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February 13, 2016

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Jim Sessions  
NYS Department of Environmental Conservation  
Division of Lands and Forests  
625 Broadway  
Albany, NY 12233-4250

**RE: Public Comments on Draft Regulation for Conservation Easement Modifications**

Dear Mr. Sessions,

Protect the Adirondacks has reviewed the new Draft Regulations for Conservation Easement Modifications. It's important to state that conservation easements are a shared land class between the public and private landowners, which are usually forest product companies. The people of the State of New York spent hundreds of millions of dollars to purchase nearly 800,000 acres of easements and spend millions each year to pay local taxes on these lands in the Adirondack Park. In many ways conservation easements were an investment in the economy and environment of the Adirondack Park because they have helped to sustain a supply of raw materials to the local secondary forest products industry in and around the Adirondack Park. History will judge well the prescience of the State of New York's actions to build a robust conservation easements program during the last two decades when the forest products industry underwent massive changes. Conservation easements have also helped to protect the great forested open spaces of the Adirondacks and protect water quality and wildlife.

A major challenge in the management of conservation easements is the role of the public. This issue is also front and center in the weaknesses of the proposed draft regulations. When the State purchases a conservation easement it does so in secret. The purchase agreement details the recreational rights of the public. There is no public process about the public uses on a particular tract because these are decided during private purchase negotiations. This process contrasts markedly with State purchase of Forest Preserve lands, where there are robust public processes for classification and recreational management planning. The public has a fundamentally different role in its review of a heavily circumscribed Recreational Management Plan for conservation easement lands compared with Forest Preserve classification

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review and development of a Unit Management Plan.

Another major challenge unaddressed in these draft regulations is the problem of unilateral DEC authority over conservation easements. In many ways, these regulations further concentrate and solidify management by the Department of Environmental Conservation. There needs to be a publicly accountable checks-and-balances management of conservation easements between the Adirondack Park Agency (APA) and DEC. The APA is currently reviewing proposed amendments to the Adirondack Park State Land Master Plan (APSLMP). Unfortunately, the APA has ruled out, without good reason or legal basis, inclusion of management guidelines for conservation easement lands in the APSLMP. There needs to be some kind of joint review between state agencies in the Adirondacks to improve and open up the management of conservation easement lands. If it is not possible to include conservation easement management in the APSLMP, then there should be an Adirondack Park State Conservation Easements Lands Master Plan.

### **Diminishing the Original Vision of Public Recreational Access on Conservation Easements**

The first generation of conservation easements, from Diamond to Champion, including Lassiter, Lyons Falls, Long Pond, NiMo, and Yorkshire, among others, was for blanket public recreational access on these lands. This generation of easements provided open public recreational use of these lands, constricted only by active forest management operations. The DEC abruptly changed its policy with the second generation of conservation easements, however, including International Paper, Domtar, and Finch, to purchase largely only limited public access rights while allowing the private landowner to retain broad rights to undertake private recreational camp leases throughout these lands.

The DEC also further retrenched its conservation easements program during the highly controversial and questionable modifications to the 110,000-acre Heartland (Champion) conservation easement. These modifications saw the DEC trade away blanket public recreational use to enable scores of private leased camps to remain on the lands. DEC did this even though it had never attempted to build a robust public recreational infrastructure on these lands to allow motorized camping and other more intensive motorized uses, something highly appropriate for conservation easement lands but not for the Forest Preserve. DEC is now seeking to make similar changes to the 21,000-acre Long Pond easement.

When private leased camps are abundant on a conservation easement tract, the public becomes a 2nd class user. On easements where extensive private leases are available recreational use is dominated by those who are paying for the privilege. While the public may have substantial recreational rights on paper, the reality is that their rights are significantly diminished in the field.

### **Conservation Easements should be a Safety Valve for the Forest Preserve**

Another aspect of the original vision for conservation easements is that they were supposed to be a safety valve for the Forest Preserve. Due to Article XIV, Section 1 of the State Constitution, the “forever wild” clause, some motorized recreational uses are not allowed

on parts of the Forest Preserve. The Adirondack Park State Land Master Plan provides specific guidelines where Forest Preserve lands classified as “Wilderness” prohibit the use of bicycles and motor vehicles. These more intensive recreational uses are allowed in some areas where Forest Preserve lands are classified as “Wild Forest.”

Conservation easements are generally actively managed industrial forestlands. They have a highly developed major road system used by a variety of motor vehicles. They also have a variety of secondary roads. The developed and maintained road network within conservation easement lands provides an infrastructure for public motorized recreation that the Forest Preserve can never match.

The major priority of the Cuomo Administration should be to fully develop, which has never been done, the public motorized recreational opportunities on conservation easement lands. Unfortunately, the Cuomo Administration has neglected public motorized recreational uses on conservation easements lands, though it has made a priority to motorize the Forest Preserve by significantly expanding motorized uses, which in many places is deeply harmful and negatively impacts natural resources.

The sad reality is that to date, there is just one Recreational Management Plan (RMP) for the 19,000-acre Kushaqua Conservation Easement from among the more than 750,000 acres of conservation easements. Much more attention should be directed to planning for public recreational use of the conservation easement lands in the Adirondack Park. Public motorized recreation is much better suited to easement lands than to Forest Preserve lands.

### **New Regulations Seek to Accelerate Irreparable Loss of Public Recreational Rights**

As previously noted, the DEC unwisely made wholesale changes to undermine and circumscribe public recreational rights to the 110,000-acre Heartland easement where the people of the State of New York had purchased blanket recreational rights. DEC made changes to this easement to allow scores of private and exclusive leased camps to remain on these lands, which relegates public recreational users to permanent 2nd class status. The DEC is seeking to make similar changes to the 21,000-acre Long Pond Conservation Easement now. PROTECT is concerned that if these regulations are approved in their current form, that the DEC will seek modifications for all other conservation easements where blanket public recreational rights were purchased. This would mark a significant roll back of public recreational opportunities.

### **Consistency with Environmental Conservation Law**

PROTECT is concerned about the consistency of these new regulations with the statute. The procedure for the modification or extinguishment of a conservation easement held by the DEC is in the Environmental Conservation Law (sections 3-0301, 49-0305 and 49-0307). Of particular importance is the directive in the ECL that the DEC make changes to conservation easements only “to the minimum extent necessary” to accomplish its management objectives. The Heartland conservation easement, and the changes to the Long Pond easement being sought now, are substantial and significant changes that seriously and irreparably weaken public recreational access and the public’s use and enjoyment of these lands.

The ECL 49035 (9)(5) states:

Where a conservation easement is modified or extinguished pursuant to paragraph (d) of subdivision two or paragraph (e) of subdivision three of this section, such easement shall be modified or extinguished only to the minimum extent necessary to accommodate the facility which is the subject of the certificate of environmental compatibility and public need.

In our review of the proposed new regulations Section 592.3 Standards and Section 592.4 Procedures, we do not see any recognition of this directive that any changes or modifications be undertaken only “to the minimum extent necessary.” These sections should be revised to clearly state that this directive from the ECL is recognized and will be upheld.

### **Specific Comments on Proposed Regulations**

PROTECT has no comments on the proposed definitions.

PROTECT is concerned about Section 592.3 Standards where it appears that the DEC is seeking to consolidate its authority and expand its discretion to make changes. Part of the proposed regulations in this section state:

The proposed modification of a DEC conservation easement shall not result in any net loss of benefits to the state, as determined by the department in its sole discretion, including: consideration of any change in the level of public recreational opportunities or any change to the limitations or restrictions on the development, management or use of the property, or any other real property owned by or under the control of the grantor, for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the area where the property is located in a manner consistent with the public policy and purpose set forth in ECL section 49-0301.

While PROTECT agrees that changes to a conservation easement should not result in any net loss of benefits, we’re concerned that about DEC’s open-ended discretion. We’re also concerned about how DEC plans to evaluate “net loss.”

PROTECT notes that the DEC is sole judge and jury in making the net loss assessment. There really needs to be some kind of checks-and-balances in management of conservation easement lands. This exists for Forest Preserve management between the Adirondack Park Agency (APA) and DEC, but there is no equivalent program for the nearly 800,000 acres of conservation easement lands in the Adirondacks.

Further, while any changes must be subject to a public hearing, a series of recent public hearings in the Adirondacks have seen overwhelming public comments ignored by the DEC. The public overwhelmingly opposed changes in 2015 to the Jay Mountain Wilderness area, yet the DEC made these changes. The public supported a Wilderness classification for the Essex Chain Lakes area by a 4-1 ratio in 2014, yet the DEC moved ahead with a different

classification. Recently, in 2015, the public overwhelmingly opposed by 87% a new snowmobile trail through a wild and trailless part of the Vanderwhacker Mountain Wild Forest area and retention of the Polaris Bridge over the Hudson River, yet the DEC went ahead and approved these highly controversial actions.

That the DEC routinely turns a tin ear to public comments does not give us much comfort that public comments in the case of modifications to conservation easements will be considered fairly. DEC should provide the specific criteria it plans to use to assess net loss.

**New Regulations should Require that a Recreational Management Plan be Completed before any Changes can be made**

PROTECT urges the DEC to amend these regulations in Section 592.4 Procedures to include the requirement that no changes can be proposed until a Recreation Management Plan has been completed for all tracts in the easement in question. A RMP details how public recreational rights will be managed and provides an inventory of the different recreational opportunities. This will go a long ways towards providing the public with certainty about the impact of the proposed changes as well as providing a complete enumeration of the public recreational rights in a given easement tract.

On behalf of the Board of Directors of Protect the Adirondacks, please accept our gratitude for the opportunity to comment on these important matters.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Bauer". The signature is fluid and cursive, with a large initial "P" and "B".

Peter Bauer  
Executive Director