohibit the cutting of any tree in the Forest Preserve. *See* ECL § 9-0303(1) ("[N]o person shall cut, remove, injure, destroy or cause to be cut, removed, injured or destroyed any trees or timber or other property thereon or enter upon such lands with intent to do so."). Having approved the UMP Amendment and the TRP without delegated power to do so, and having indicated the intent to commence mineral sampling operations on Lot 8, Respondents therefore have proceeded and are proceeding in excess of their jurisdiction. *See Matter of New York State Superfund Coal. v. New York*, 75 N.Y.2d 88, 92 (1989) (recognizing "[t]he axiom that an agency's authority must coincide with its enabling statute").

2. The Agencies Cannot Implement the Prop. 5 Amendment without Enabling Legislation Because the Provision Is Not Self-Executing.

The Agencies cannot overcome the absence of properly delegated authority to approve the UMP Amendment and TRP by directly invoking the Prop. 5 Amendment, because that provision is not self-executing. A constitutional provision may be considered self-executing "if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced." *In re Sweeley*, 33 N.Y.S. 369, 371-72 (Sup. Ct. Albany Cnty. Special Term 1895), *aff'd sub nom. People ex rel. Sweeley v. Wilson*, 146 N.Y. 401 (1895). A constitutional provision "is not self-executing when it merely indicates principles without laying down rules by means of which those principles may be given the force of law." *Id.* Because the Prop. 5 Amendment lacks any rules governing its implementation, further legislative action is needed before the Agencies may permit any exploratory drilling on Lot 8.

When deciding whether a constitutional amendment is self-executing, its plain language is "[t]he most compelling criterion." *People v. Carroll*, 3 N.Y.2d 686, 689 (1958). The Prop. 5

Amendment states: "Notwithstanding the foregoing provisions, the state *may* authorize NYCO Minerals, Inc. to engage in mineral sampling operations . . . ." N.Y. Const. art. XIV, § 1 (emphasis added). The voters did not mandate the issuance of a permit; nor did the Prop. 5 Amendment make any effort "to detail the method or procedures of implementation." *Carroll*, 3 N.Y.2d at 690. Given the textual silence with respect to such "operational details," *id.* at 691, this Court should read the Prop. 5 Amendment merely "to remove the constitutional bar to the Legislature's authority to enact" laws allowing mineral sampling but not to eliminate the need for such enabling legislation, *id*. at 690. The "total absence of specifics," *id.*, especially when industrial operations will take place within the Forest Preserve for the first time in its history, rebuts the usual presumption that constitutional provisions are self-executing.

The legislative context in which the Prop. 5 Amendment was passed also militates against regarding it as self-executing. "The drafting and adoption of [constitutional amendments] must be deemed to have been made in the light of and with consideration of existing legislation, and such legislation becomes operative in carrying out the constitutional provisions." *Uhlmann v. Conway*, 101 N.Y.S.2d 4, 7 (3d Dep't 1950); *see People ex rel. Jackson v. Potter*, 47 N.Y. 375, 380 (1872) ("[A] Constitution is to be held as prepared and adopted in reference to existing statutory laws, upon the provisions of which, in detail, it must depend to be set in practical operation."). The Prop. 5 Amendment can be effectuated through the existing Executive Law, ECL, and SLMP, if the state decides not to permit drilling on Lot 8, but if drilling is to be permitted, new enabling legislation is required. *See People ex rel. McClelland v. Roberts*, 148 N.Y. 360, 369 (1896) ("It was the intention to put all the new provisions of the Constitution into operation through the instrumentality of such laws as were then in force, so far as practicable,

and if, in practice, they were found to be in any respect insufficient for that purpose, they were to be replaced or supplemented by new ones.").

The New York Court of Appeals recognized the need for implementing legislation in *Chittenden v. Wurster*, where the constitutional amendment at issue provided that "appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examination . . . ." 152 N.Y. 345, 354 (1897). The Court of Appeals noted that the provision was "framed and adopted with reference to existing laws, which were intended to give it immediate practical operation," but that counties, towns, and villages (as opposed to the state and cities) lacked the "machinery necessary for the conducting of a competitive examination." *Id.* at 355-56. The defendants in that case argued that the amendment nevertheless was self-executing in counties, towns, and villages, because "each officer . . . could himself examine the applicants for position, and in that way determine who should be the appointee by a competitive examination." *Id.* The Court rejected that approach because "this system would practically nullify the civil service law, and bring it into disrepute." *Id.* Instead, the Court concluded that because "there was neither statutory nor executive machinery for putting the amendment into effect in [counties, towns, and] villages, so it may be well that as to [them] the amendment will, until there shall be legislation, remain ineffectual." *Id.*

The situation before this Court is closely analogous to that in *Chittenden*. There are no statutes authorizing mineral sampling in the Forest Preserve, and thus there is no "machinery" through which to implement a decision to allow drilling on Lot 8. Just as conducting municipal employment examinations without governing legislation would "nullify the civil service law, and bring it into disrepute," so authorizing NYCO's mineral sampling without statutory guidelines

would undermine the legal framework protecting the integrity of the Forest Preserve. For this reason, too, the Prop. 5 Amendment should not be regarded as self-executing.

Prior revisions of the same constitutional provision affected by the Prop. 5 Amendment have not been regarded as self-executing, even though they have prefatory language similar to that at issue in this case and did not expressly require enabling legislation. Section 1 of article XIV provides in pertinent part:

> Notwithstanding the foregoing provisions, *the state may* convey to the village of Saranac Lake ten acres of forest preserve land . . . .
>
> * * *
>
> Notwithstanding the foregoing provisions, *the state may* convey to the town of Arietta twenty-eight acres of forest preserve land . . . .
>
> * * *
>
> Notwithstanding the foregoing provisions *the state may* convey to the town of Arietta fifty acres of forest preserve land . . . ."

N.Y. Const. art. XIV, § 1 (emphasis added). In the absence of essential details for implementing those amendments, enabling legislation was passed to effectuate their purposes. *See* 1992 N.Y. Sess. Laws. Ch. 360 (S. 7618, A. 10700); 1966 N.Y. Laws 1020; 1966 N.Y. Laws 57. The legislation specified the terms of the land transfers, including procedures to be followed. *See, e.g.*, 1992 Sess. Laws. Ch. 360 (S. 7618, A. 10700) § 2 (prescribing the covenants and restrictions to be incorporated into the letters patent issued by the commissioner of general services to the town of Arietta when conveying the land); 1966 N.Y. Laws at 58 ("Title to the lands to be conveyed to the state shall be approved by the attorney general and the deed to the state shall be approved by him as to form and manner of execution before such deed shall be accepted on behalf of the state."). In none of those cases did anyone insist that executive branch officials alone could implement constitutional amendments affecting the Forest Preserve, with

absolutely no legislative involvement. Given that consistent historical practice, the Prop. 5 Amendment should not be regarded as self-executing, and Respondents' efforts to proceed without enabling legislation are acts in excess of their jurisdiction. This Court therefore should grant Petitioners judgment under Article 78; issue a declaratory judgment that the UMP Amendment and TRP are invalid, null, and void, and enjoin any preparations for mineral sampling operations on Lot 8.

B. Untethered from All of the Legal Standards Ordinarily Protecting Forest Preserve, the Agencies' Approvals of the UMP Amendment and TRP Were Arbitrary, Capricious, and an Abuse of Discretion.

In support of their actions, the Agencies claim that all statutory and regulatory provisions prohibiting mineral sampling on Forest Preserve land are in conflict with and therefore are abrogated—or "implicitly repealed"—by the Prop. 5 Amendment. Because there is no legislation delegating to the Agencies the power to permit exploratory drilling in the Forest Preserve, and there is no legislation implementing the Prop. 5 Amendment, Respondents' theory of implicit repeal leaves them operating without any standards whatsoever to guide their determinations. Administrative decisions issued in a legal vacuum are quintessentially arbitrary, capricious, and an abuse of discretion. Moreover, they violate the doctrine of the separation of powers.

1. The Agencies May Not Exercise Discretion Unfettered by Law.

Respondents contend that "[u]pon the adoption of a constitutional amendment, all statutes and regulations that are inconsistent with the approved constitutional amendment become abrogated and are therefore nullified."[3] On that theory, Respondents expressly claim not to be bound by "SLMP Wilderness guidelines that would otherwise prohibit NYCO's mineral sampling operations within the Jay Mountain Wilderness area." Ex. 1 (Goldberg Aff., Ex. A

[3] Ex. 26 (Response to Public Comments at 1).

at 4).[4] Their disregard of the statutory mandate to keep the Adirondack Park maintained for free public use, of the statutory prohibition of tree-cutting on state lands in the Park, and of a variety of regulatory provisions related to state Forest Preserve land presumably also may be traced to that theory. *See* ECL § 9-0303(1) ("[N]o person shall cut, remove, injure, destroy or cause to be cut, removed, injured or destroyed any trees or timber or other property thereon or enter upon such lands with intent to do so."); 6 NYCRR §§ 190.8(a) (prohibiting use of state land for private revenue or commercial purposes); 193.3 (protecting exploitably vulnerable plants); 196.6 (prohibiting operations of motorized vehicles in the Forest Preserve, except on designated roads). It is not clear whether the Agencies believe that the MOU governing implementation of the SLMP and the TRP Policy governing temporary uses of the Forest Preserve also have been nullified or whether they simply have chosen not to let guidance documents cramp their newfound liberation from otherwise binding law. In any event, the Agencies have refused to comply with all of those laws, regulations, plans, and policies. With nothing to replace them, the approvals of the UMP amendment and the TRP are wholly untethered to any legal standards.

"It is fundamental that employees of any State agency must administer the law in accordance with the will of the Legislature, rather than in accordance with their own will." *Nicholas v. Kahn*, 47 N.Y.2d at 30. If statutes protecting the Forest Preserve are nullified, as Respondents contend, then the will of the Legislature cannot guide the Agencies' authorization of NYCO's mineral sampling. For example, if section 9-0303(1) of the ECL no longer binds DEC employees, nothing is left but "their own will" to determine the extent of permissible tree

[4] *See also* Memorandum from Kathy Regan, APA Sr. Natural Res. Planner, to Terry Martino, APA Exec. Dir. 2 (June 4, 2014), *available at* http://apa.ny.gov/Mailing/2014/06/StateLand/Jay%20Mt.%20Public%20Comment%20Cover%20Memo.pdf ("The Constitutional Amendment overrides the APSLMP guidelines for Wilderness."); *id.* at 3 ("The legal effect of the constitutional amendment is that the APSLMP's Wilderness guidelines do not apply to Lot 8.").

cutting on Lot 8. Similarly, if the SLMP guidelines for the use and management of Wilderness areas have been overridden, as Respondents claim, the APA's conformance determination is necessarily arbitrary and capricious, because there are *no standards* to which the amendment can conform.[5] When an executive agency purports to act in the absence of standards, "there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities." *Rapp v. Carey*, 44 N.Y.2d 157, 162 (1978).

Even when an executive body is authorized to implement legislation, "an administrative agency is forbidden from exercising its discretionary power without first detailing standards or guides to govern the exercise of that discretion." *Nicholas v. Kahn*, 47 N.Y.2d at 34. In *Committee to Preserve Brighton Beach & Manhattan Beach v. Planning Comm'n*, 695 N.Y.S.2d 7 (1st Dep't 1999), the city planning commission failed to adopt statutorily required rules "either list[ing] major concessions or establish[ing] a procedure for determining whether a concession is a major concession." *Id.* at 10. Following the grant of a concession for the construction and operation of a private recreational center in a city park, the petitioners sued, arguing that, in the absence of the mandated rules, the "determination was necessarily arbitrary and capricious." *Id.* at 12-13. The court agreed, finding:

> [I]n the absence of Planning Commission rules, the [agency] made a determination without the benefit of the specific guidelines upon which the determination was intended to be based. Presumably, it was exactly this type of unfettered discretion that [the statute requiring the rules] was designed to eliminate.

Id. at 13. The court concluded that "an agency determination rendered without the statutorily mandated guidelines *must be considered arbitrary and capricious*." *Id.* (emphasis added).

---

[5] *See* Memorandum from Kathy Regan, APA Sr. Natural Res. Planner, to Terry Martino, APA Exec. Dir. 2 (June 4, 2014), *available at* http://apa.ny.gov/Mailing/2014/06/StateLand/Jay%20Mt.%20Public%20Comment%20Cover%20Memo.pdf.

Like the Planning Commission, the Agencies have statutory obligations to adopt rules and guidelines for the management and use of state Forest Preserve lands. The APA Act directed APA to prepare a master plan that would classify state lands within the Adirondack Park and "provide general guidelines and criteria for the management and use of lands within such classifications." 1971 N.Y. Laws 1853-61 (formerly N.Y. Exec. Law § 807, which was amended and renumbered § 816 by 1973 N.Y. Laws 1223-24).[6] The APA Act also directed DEC to develop unit management plans and stated that the plans "shall conform to the general guidelines and criteria set forth in the master plan." N.Y. Exec. L. § 816. DEC also has a statutory "duty . . . to: . . . make rules and regulations and issue permits for the temporary use of the forest preserve." ECL § 9-0105(15). The SLMP Wilderness guidelines, the Jay Mountain Wilderness UMP, the Part 190 Regulations, and the TRP Policy were adopted pursuant to those directives.

The Agencies have decided, however, that they need not follow any of those provisions with respect to Lot 8. Moreover, the Agencies have approved the UMP Amendment and the TRP without detailing any substitute standards to govern their decisions. Without binding statutes or other instruments with the force of legislative enactment or controlling regulations—or even guidance documents that the Agencies are willing to follow voluntarily—the Agencies' discretion is impermissibly unfettered. *See Committee to Preserve Brighton Beach*, 695 N.Y.S.2d at 13 (holding that agencies may not exercise "unfettered discretion"). Under those circumstances, the determinations challenged here "must be considered arbitrary and capricious." *Id.*

[6] The full text of former section 807 of the APA Act is set forth in Appendix I of the SLMP.

2. Administrative Action Unsupported by Lawful Standards Violates the Doctrine of the Separation of Powers.

The Agencies' unlawful determinations cannot be saved by resort to their theory of "implicit repeal" not only because unfettered discretion is inherently arbitrary and capricious, but also because administrative action in the absence of any lawful standards violates the doctrine of the separation of powers. An agency's exercise of discretion must be "*within the law*" and "cannot be invoked outside the law." *Matter of Barry v. O'Connell*, 303 N.Y. 46, 52 (1951). The applicable laws "are made by the law-making power, and not by administrative officers acting solely on their own ideas of sound public policy, however excellent such ideas may be." *Matter of Picone v. Comm'r of Licenses*, 241 N.Y. 157, 162 (1925). As determinations made in a legal void left by "implicitly repealed" laws, the Agencies' actions thus "constitute an unauthorized exercise of legislative power in contravention of the separation of powers doctrine." *Nicholas v. Kahn*, 47 N.Y.2d at 30; *see Matter of Broiderick v. Lindsay*, 39 N.Y.2d 641, 646 (1976) (finding that an agency may not create a different policy "not embraced in the legislation" because such action "would constitute an impermissible exercise of legislative power"). As the New York Court of Appeals has recognized:

> Under our system of distribution of powers with checks and balances, . . . [n]o single branch of government may assume a power, especially if assumption of that power might erode the genius of that system. The erosion need not be great. Rather should we be alive to the imperceptible but gradual increase in assumption of power properly belonging to another department.

Rapp v. Carey, 44 N.Y.2d 157, 167 (1978) (internal quotation marks omitted). Because the Agencies have arrogated to themselves a power belonging only to the Legislature, their determinations are affected by an error of law and are arbitrary, capricious, and an abuse of discretion. This Court therefore should grant Petitioners judgment under Article 78; issue a

declaratory judgment that the UMP Amendment and TRP are invalid, null, and void, and enjoin any preparations for mineral sampling operations on Lot 8.

C. Because Existing Legal Protections for the Forest Preserve Have Not Been Abrogated by the Prop. 5 Amendment, the Agencies' Determinations Were Affected by an Error of Law.

Respondents' theory of implicit repeal is fatally flawed for another reason. There is no basis for the Agencies' contention that existing laws protecting the Forest Preserve conflict with the Prop. 5 Amendment. To the contrary, those laws can be fully enforced consistently with the terms of the Prop. 5 Amendment, because the Agencies can choose not to authorize mineral sampling. If the state chooses instead to authorize exploratory drilling in Lot 8, the existing laws prohibiting industrial activities in the Forest Preserve are not thereby repealed but rather must be supplemented with properly adopted new standards and guides to govern the temporary operations that otherwise would be barred.

As a preliminary matter, it is important to understand how far Respondents' theory of implicit repeal diverges from the usual doctrine of constitutional abrogation of conflicting laws. Ordinarily, when a constitutional amendment abrogates an inconsistent statute, the entire statute is nullified, equally and permanently as to all affected entities. In *Durante v. Evans*, for example, the court found that the constitutional amendments reorganizing the courts and centralizing supervisory power in the Chief Administrative Judge completely abrogated provisions of the county law that granted County Clerks the power of appointment for certain positions. *See* 94 A.D.2d 141 (3d Dep't 1983). By contrast, Respondents argue that the Prop. 5 Amendment nullifies the SLMP Wilderness guidelines, but only with respect to one piece of property, only for one purpose, only for the benefit of one private corporation, possibly only temporarily, and entirely at Respondents' discretion. On their theory, if NYCO extracts a few cores and decides wollastonite mining will not be profitable on Lot 8, or if DEC revokes the TRP

for any reason, the SLMP Wilderness guidelines will un-repeal themselves and go back into full effect on the site.[7] This Court should decline Respondents' invitation to stretch the abrogation doctrine in so many unprecedented ways.

Even if the Court were to entertain Respondents' theory of "implicit repeal," however, no such repeal occurs as a result of the passage of the Prop. 5 Amendment. Although the New York Constitution states that laws "repugnant" to the Constitution are considered "abrogated," N.Y. Const. art. I, § 14, the threshold for "repugnancy" is extremely high. A constitutional amendment will not abrogate a law, unless that law "is so repugnant to and in conflict with" the constitutional provision "that they cannot both stand or be reconciled in *any reasonable way*." *Amico v. Erie County Legislature*, 36 A.D.2d 415, 426-27 (4th Dep't 1971) (emphasis added). Courts therefore "are required to give effect to all [constitutional and statutory provisions] and such a construction, if possible, that all may operate harmoniously." *Seeley v. Stevens*, 190 N.Y. 158, 166 (1907); *see People v. Young*, 45 N.Y.S. 772, 775 (2d Dep't 1897) (noting "the familiar doctrine" that the Constitution "ha[s] in mind existing legislation" and concluding that constitutional "[r]epeals by implication are not favored and are never allowed except where inconsistency and repugnancy are plain *and unavoidable*") (emphasis added).[8]

---

[7] Respondents themselves acknowledge both of these contingencies are possible. The Final TRP clearly states "work will be done in three phases, with phases two and three being dependant [sic] on the results of phase one," and that the permit "may be revoked or suspended at any time at the sole discretion of the Department." Ex. 1 (Goldberg Aff., Ex. B at 4, 6).

[8] The standard for "repugnancy" mirrors the presumption against the implicit repeal of an earlier-enacted statute by a later-enacted statute. *See* N.Y. Stat. § 391 ("Repeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect."); *see Consol. Edison Co. of N.Y. v. Dep't of Envtl. Conservation*, 71 N.Y.2d 186, 195 (1988) ("If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted.") (internal quotation marks and citations omitted); *see also Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed [legislative] intent to the contrary, to regard each as effective.").

In this proceeding, for the Court to find that the SLMP Wilderness guidelines have been nullified, it "must be able to say that [the SLMP] is so repugnant to and in conflict with" the Prop. 5 Amendment that the two "cannot stand or be reconciled in any reasonable way." *Seeley*, 190 N.Y. at 166. The Prop. 5 Amendment easily may be reconciled with the SLMP, however, because the constitutional text says merely that "the state *may* authorize NYCO Minerals, Inc. to engage in mineral sampling operations" in Lot 8. N.Y. Const. Art. XIV, § 1 (emphasis added). It is unquestionable that "may" is merely a permissive term, and its use does not signify any mandate. *See, e.g.*, *Wood v. New York*, 274 N.Y. 155 (1937) (interpreting a constitutional provision as permissive because of its use of "may"); *New York State Elec. & Gas Corp. v. Aasen*, 550 N.Y.S.2d 223, 225 (3d Dep't 1990) ("The word 'may' provides for a permissive and not a mandatory meaning."); *Marro v. Bartlett*, 61 A.D.2d 729, 731 (3d Dep't 1978) ("The ordinary meaning of the word 'may' is permissive."), *aff'd*, 46 N.Y.2d 674 (1979). The Prop. 5 Amendment thus gives the State a *choice* whether or not to authorize NYCO's mineral sampling, which it could exercise consistently with existing law not only by denying authorization but also by enacting enabling legislation that defines the procedures and standards applicable to this unique situation. Because both of those alternatives are reasonable ways to reconcile the Prop. 5 Amendment and existing laws protecting the Forest Preserve, those laws have not been abrogated and remain fully in effect. Respondents' determinations, which rely on the premise that the SLMP Wilderness guidelines and other express protections for the state Forest Preserve land on Lot 8 have been implicitly repealed, therefore violate each of those legal provisions, are affected by an error of law, and are arbitrary and capricious and an abuse of discretion. This Court therefore should grant Petitioners judgment under Article 78; issue a declaratory judgment

that the UMP Amendment and TRP are invalid, null, and void, and enjoin any preparations for mineral sampling operations on Lot 8.

D. Respondents Failed to Comply with SEQRA in Issuing the Negative Declaration for NYCO's Mineral Sampling Operations.

The purpose of SEQRA is to ensure "that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations." ECL § 8-0103(8). In defiance of this legislative policy, Respondents are attempting to authorize unprecedented and irreversible destruction of Wilderness land with superficial environmental review and minimal public scrutiny. Because the Negative Declaration for NYCO's mineral sampling operations fails to identify relevant areas of environmental concern, to take a hard look at potential environmental impacts, or to provide a reasoned elaboration for DEC's significance determination, this Court should invalidate the UMP Amendment and the TRP and enjoin NYCO's proposed activities on Lot 8. *See Chinese Staff & Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 369 (1986) (annulling permit due to deficiencies in SEQRA review).

The first step in implementing SEQRA is the classification of the proposed action as a Type I, Type II, or Unlisted action. Listing of a project as a Type I action "carries with it the presumption that it is likely to have a significant adverse impact on the environment," 6 NYCRR § 617.4, Type II actions are those that do not have a significant impact on the environment or otherwise are excluded from review under SEQRA, *see id.* § 617.5, and Unlisted actions are neither Type I nor Type II actions, *see id.* § 617.2(ak). Type I actions include any unlisted actions approved by an agency "occurring wholly or partially within . . . any historic . . . site . . . that is listed on the National Register of Historic Places," *id.* § 617.4(b)(9), and those occurring

within "publicly owned or operated parkland" that exceed the acreage threshold for "physical alteration"—in this case, 2.5 acres, *id.* § 617.4(b)(10) (providing that an Unlisted action occurring within parkland and exceeding 25 percent of the 10-acre threshold for physical alteration is a Type I action); *see id. §* 617.4(6) (setting the 10-acre threshold for physical alteration). The proposed mineral sampling is unquestionably a Type I action because it will occur in the Adirondack Forest Preserve, which is listed on the National Register of Historic Places, *see* 34 Fed. Reg. 2580, 2590 (Feb. 25, 1969).[9] Moreover, it will physically alter more than 2.5 acres within the Adirondack Park, *see* Ex. 1 (Goldberg Aff., Ex. B, Work Plan at 1) (admitting that the sampling operations will cause "disturbance" of up to 7.35 acres, not including changes to adjacent forest and habitat).

SEQRA requires the preparation of an environmental impact statement ("EIS") for any action that "*may* have a significant effect on the environment." ECL § 8-0109(2) (emphasis added); *see also* 6 NYCRR § 617.7(a)(1) (noting that, for Type I actions, an EIS is required when "the action may include the potential for at least one significant adverse environmental impact"). As this language suggests, "there is a relatively low threshold for the preparation of an EIS." *Matter of Barrett v. Dutchess Cnty. Legislature*, 38 A.D.3d 651, 655 (2d Dep't 2007). The Third Department has recognized that "[p]articularly in a Type I project, there is a relatively low threshold for requiring an EIS." *Shawangunk Mountain Envtl. Ass'n v. Planning Bd.*, 157 A.D.2d 273, 275 (3d Dep't 1990). By contrast, to support a Negative Declaration concluding

[9] DEC's cavalier approach to its duties under SEQRA is evident from the start. In the Negative Declaration, DEC claimed that the "the type of activities proposed by NYCO . . . are typically classified as a Type II Action under SEQR, however because this project is located within the Forest Preserve, the Department will treat this activity as a Type I Action out of an abundance of caution to ensure proper consideration is given to the potential for environmental impacts." Ex. 27 (EAF Part 3 at 1). Suggesting that the regulations did not *require* classification of the mineral sampling as a Type I action reflects either an error of law or a cynical effort to bolster DEC's perfunctory attention to SEQRA's demands.

that an EIS is not required, the agency "must determine either that there *will be* no adverse environmental impacts or that the identified adverse environmental impacts *will not be* significant." 6 NYCRR § 617.7(a)(2) (emphasis added); *see id.* § 617.2(y) (defining a "Negative declaration" as "a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts"). The possibility of even one significant environmental impact from NYCO's mineral sampling is enough to require preparation of an EIS; DEC may avoid that obligation only by demonstrating that no such impacts will occur.

When making the significance determination for NYCO's Type I action, DEC must:

> identify the relevant areas of environmental concern; . . . thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.

Id. § 617.7(b); *see also Save the Pine Bush, Inc. v. Planning Bd. of the City of Albany*, 130 A.D.2d 1, 3 (3d Dep't 1987). The SEQRA regulations set forth an illustrative but not exhaustive list of 12 "indicators of significant adverse impacts on the environment," *id.* § 617.7(b)-(c), and the following seven criteria are applicable on their face to NYCO's proposed mineral sampling:

> (i) a substantial adverse change in . . . noise levels . . . ;
>
> (ii) the . . . destruction of large quantities of vegetation . . . ; [or] impacts on a significant habitat area . . . :
>
> ***
>
> (v) the impairment of the character or quality of important historical . . . resources . . . ;
>
> ***

> (viii) a substantial change in use, or intensity of use, of land including . . . open space or recreational resources, or in its capacity to support existing uses;
>
> ***
>
> (ix) the encouraging or attracting of a large number of people to a place . . . for more than a few days, compared to the number of people who would come to such place absent the action;
>
> (x) the creation of a material demand for other actions that would result in one of the above consequences;
>
> (xii) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, . . . when considered cumulatively would meet one or more of the criteria in this subdivision . . . .

As is shown below, DEC has disregarded completely several of these significance criteria—including impacts on plant species of special concern, on historic resources, and from increased human traffic at the site, as well as the creation of a material demand for mining—and even when the criteria are not ignored, DEC has failed to take a "hard look" at potentially significant impacts and has inadequately explained its Negative Declaration. This Court therefore should invalidate the UMP Amendment and TRP and enjoin NYCO from undertaking any activity on Lot 8. *See id.* § 617.3 ("A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been complied with.").

1. Drilling on Lot 8 Carries the Potential for Significant Noise Impacts.

The SEQRA regulations provide that "a substantial adverse change in . . . noise levels" is a criterion for potentially significant adverse impacts. 6 NYCRR § 617.7(c)(1)(i). DEC concludes that "[p]ossible continuous 24 hour drilling operations" on Lot 8 will have an insignificant adverse impact on noise levels. Ex. 27 (EAF Part 2 at 9); *see id.* (EAF Part 3 at 3) (noting that "24 hour-7 days a week drilling may be possible"). The explanation offered for this conclusion is that "Lot 8 adjoins an active mine and is not expected to produce noise levels that

greatly exceed the levels associated with activity at the adjacent mine" and that "noise . . . impacts will be mitigated by limiting preparation and operation of drill pads to one phase at a time." *Id.* (EAF Part 3 at 2). The explanation ignores the Wilderness setting, is unsupported by evidence, and contradicts acknowledged facts.

The Jay Mountain Wilderness Area was classified as Wilderness nearly 20 years ago, "in recognition of its remote and wild character." Jay Mountain Wilderness UMP at 1. Less than four years ago, the Agencies acknowledged that it "offers the user a sense of solitude and wildness that can be hard to find in the more popular Wilderness Areas, such as the High Peaks. This is due in part to the absence of improved trails and campsites within the unit." *Id.* at 58. Apart from the occasional nature-lover, there has been no source of human noise within the Jay Mountain Wilderness Area for generations. Only by ignoring the pristine setting for the mineral sampling, in violation of SEQRA, *see* 6 NYCRR § 617.7(c)(3)(i), can Respondents conclude that drilling in Wilderness does not raise even the possibility of significant noise impacts.

DEC suggests that noise impacts will be insignificant because Lot 8 adjoins an active mine, but Respondents refused to conduct any baseline testing of noise levels at the proposed drilling sites, notwithstanding Petitioners' express request, *see* Ex. 22 (Petitioners' Comments at 16), and there is no data to support DEC's "expectation" that core drilling noise on Lot 8 will be comparable to that from routine mine operations as much as a quarter-mile away.[10] Indeed, DEC

[10] DEC has refused to conduct any of the baseline studies that Petitioners have requested, including field inspections for water resources, including wetlands and vernal pools. Although the Agencies admit and Petitioners have demonstrated that the wintertime aerial photography relied upon for wetland mapping is inadequate, *see* Ex. 1 (Goldberg Aff., Ex. A at 10) (noting that the wetlands map is "[s]ubject to field verification"); Ex. 22 (Petitioners' Comments at 8-11), DEC is satisfied to rely on the best *available* information," Ex. 26 (Response to Public Comment at 4 (emphasis added)). Having refused to perform field inspections for wetlands, or to document locations of streams and vernal pools, DEC's assertion that all of these resources "have been avoided," Ex. 27 (EAF Part 3 at 1), lacks any record support.

contradicts its unsupported expectation in the TRP, where it assumes that "maintaining a closed canopy to the extent possible" will mitigate noise impacts. Ex. 1 (Goldberg Aff., Ex. B at 6). Respondents cannot have it both ways. The very need to mitigate noise impacts constitutes "an underlying acknowledgement that there existed a potential for a substantial increase" in noise, requiring a positive declaration and preparation of an EIS. *W. Branch Conservation Ass'n, v. Planning Bd. of Town of Clarkstown.*, 207 A.D.2d 837, 841 (2d Dep't 1994).

DEC's assertion that noise will be minimized because pads will be developed one at a time also is of no avail. The serial development of the pads means that industrial activity may be stretched out for as much as eight months, *see* Ex. 27 (EAF Part 1 at 3), through the summer vacation period, fall migration season, and into the winter, destroying peace and quiet for humans and wildlife alike. Noise impacts will occur in a Wilderness area that provides habitat for bears, deer, mice, frogs, salamanders, and snakes, *see id.* (EAF Part 1 at 12), as well as breeding habitat for 76 bird species, *see* Ex. 26 (Response to Public Comments at 5). As DEC concedes: "Wildlife including birds, bats, and overwintering bears will likely be impacted by the noise and light of the mineral sampling equipment." *Id.* at 14. Months of loud, industrial noise introduced into a natural area renowned for its uninterrupted quiet cannot be regarded as insignificant.

2. Clear-Cutting for Access Corridors and Drill Pads May Have a Significant Adverse Impact on Lot 8's Plants and Wildlife Habitat.

DEC affirms, without any evidence or explanation, that the proposed action will cause no "loss of individuals" of "any species of special concern or conservation need" or only a small impact. Ex. 27 (EAF Part 2 at 4). Part 1 of the EAF denies that any such species are to be found on Lot 8, and in Part 3, DEC asserts merely that it did "not find any significant habitat, threatened, rare or endangered plants or animals, or old growth stands" on Lot 8. The omission

of any reference to species of special concern or conservation need is telling and suggests that DEC either found such species on Lot 8, but is refusing to admit their presence, or failed to look.[11]

DEC's omission is particularly troubling because Petitioners informed the Agencies of two "protected native plants" located on Lot 8: Yellow Ladyslipper (Cypripedium parviflorium var. pubescens) and Pink Ladyslipper (Cypripedium acaule). 6 NYCRR § 193.3(d); *see* Ex. 17 (Greene Aff. ¶¶ 11-13). These two species are classified as "exploitably vulnerable native plants likely to become threatened in the near future throughout all or a significant portion of their ranges within the state if causal factors continue unchecked." 6 NYCRR § 193.3(d). State law prohibits any person from "knowingly pick[ing], pluck[ing], sever[ing], remov[ing], damag[ing] by the application of herbicides or defoliants or carry[ing] away, without the consent of the owner thereof, any protected plant." ECL § 9-1503. Staff at the New York Natural Heritage Program housed within DEC apparently observed Pink Ladyslippers during a site visit to Lot 8, and Ms. Evelyn Greene provided photographs of the Yellow Ladyslippers in Lot 8 to the Agencies on June 11, 2014. *See* Ex. 17 (Greene Aff. ¶¶ 11-14). DEC cannot meet the requirements of SEQRA, and Respondents cannot move forward with mineral sampling, in complete disregard of the demonstrated facts. *See W. Branch Conservation Ass'n, Inc. v. Planning Bd., Town of Ramapo*, 177 A.D.2d 917, 919 (3d Dep't 1991) (finding a violation of SEQRA where "[t]he record is devoid of any evidence that [the lead agency] took a hard look" at the asserted presence of endangered plants on the project site); *see also Pell v. Bd. of Ed. of*

[11] The failure to look violates not only SEQRA but also the Jay Mountain Wilderness UMP, which promises: "The sites of any proposed facilities or improvements *will be surveyed* for the presence of protected plant species prior to construction" and that "any existing facilities or improvements that have the potential to directly impact a protected plant species will be closed or relocated." Jay Mountain Wilderness UMP at 15-16 (emphasis added).

Union Free Sch. Dist. No. 1, 34 N.Y.2d 222, 231 (1974) ("Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.").

Indeed, upon receiving Ms. Greene's notice of protected plant species on Lot 8, DEC should have rescinded the Negative Declaration. *See* 6 NYCRR § 617.7. DEC received the information prior to its decision to approve the UMP Amendment and TRP, and its own regulations state that it "must rescind a negative declaration" when substantive new information is discovered. *Id.* Because strict compliance is required with the procedures mandated under SEQRA, the failure to rescind the Negative Declaration is grounds alone for invalidating the Agencies' determinations and enjoining site disturbance on Lot 8. *See King v. Saratoga Cnty. Bd. of Supervisors*, 89 N.Y.2d 341, 347 (1996) (stating that "departures from SEQRA's procedural mechanisms" are unacceptable and that "strict, not substantial, compliance is required"); *Pyramid Co. of Watertown v. Planning Bd. of Watertown*, 24 A.D.3d 1312, 1313 (4th Dep't 2005) (finding that "[b]ecause SEQRA requires strict adherence to its procedural requirements," a failure to comply "cannot be deemed harmless"); *Golten Marine Co., Inc. v. DEC*, 193 A.D.2d 742, 743-44 (2d Dep't 1993) ("[L]iteral compliance with both the letter and spirit of SEQRA is required and substantial compliance will not suffice.").

Having ignored evidence of potentially significant impacts on plants, DEC belittles the potential effects on animals, stating: "Due to the limited scope of this project in relation to the entirety of Lot 8 and surrounding forested land, the subsurface investigation is not expected to have a significant impact on wildlife or wildlife habitat." Ex. 27 (EAF Part 3 at 1). Such a "bald conclusory statement does not satisfy [DEC's] obligation to fully analyze the environmental consequences of its contemplated action," *Niagara Mohawk Power Corp. v. Green Island Power Auth.*, 265 A.D.2d 711, 712 (1999), especially when the "subsurface investigation" requires the

cutting of up to 1,254 trees for 2,500-square-foot clearings. Indeed, DEC concedes that "forest bird species will most likely be directly impacted by the proposed mineral sampling activities, and the additional edge habitats created by the openings in the forest canopy," Ex. 26 (Response to Public Comments at 6), belying the assertion that a "limitation on vegetation removal will prevent new forest edge from being created," Ex. 27 (EAF Part 3 at 1). The required 100-meter buffer zone between surface disturbance on Lot 8 and the adjacent Jay Mountain Wilderness Area, *see* Ex. 1 (Goldberg Aff., Ex. B at 4), also acknowledges that such disturbance could have impacts on forest bird species as far away as 330 feet.[12] Given the "destruction of large quantities of vegetation," 6 NYCRR § 617.7(c)(1)(ii), with unexamined consequences for protected native plants and admitted consequences for wildlife, DEC cannot support its conclusion that mineral sampling operations on Lot 8 carry no potential for significant adverse impacts on natural resources.

3. NYCO's Industrial Operations May Cause Significant Harm to Important Historical Resources.

The SEQRA regulations provide that "the impairment of the character or quality of important historical . . . resources" is a criterion for potentially significant adverse impacts on the environment. 6 NYCRR § 617.7(c)(1)(i). To support the Negative Declaration in the face of this provision, Respondents deny the incontrovertible fact that NYCO's proposed mineral sampling will take place within a Forest Preserve listed on the National Register of Historic Places, *see* 34 Fed. Reg. 2580, 2590 (Feb. 25, 1969)—a fact that Petitioners included in their April 9 Letter to the Agencies, *see* Ex. 21 (April 9 Letter at 7). Part 1 of the EAF fails to recognize the listing, *see* Ex. 27 (EAF Part 1 at 13), and Part 2 denies both that "the proposed

[12] DEC's suggestion that there could not be a significant impact on wildlife or wildlife habitat because only a small section of the Forest Preserve will be destroyed is a recipe for the piecemeal destruction of protected land.

action may occur in . . . a historic . . . resource," *id.* (EAF Part 2 at 6 (leaving blank the question whether the "proposed action may occur wholly . . . within . . . any . . . district which is listed on . . . the State or National Register of Historic Places"), and that any unusual land forms will be affected, *see id.* (EAF Part 2 at 2) (leaving blank the question whether "[t]he proposed action may affect . . . a geological feature listed as a registered National Natural Landmark"). The Response to Public Comments and Part 3 of the EAF altogether ignore the listed status of the Forest Preserve and make no mention whatsoever of potentially affected historic resources. Respondents' utter failure to address a key significance criterion is grounds alone for overturning the Negative Declaration, *see W. Branch Conservation Ass'n, Inc. v. Planning Bd., Town of Ramapo,* 177 A.D.2d at 919, particularly because "the responses provided on the EAF were misleading and failed to provide an adequate basis" for the agency's significance determination. *Corrini v. Village of Scarsdale*, 1 Misc. 3d 907(A), *8 (Sup. Ct. Westchester Co. 2003) (citing *Niagara Mohawk Power Corp.*, 265 A.D.2d 711, and *Segal v. Town of Thompson*, 182 A.D.2d 1043 (3d Dep't 1992)).

4. NYCO's Mineral Operations Will Cause a Substantial Change in the Use of Lot 8 and in its Ability to Support Existing Recreational Use.

The SEQRA regulations provide that "a substantial change in use, or intensity of use, of land including . . . open space or recreational resources, or in its capacity to support existing uses" is a criterion for potentially significant adverse impacts on the environment. 6 NYCRR § 617.7(c)(1)(viii). The Jay Mountain Wilderness UMP strictly constrains human use, providing that even "recreation should be managed and kept within acceptable limits that maintain the unit's wilderness character, including opportunities for solitude or a primitive and unconfined type of recreation emphasizing a quality visitor experience." Jay Mountain Wilderness UMP at 71. Notwithstanding the long history of limited human use of Lot 8, the Agencies contend that

its transformation from unbroken Wilderness land to a spider web of clear-cut access corridors and drill pads for industrial operations—with motorized vehicles and equipment, chemicals for drilling operations, and associated waste generation—does not carry the potential for even one significant land use impact. During operations, the drilling sites will support no recreational uses, "the exploration activities may be visible or audible from the Forest Preserve," Ex. 27 (EAF Part 3 at 2), and the industrial activity will destroy the beauty and serenity for which the area is known. After operations, if full-fledged mining does not proceed, the unmistakable evidence of widespread and destructive human intrusion will discourage recreational users seeking a quality wilderness experience. DEC offers no explanation whatsoever why these short-term and permanent adverse impacts on land use are insignificant and therefore has failed to take the hard look or to provided "the reasoned elaboration mandated by SEQRA."[13] *Baker v. Village of Elmsford*, 70 A.D.3d 181, 190 (2d Dep't 2009) (internal quotation marks omitted) (citing *Gernatt Asphalt Prods. v. Town of Sardinia*, 87 N.Y.2d 668, 688 (1996)).

5. NYCO's Mineral Sampling Operations Will Substantially Increase Human Traffic on the Lot 8.

Under SEQRA, "the encouraging or attracting of a large number of people to a place . . . for more than a few days, compared to the number of people who would come to such place absent the action" is an indication of a significant adverse environmental impact. 6 NYCRR § 617.7(c)(1)(viii). NYCO's mineral sampling operations will require use of Lot 8 by numerous NYCO workers, as well as DEC staff responsible for on-site oversight of the work, over a period of months, even if drilling stops after the first Phase is complete. In violation of SEQRA, DEC

[13] DEC implausibly suggests that visual impacts "will be mitigated by limiting preparation and operation of drill pads to one phase at a time." Ex. 27 (EAF Part 3 at 2). The phased nature of NYCO's activities does not reduce impacts on aesthetic resources, however, because revegetated drill pads and access corridors merely substitute meadow, grass, and brushland for previously dense forest, remaining a blot on the landscape for the foreseeable future

fails even to address this increased human use of Lot 8, much less to supply a reasoned elaboration of the basis for its determination that its impacts will be insubstantial.

6. The Mineral Sampling Operations Are Likely to Create a Demand for Expansion of NYCO's Adjacent Mine.

The "creation of a material demand for other actions that would result in one of the above consequences," including impacts on noise, flora and fauna, historic resources, and land use, is an indicator of a significant adverse impact on the environment. 6 NYCRR § 617.7(c)(1)(x). The whole point of NYCO's proposed mineral sampling operations is to confirm whether sufficient reserves of wollastonite underlie Lot 8 to make full-fledged mining a profitable enterprise. As NYCO admits:

> Lot 8 is believed to be host to an extension of a wollastonite deposit currently mined on an adjacent parcel of ground. In order to verify this belief, NYCO proposes to diamond core the parcel to the ultimate depth of the mineral bed (but not deeper than 400 feet from the surface).

Ex. 27 (EAF Part 1 at 1). In determining whether that activity may cause a significant adverse impact on the environment, DEC must consider "reasonably related long-term . . . indirect . . . impacts, including other . . . subsequent actions which are . . . dependent thereon." 6 NYCRR § 617.7(c)(2). Yet there is no discussion in the reasons for the Negative Declaration of the admitted intent and highly probable result of the exploratory drilling authorized by the TRP—mining—which is unquestionably dependent on the sampling phase. *See* Ex. 1 (Goldberg Aff., Ex. A at 4 & n. 1). Even if "[t]he TRP and UMP amendment are for mineral exploration only," Ex. 26 (Response to Public Comments at 2), DEC should not be allowed to ignore with impunity the material demand for mining that its actions create.

7. Considered Cumulatively with NYCO's Plans to Expand its Existing Mines, Mineral Sampling Operations on Lot 8 Will Have a Significant Adverse Environmental Impact.

The final indicator of significance relevant to this proceeding is "two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, . . . when considered cumulatively would meet one or more of the criteria in this subdivision." 6 NYCRR § 617.7(c)(1)(xii). The impacts of mineral sampling on Lot 8 alone warrant a positive declaration, but when considered cumulatively with the impacts of NYCO's existing Seventy Road mine, its proposed expansion of that mine, and the proposed expansion of its Oak Hill mine, there can be no doubt that a "potential for at least one significant adverse environmental impact" exists. *Id.* § 617.7(a)(1).

In considering the criteria for determining significance—including whether "two or more related actions" cumulatively have impacts meeting one of the other criteria—agencies are required to "consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are . . . included in any long-range plan of which the action under consideration is a part." 6 NYCRR § 617.7(c)(2).[14] NYCO's activities on Lot 8, at the Seventy Road mine, and at the Oak Hill mine—all in the Town of Lewis—are part of its long-range plan to increase company profits in a wollastonite-rich area. In addition to applying for a TRP for the Lot 8 sampling, NYCO recently has

[14]In its SEQR Handbook, DEC explains:

> Cumulative impacts occur when multiple actions affect the same resource(s). These impacts can occur when the incremental or increased impacts of an action, or actions, are added to other past, present and reasonably foreseeable future actions. Cumulative impacts can result from a single action or from a number of individually minor but collectively significant actions taking place over a period of time. They may include indirect or secondary impacts, long term impacts and synergistic effects.

DEC, The SEQR Handbook 83 (2010), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf.

requested permission to expand operations at both existing mines, including by more than 25 percent of the current permitted excavation limit and by nearly 50 percent of the affected area at the Seventy Road mine.[15] NYCO admits the connections among all of this activity in its 25 Year Mine Plan, published in 2006, which covers operations at Seventy Road and Oak Hill, and from the fact that the Stormwater Pollution Prevention Plan ("SWPPP") for the Lot 8 mineral sampling is described as an amendment to NYCO's SWPPP for the Seventy Road mine.[16] *See* Ex. 1 (Goldberg Aff., Ex. B, Work Plan, Att. E at 1).

Although DEC admits that the environmental review of the Seventy Road mine expansion must include analysis of any cumulative impacts from both existing mine sites, *see* Ex. 26 (Response to Public Comments at 1) ("The SEQR review of the DEC issued mining permit will address NYCO mining operations in the area, and if necessary provide an evaluation of the cumulative impacts with both mine sites being considered."), DEC has refused to examine, much less take a hard look at or consider the significance of, the cumulative impacts from operations at both Lot 8 and the Seventy Road mine, *see id.*. The only grounds DEC offers for its refusal is the fact "[t]he action under consideration is the exploration of Lot 8, and not the proposed mining of Lot 8." *Id.* That distinction makes no difference, however, as long as the exploration of Lot 8 and the expansion of existing mines are "part of the same plan" and "shar[e]

[15] *See* DEC, ENB – Region 5 Notices 6/25/2014, *at* http://www.dec.ny.gov/enb/20140625_not5.html. NYCO also has requested an increase in truckload limits at its Oak Hill mine. *See id.*

[16] The 25 Year Mine Plan may be found at http://www.protectadks.org/wp-content/uploads/2013/05/NYCO-25yrPlan-Web.pdf.

a common purpose." *Village of Westbury v. Dep't of Transp.*, 75 N.Y.2d 62, 69-70 (1989).[17] Having refused even to consider potential cumulative impacts, DEC's conclusion that they are insignificant remains wholly unsupported, and its Negative Declaration should be annulled.

CONCLUSION

For all the reasons set forth above, this Court should grant Petitioners' application for a TRO and preliminary injunction prohibiting NYCO from entering Lot 8 to begin mineral sampling operations, and preliminary relief should be continued until this Court decides Petitioners' claims on the merits. At that time, the Court should enter a declaratory judgment and judgment pursuant to CPLR Article 78 granting the permanent relief requested in Petitioners' Verified Petition and Complaint.

Dated: New York, New York
July 11, 2014

Respectfully submitted,

John M. Delehanty
Todd F. Rosenbaum
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
666 Third Avenue
New York, NY 10017
212-935-3000

Deborah Goldberg
Hannah Chang
EARTHJUSTICE
48 Wall Street
19th Floor
New York, NY 10005
212-845-7376
dgoldberg@earthjustice.org

Attorneys for Petitioners/Plaintiffs

[17] *See also Save the Pine Bush v. City of Albany*, 70 N.Y.2d 193 (1987) (requiring consideration of the cumulative impacts of other proposed or pending developments); *Sun Co. v. City of Syracuse Indus. Dev. Agency*, 209 A.D.2d 34 (4th Dep't 1995) (noting that "the decisive factor" in determining whether a lead agency must examine cumulative impacts of separate applications within the same geographic area "is the existence of a larger plan for development") (internal quotation marks omitted); *Segal v. Town of Thompson*, 182 A.D.2d 1043 (3d Dep't 1992) (annulling negative declaration and remanding for consideration of cumulative impacts of future development).