STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

INDEX NO. 2137-13

In the Matter of the Application of

PROTECT THE ADIRONDACKS! INC.,

RJI NO.01-13-ST-4541

Plaintiff-Petitioner,

for a Judgment Pursuant to
Section 5 of Article 14 of
the New York State Constitution,
and CPLR Article 78,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ADIRONDACK PARK AGENCY,

Defendants-Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTIONS AND IN OPPOSITION TO DEFENDANTS' MOTIONS

Dated: July 12, 2013

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PRELIMINARY STATEMENT

This memorandum of law is submitted in support of the cross-motions by plaintiff-petitioner Protect the Adirondacks! Inc. ("PROTECT" or "Plaintiff") for a default judgment on the First Cause of Action, or in the alternative, a temporary restraining order and a preliminary injunction during the pendency of the First Cause of Action, and in opposition to the motions by the defendants-respondents New York State Department of Environmental Conservation ("DEC") and Adirondack Park Agency ("APA") (collectively "Defendants") to convert and to dismiss the Plaintiff's verified complaint-petition ("Complaint"), and to compel acceptance of Defendants' tardy motion papers.

This combined action and CPLR Article 78 proceeding was commenced by the filing of the Summons, Notice of Petition and Complaint in the Office of the Albany County Clerk on April 15, 2013. Service of process was completed on April 19, 2013. Defendants served their initial motion to convert and dismiss the Complaint on June 21, 2013. On June 25, 2013, Plaintiffs rejected that portion of the motion related to the First Cause of Action as untimely. On July 1, 2013, Defendants moved to compel acceptance thereof.

The facts of this action are set forth in the Complaint and in the affidavits of the parties.

STANDARD OF REVIEW

Motion to Convert

If a civil judicial action or proceeding is not brought in the proper form, the court should convert the action or proceeding into the correct form. CPLR § 103(c). Where a claim is commenced using the proper form, it would be an error for the court to convert it. See Gooshaw v. City of Ogdensburg, 67 A.D.3d 1288, 1289-1290 (3d Dept. 2009). In order to determine whether an action or a CPLR Article 78 proceeding is the proper form for bringing allegations, the court must examine the essence of the allegations and the relief sought. See Zuckerman v. Board of Ed. of City School Dist. of City of New York, 44 N.Y.2d 336, 341, 344 (1978); see also Abiele Contracting, Inc v. New York City School Const. Authority, 91 N.Y.2d 1, 8 (1997) (noting that the court must look at the "primary thrust of the allegations", or "the focus of the controversy", to determine the correct form).

Motion to Dismiss - Ripeness

"[W]hen a party contemplates taking certain action a genuine dispute may arise before any breach or violation has occurred". New York Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527, 530 (1977). In that situation, the dispute is ripe for

judicial review, and the court can "declare the rights and obligations of the parties" so that the parties' future acts "will [be] in accordance with the law". Id.; see New York County Lawyers' Assn. v. State of New York, 294 A.D.2d 69, 73-74 (1st Dept. 2002) (finding case ripe even though "the factual support provided tends to demonstrate only a prospective" violation of the constitution). An action against an agency is ripe for judicial review when the agency's decision "is final, and there is no administrative proceeding available" to the plaintiff in which to challenge said decision. Ken-Vil Assoc. Ltd. Partnership v. New York State Div. of Human Rights, 100 A.D.3d 1390, 1393 (4th Dept. 2012). It is worth noting that in The Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 236 (1930) the Court of Appeals decided that building a "bobsleigh run will be" a violation of the Constitution, before it was constructed in the Forest Preserve.

Motion to Dismiss - Necessary Parties

Persons "who might be inequitably affected by a judgment in an action" are necessary parties who should be named as plaintiffs or defendants in the action. CPLR § 1001(a). Dismissal pursuant to CPLR 3211(a)(10) for failure to name necessary parties is a remedy "of last resort". Blank v. Blank, 222 A.D.2d 851, 853 (3d Dept. 1995).

POINT I:

DEFENDANTS HAVE NOT DEMONSTRATED A REASONABLE EXCUSE FOR THEIR DEFAULT IN ANSWERING, PLAINTIFF SHOULD BE AWARDED JUDGMENT BY DEFAULT ON THE FIRST CAUSE OF ACTION, AND DEFENDANTS' MOTION TO COMPEL ACCEPTANCE OF THEIR LATE MOTION SHOULD BE DENIED

When a party defaults in answering, in order for the court to excuse that default, the party must both "demonstrate a reasonable excuse for the default and the existence of a potentially meritorious ... defense." Thomas v. Avalon Gardens Rehabilitation & Health Care Center, 107 A.D.3d 694, 966 N.Y.S.2d 505, 506 (2d Dept. 2013).

> Although a court has the discretion to accept law office failure as a reasonable excuse (see CPLR 2005), a conclusory, undetailed and uncorroborated claim of law office failure does not amount to a reasonable excuse.

Id., at 507 (quotation marks and internal citations omitted). See also Piton v. Cribb, 38 A.D.3d 741, 742 (2d Dept. 2007)(party must demonstrate both elements).

In this case, the Defendants defaulted in answering the Summons and the First Cause of Action, and have only offered a vague claim of law office failure as an excuse. Plaintiff should be granted judgment by default on that cause of action and Defendants' motion to compel acceptance of their late motion to convert said cause of action into a CPLR Article 78 proceeding should be denied.

A. Defendants Defaulted in Answering

This case is a combined action and Article 78 proceeding. The First Cause of Action is in the nature of an action under Article 14, § 5 of the Constitution. See Complaint pp. 1-2, 6-7, 21-28, 39-40. The Second and Third Causes of Action are in the nature of an Article 78 proceeding. See Complaint pp. 2, 7-21, 28-40. Accordingly, the Complaint was served with both a Summons and a Notice of Petition.

CPLR § 3012(a) requires that when a summons and complaint are served, an answer must be served by the defendant within 20 days of the completion of service.[1] In this case, personal service was made on the Attorney General pursuant to CPLR § 307(1) on April 19, 2013.[2] Personal service was made on APA and DEC by certified mail, return receipt requested, pursuant to CPLR § 307(2)(2), and was complete on April 18, 2013.[3]

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[1] CPLR § 3012(c) allows for service of the answer 30 days after service of the summons and complaint if they are served by means other than personal service, pursuant to certain enumerated sections of CPLR Article 3. In this case, the Defendants were served by personal service and none of the methods enumerated in § 3012(c) was used.

[2] Defendants do not dispute that service occurred on said dates. Affidavit of Lawrence A. Rappoport, sworn to July 1, 2013 ("Second Rappoport Aff.") ¶4.

[3] Copies of the proof of such service are Ex. A to the Affidavit of John W. Caffry, sworn to July 12, 2013 ("Caffry Aff."). The originals thereof were filed with the Clerk on May 1, 2013. Caffry Aff. Ex. A.

Therefore, pursuant to CPLR § 3012(a), Defendants' answer to the First Cause of Action was due on May 9, 2013.[4]

Rather than answer in a timely manner, counsel for the Defendants took no action until May 15 or 16, 2013, when he called counsel for the Plaintiffs to discuss a schedule. Second Rappoport Aff. ¶6. By that time, Defendants had already been in default for a week.

B. Defendants' Default in Answering Can Not Be Excused by the Court

The Defendants do not deny that they defaulted, and they have not satisfied the legal test that they must meet in order for the Court to excuse their default. Counsel for the Defendants offers a long litany of discussions and correspondence between the attorneys. Second Rappoport Aff. ¶¶ 6-10, 13. However, all of them occurred after the May 9, 2013 default. Second Rappoport Aff. ¶¶ 6-10, 13. Therefore, none of these communications are relevant, and they provide no excuse for the Defendants' default.

The Defendants' papers completely fail to acknowledge that their answer was due on May 9th. The only excuse offered which may relate to Defendants' default on May 9th is that, despite the

[4] It should be noted that, when served, the Summons was stapled on top of the Notice of Petition and Combined Complaint-Petition, and it clearly stated on the first page that it must be answered within 20 days.

fact that the Attorney General's office handles many cases of this type, "[a] hybrid action-proceeding like the one in this matter creates confusion, unfairness, and the potential for an unwarranted default...". Second Rappoport Aff. ¶5. Be that as it may, Defendants' counsel took no steps to try to establish a schedule for the service of papers until May 15th or 16th, when Defendants were already in default. Second Rappoport Aff. ¶6.

This admitted "confusion" amounts to law office failure and Defendants have failed to provide satisfactory proof thereof for the Court to exercise its discretion and excuse the Defendants' default. "[A] conclusory, undetailed and uncorroborated claim of law office failure does not amount to a reasonable excuse." Thomas, supra. See also Wells Fargo Bank v. Cervini, 84 A.D.3d 789, 790 (2d Dept. 2011); Piton, supra. "Mere neglect will not be accepted as a reasonable excuse for a default." Incorporated Village of Hempstead v. Jablonsky, 283 A.D.2d 553, 554 (2d Dept. 2001). Because Defendants have not demonstrated a reasonable excuse for their default, it may not be excused. Thomas, supra; Wells Fargo Bank, supra; Piton, supra; Village of Hempstead, supra.

In addition, "[s]ince the defendants failed to demonstrate a reasonable excuse for their default, it is unnecessary to determine whether they demonstrated the existence of a potentially meritorious defense." Wells Fargo Bank, supra.

Therefore, the Court should disregard Defendants' proffered explanation of the alleged merits of their defense to the First Cause of Action.

C. Plaintiff Should Be Granted a Default Judgment Under CPLR § 3215 on the First Cause of Action

Pursuant to CPLR § 3215(a) & (b) the Court may grant a judgment by default when a defendant has failed to appear or plead. As set forth above, the Defendants herein have failed to do so with regard to the First Cause of Action and Plaintiff should be granted judgment on that claim.

CPLR § 3215(f) provides, in pertinent part:

> On any application for judgment by default, the applicant shall file proof of service of the summons and the complaint ... and proof of the facts constituting the claim [and] the default... . Where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney.

Plaintiff's verified Complaint will be submitted simultaneously herewith, and the facts establishing Defendants' default are set forth at Point I.A, supra, and in Caffry Aff. ¶¶ 7-10. The merits of the First Cause of Action are also demonstrated at Point II.A, infra. Defendants' arguments as the to the merits of their defenses should be ignored because they are in default. Therefore, judgment by default should be entered in favor of the Plaintiff on the First Cause of Action.

D. Defendants' Motion to Compel Acceptance of Their Late Motion Should be Denied

Defendants have moved for an order to compel Plaintiff to accept their late motion with regard to the First Cause of Action and to excuse their default in answering.[5] The same test applies to this motion, as applies to Plaintiff's motion for a default judgment. As set forth above, Defendants have not satisfied this test.

Defendants argue that default is disfavored when a body or officer defaults in an Article 78 proceeding. Second DefMemLaw p. 4. However, at the time of the default, and to this date, the First Cause of Action was not an Article 78 proceeding. Complaint pp. 1-2, 6-7, 21-28, 39-40. Although Defendants have moved to convert that claim into an Article 78 proceeding (see Point III, infra), they can not rely on a wish and prayer that their motion might be granted. Unless and until that motion was granted, they were obligated to answer within the timeframe required by CPLR § 3012(a), as set forth above.

Therefore, Defendants' motion should be denied and Plaintiffs should be granted a judgment by default on the First Cause of Action.

[5] Second Rappoport Aff.; Defendants' Memorandum of Law dated July 1, 2013 ("Second DefMemLaw").

POINT II:

THE DEFENDANTS SHOULD BE ENJOINED FROM DESTROYING TIMBER OR CLEARING LAND FOR SNOWMOBILE TRAILS DURING THE PENDENCY OF THE FIRST CAUSE OF ACTION

There is an imminent risk that during the pendency of this action defendant DEC will continue to destroy timber and clear land on the Forest Preserve for the construction of snowmobile trails. Therefore, unless Plaintiff's motion for a default judgment on the First Cause of Action is immediately granted, the Defendants should be enjoined from all such activities during the pendency of the First Cause of Action.

> To obtain a preliminary injunction in its favor, [a] plaintiff [is] required to demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of the equities in its favor.

Green Harbour Homeowners' Ass'n v. Ermiger, 67 A.D.3d 1116, 1117 (3d Dept. 2009) (internal quotation marks and citations omitted). Plaintiff has demonstrated that it satisfies all three elements of this test.

A. Plaintiff Has a Likelihood of Success on the Merits on the First Cause of Action Under Article 14, § 1

Article 14, § 5 of the Constitution provides in pertinent part that:

> [a] violation of any of the provisions of this article [14] may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen. (emphasis added)

Article 14, § 1 of the Constitution provides in pertinent part that:

> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. (emphasis added)

The First Cause of Action seeks to restrain the Defendants from constructing certain new snowmobile trails in the Adirondack Forest Preserve, and the cutting of a substantial number of trees in furtherance thereof, because such destruction of timber and construction would be a violation of Section 1 of Article 14.[6] Complaint pp. 1-2, 15-28, 39-40.

Plaintiff has a likelihood of success on this cause of action. The actions taken by Defendant DEC so far have destroyed over 2,000 trees in the Forest Preserve and ripped up many acres of land. DEC has admitted that it intends to continue on its destructive path. Affidavit of Peter J. Frank, sworn to June 20, 2013 ("Frank Aff.") ¶3, fn. 1, ¶¶ 6-11.

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[6] By a Decision and Order on Motion decided and entered on March 28, 2013, the Appellate Division, Third Department, granted Plaintiff's motion for consent to maintain suit pursuant to Article 14, § 5, with regard to the First Cause of Action. A copy of that Decision and Order is Caffry Aff. Ex. B. Said motion was made on notice to the Attorney General, as required by Article 14, § 5. By letter from Lawrence A. Rappoport, Associate Attorney in the Office of the Attorney General, dated March 7, 2013, the Defendants took no position on the motion. A copy of said letter is Caffry Aff. Ex. C.

In the seminal case of The Ass'n for the Protection of the Adirondacks[7] v. MacDonald, 253 N.Y. 234 (1930) the Court of Appeals held:

> Taking the words of section 7[8] in their ordinary meaning, we have the command that the timber, that is, the trees, shall not be sold, removed or destroyed. To cut down 2,500 trees for a toboggan slide, or perhaps for any other purpose, is prohibited. Id., at 238 (emphasis added).
>
> The purpose of the constitutional provision [Article 14, § 1], as indicated by the debates in the Convention of 1894, was to prevent the cutting or destruction of the timber or the sale thereof, as had theretofore been permitted by legislation, to the injury and ruin of the Forest Preserve. To accomplish the end in view, it was thought necessary to close all gaps and openings in the law, and to prohibit any cutting or any removal of the trees and timber to a substantial extent. The Adirondack Park was to be preserved, not destroyed. Therefore, all things necessary were permitted, such as measures to prevent forest fires, the repairs to roads and proper inspection, or the erection and maintenance of proper facilities for the use by the public which did not call for the removal of the timber to any material degree. Id., at 238 (emphasis added).
>
> If it were deemed necessary to obtain a constitutional amendment for the construction of a State highway, the use to which the Forest Preserve might be put with legislative sanction was greatly limited. Trees could not be cut or the timber destroyed, even for the building of a road.[9] This seems to be a fair conclusion to be drawn from the adoption of these

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[7] Plaintiff is the successor organization to The Association for the Protection of the Adirondacks, Inc. Complaint ¶4.

[8] Now Article 14, § 1.

[9] As shown by the affidavit of PROTECT's Executive Director Peter Bauer ("Bauer Aff."), the Community Connector snowmobile trails at issue herein bear an uncanny resemblance to roads, but for the current lack of pavement.

> constitutional amendments after the Constitution of 1894. Id., at 240.
>
> However tempting it may be to yield to the seductive influences of outdoor sports and international contests, we must not overlook the fact that constitutional provisions cannot always adjust themselves to the nice relationships of life. The framers of the Constitution, as before stated, intended to stop the willful destruction of trees upon the forest lands, and to preserve these in the wild state now existing; they adopted a measure forbidding the cutting down of these trees to any substantial extent for any purpose. Id., at 241-242 (emphasis added).
>
> In other words, this plea in behalf of sport is a plea for an open door through which abuses as well as benefits may pass. The Constitution intends to take no more chances with abuses, and, therefore, says the door must be kept shut. The timber on the lands of the Adirondack Park in the Forest Preserve, or that on the western slope of the Sentinel range cannot be cut and removed to construct a toboggan slide simply and solely for the reason that section 7, article VII,[10] of the Constitution says that it cannot be done. Id., at 242 (emphasis added).

See also The Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73 (3d Dept. 1930); Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dept. 1993).

Ass'n for the Protection of the Adirondacks found that the bobsleigh run that was proposed to be built for the 1932 Lake Placid Olympics on Forest Preserve lands was not permitted for 3 reasons:

(a) It would cut timber on the Forest Preserve to a "substantial" or "material degree": destroying 2,500 trees in

[10] Now Article 14, § 1.

total and clearing 4-1/2 acres (Ass'n for the Protection of the Adirondacks, supra, 253 N.Y. at 238-242; see also Balsam Lake, supra, at 853);

(b) the bobsleigh run was not consistent with the wild forest nature of the Forest Preserve (Ass'n for the Protection of the Adirondacks, supra, 253 N.Y. at 241-242; Ass'n for the Protection of the Adirondacks, supra, 228 A.D. at 82); and

(c) the construction of the bobsleigh run would result in the creation of a man-made setting in the Forest Preserve (Ass'n for the Protection of the Adirondacks, supra, 228 A.D. at 82 ("[s]ports which require a setting that is man-made are unmistakably inconsistent with the preservation of these forest lands in the wild and natural state in which Providence has developed them")). See also Ass'n for the Protection of the Adirondacks, supra, 253 N.Y. at 241-242).

The Appellate Division described the effects on the Forest Preserve of the construction of the proposed bobsleigh run in detail:

> The proposed bobsleigh run does not follow any existing road or trail but the return-way partially follows a former road now used as a trail and in large part follows an abandoned lumber road. If constructed the proposed bobsleigh run will be approximately one and one-quarter miles long and six and one-half feet in width, and it will be necessary to clear additional land on either side of the run so that where the course is straight the width will be approximately sixteen feet and where the course curves the width will be twenty feet. The return-way will be either a roadway approximately one mile long and eight feet wide up

> which the bobsleighs will be hauled to the top of the slide by a tractor, or a line approximately five-eighths of a mile long and six feet wide up which the bobsleighs will be hauled by a cable. Ass'n for the Protection of the Adirondacks, supra, 228 A.D. at 75.
>
> To construct the bobsleigh run it would be necessary to cut down and remove 1,710 trees of varying kinds and sizes down to three inches in diameter. In addition it would be necessary to cut and remove for the return-way about fifty per cent more, or in all about 2,600 trees. Of these some 480 are eight inches or more in diameter at breast height and as many as 33 are twenty inches or more in diameter. Most of the softwood is second growth but there is a scattering stand of first growth hardwoods. In all, over four and one-half acres of land must be cleared. In addition it will be necessary to blast away about fifteen large boulders and the ends of three or four ledges of rock, entailing the removal by blasting of about 50 cubic yards of rock. Id., at 76.
>
> This bobsleigh run and return-way require the clearing of four or five acres of forest lands, the cutting of 2,600 trees which must unquestionably be regarded as of 'timber' size and the blasting of some fifty cubic yards of rock from their natural state, to say nothing of the cuts and fills of earth and rock which will be required to make the slide an even and safe surface for the sport and the return-way possible up a steep slope to the top of the slide. Id., at 82.

In the present case, the amount of timber destroyed and the damage to the wild forest nature of the Forest Preserve is comparable to that which would have occurred in the construction of the unconstitutional bobsleigh run:

a. Trees to be cut: bobsleigh run - about 2,600 (id., at 82); snowmobile trails - 2,085 to 2,220 for the Seventh Lake Mountain Trail (Frank Aff. ¶7); about 2,700 for the three trails

at issue herein (Complaint ¶¶ 85-88); over 8,000 for the entire system of Community Connector trails (Complaint ¶¶ 90-96).

b. Forest land to be cleared: bobsleigh run - 4 to 5 acres (id., at 82); snowmobile trails - up to 16 acres for the three trails at issue herein (Complaint ¶¶ 71, fn 18, 74-77); up to 48 acres for the entire system of Community Connector trails (Complaint ¶71).

c. Rock removal: bobsleigh run - "about fifteen large boulders and the ends of three or four ledges of rock" (id., at 82); snowmobile trails - uncountable rocks and at least one ledge of rock (Bauer Aff.; Complaint ¶106; Frank Aff.).

d. Alteration of forest floor: bobsleigh run - "cuts and fills of earth and rock which will be required to make the slide an even and safe surface for the sport" (id., at 82); snowmobile trails - same (Bauer Aff.; Frank Aff.; Complaint ¶¶ 65-66, 80, 103-110).

e. Construction of facilities: bobsleigh run - bobsleigh run and return facility (id., at 75); snowmobile trails - massive bridges, gravel and man-made tread for hardened trail surface (Bauer Aff.).

f. Width of run/trail: bobsleigh run - 6.5 feet (id., at 75); snowmobile trails - 9 to 12 feet (Frank Aff.; Bauer Aff. ¶7 and exhibits).

g. Total width of clearing and grading of forest floor: bobsleigh run - 16 feet to 20 feet (id., at 75); snowmobile trails - 9 feet to 20 feet (Bauer Aff. ¶7 and exhibits).

Defendants argue that they have a meritorious defense, claiming that in Ass'n for the Protection of the Adirondacks, "the Court of Appeals held that man-made settings for sport would be unconstitutional only if a sport were inconsistent with the purpose of the Forest Preserve, would destroy the wild forest character of the affected lands and would result in a substantial amount of tree cutting." Second Rappoport Aff. ¶15 (emphasis added). This argument misstates the holding of Ass'n for the Protection of the Adirondacks. The Court of Appeals held that any one of these three things would be enough to render a project unconstitutional. Id., at 238, 231-242. It did not hold that all three factors must be present for an action to be unconstitutional.

Thus, even if a proposed use is consistent with the wild forest nature of the land,[11] a substantial amount of tree cutting, the creation of a man-made setting, or the destruction of the land's wild forest nature, would still be unconstitutional. Id. See also Ass'n for the Protection of the Adirondacks, supra, 228 A.D. at 81-82; Balsam Lake, supra, at

[11] The constitutionality of the operation of snowmobiles on the Forest Preserve is not at issue in this action.

853-854. In the present case, regardless of the overall constitutionality of driving snowmobiles on the Forest Preserve, the Community Connector trails will require a substantial amount of tree cutting, the creation of a man-made setting, and the destruction of the land's wild forest nature, so they are prohibited by the Constitution.

Defendants also argue that the snowmobile trails "are being constructed carefully." Second Rappoport Aff. ¶16. This claim is easily contradicted by the pictures attached to the Bauer Aff. Moreover, it is irrelevant. As described in Ass'n for the Protection of the Adirondacks, supra, 228 A.D. at 74-75, the bobsleigh run would also have been constructed carefully, but it was still found to be unconstitutional. Id.

Therefore, Plaintiff has established a likelihood of success on the merits, and Defendants do not have a valid defense to the First Cause of Action.

In order to obtain an injunction to restrain this violation of Article 14, Plaintiff need not establish a high likelihood of success:

> Denial of injunctive relief would render the final judgment ineffectual, since the trees, once cut down, cannot be replaced, and therefore, the degree of proof required to establish the element of likelihood of success on the merits should be accordingly reduced.

The Gramercy Company v. Benenson, 223 A.D.2d 497, 498 (1st Dept. 1996)(internal quotation marks and citations omitted). Under

both the usual standard, and this reduced standard, Plaintiff has established the requisite likelihood of success.

B. Plaintiff, and the Forest Preserve, Will Suffer Irreparable Injury in the Absence of an Injunction

In the absence of an injunction, DEC will continue with the construction of the Seventh Lake Mountain and Wilmington[12] Trails and commence construction of the Gilmantown Trail. Frank Aff. ¶¶ 3, fn. 1, 7-8, 10-11. This will result in the continued widening, flattening, ditching, grading, banking and leveling of Forever Wild Forest Preserve land. Trees, stumps and rocks will be removed, bedrock will be destroyed, and land will be cleared. Complaint ¶¶ 65-66, 80, 103, 106-108. See also Bauer Aff. At a minimum, 123 trees in the Forest Preserve will be destroyed in the construction of the Gilmantown Trail. Complaint ¶86; See Caffry Aff. Ex. D - copy of notice published by DEC in the Environmental Notice Bulletin on December 26, 2012, disclosing its intent to destroy 123 trees.

It is not clear from the record how many trees have yet to be cut for the Seventh Lake Mountain Trail or the Wilmington Trail. See Frank Aff. ¶¶ 7-8, 10-11. However, it is clear that DEC will continue with "cutting trees and vegetation, clearing the trail surface, constructing drainage structures, lateral

[12] Referred to in the Complaint as the "Cooper Kill Trail".

bench cuts across hillside slopes, and construction of bridges..." (Frank Aff. ¶6) and also with unspecified "rock work" (Frank Aff. ¶11). The planned work on the Wilmington Trail includes "several minor reroutes of the trail" (Frank Aff. ¶11), which will no doubt include destruction of additional timber and clearing and excavation of additional Forest Preserve land. See Frank Aff. ¶¶ 6, 7-8, 10-11; Frank Aff. Ex. A, B, D; Complaint ¶¶ 65-66, 80, 86, 103, 106-108.

The threatened removal of trees and other damage to the Forest Preserve constitutes a risk of irreparable harm and is grounds for the granting of a preliminary injunction. Green Harbour, supra, at 1117-1118 (threatened loss of several large trees after 26 were already cut); Walsh v. St. Mary's Church, 248 A.D.2d 792, 794 (3d Dept. 1998)(threatened loss of several large trees); Gramercy Company, supra, at 498 (threatened removal of trees in park); Wiederspiel v. Bernholz, 163 A.D.2d 774, 775 (3d Dept. 1990)(threatened removal of more trees after removal of large trees).

In the present case, as demonstrated by the Bauer Aff. and the photographs annexed thereto, DEC has already done significant damage to the Forest Preserve. Timber has been destroyed and strewn about the landscape, trails up to 20' wide have been clear-cut and excavated, side slopes have been cut and filled, gravel fill and lumber have been laid down to create man-made

trail tread to accommodate grooming machines weighing several tons, massive bridges have been built to accommodate these machines, rock ledges have been demolished and the forest floor has been destroyed. See Bauer Aff. All of this has combined to result in the substantial destruction of timber on the Forest Preserve, and has created a man-made setting that is not consistent with the wild forest nature of the Forest Preserve. Bauer Aff. ¶7.

So far, in total, DEC has destroyed over 2,000 Forest Preserve trees (Frank Aff. ¶7), and threatens to destroy at least 123 more (Caffry Aff. Ex. D; Frank Aff. ¶3, fn. 1, ¶11). All of these trees are over 3" in diameter at breast height ("dbh"), as DEC does not even count trees under that size as timber pursuant to Article 14, § 1. Many of the trees that have been cut for the Seventh Lake Mountain and Wilmington Trails are a foot or more dbh, with some as large as 20" dbh. Frank Aff. Ex. A, pp. 4-5, Ex. D, p. 6.

If these additional trees are removed, they can not be replaced with equivalent trees. Gramercy Company, supra, at 498; Wiederspiel, supra, at 775. This constitutes a risk of irreparable harm sufficient to warrant the issuance of a preliminary injunction. Id.

C. The Balance of the Equities Favors Plaintiff

The balance of the equities favors the Plaintiff because it merely seeks to preserve the status quo while the action is pending. Green Harbour, supra, at 1117; Walsh, supra, at 793; Gramercy Company, supra, at 498. If the trees are cut, and the land is cleared, ditched, drained and flattened, it will be decades, if ever, before the damage is fully restored. See Bauer Aff.

On the other hand, if the Defendants ultimately prevail on the First Cause of Action, they can still destroy the Forest Preserve timber, and clear, ditch, drain and flatten the land, and otherwise create a man-made setting in the Forest Preserve, after the courts rule in their favor. Gramercy Company, supra, at 498. In addition, there would be minimal prejudice to the Defendants because two of the three snowmobile trails at issue herein are already in a usable condition. Frank Aff. ¶¶ 7, 11. See Walsh, supra, at 793; Wiederspiel, supra, at 775.

Finally, the Forest Preserve is not DEC's private property, nor is it held by DEC "as proprietor only". People v. Baldwin, 197 A.D. 285, 288 (3d Dept. 1921), aff'd 233 N.Y. 672 (1922).

> Since 1885 the State has held, and been in possession of ... its Forest Preserve, kept as a public park in trust for the people, to promote the general health and welfare and to conserve the streams.

Id., at 290. DEC is merely the steward of the land and timber held in trust for the public pursuant to Article 14, § 1. Id.,

at 288-290. Therefore, DEC can not be prejudiced if it is delayed in its self-appointed mission to destroy the Forest Preserve lands and timber at issue herein (see Bauer Aff.), in violation of Article 14, § 1. See Gramercy Company, supra, at 498 (enjoining trustees from destroying trees on trust property during pendency of action). Indeed, the risk of prejudice to the Plaintiff is not really what is at issue. Plaintiff, acting in the stead of the State, has sued to protect the People's Forest Preserve, because the State will not do so. See Constitution, Article 14, § 5; Point III, infra. It is the Forest Preserve that will be prejudiced if an injunction is not granted.

D. A Temporary Restraining Order, and Then a Preliminary Injunction, Should be Granted

Plaintiff has met all three elements of the test for the issuance of a temporary restraining order and a preliminary injunction under CPLR Article 63, so as to restrain the Defendants' violation of Article 14, § 1 pursuant to Article 14, § 5. Its motion for such relief should be granted.

POINT III:

DEFENDANTS' MOTION TO CONVERT THE FIRST CAUSE OF ACTION UNDER CONSTITUTION ARTICLE 14 TO A CPLR ARTICLE 78 PROCEEDING SHOULD BE DENIED BECAUSE PLAINTIFF BROUGHT THE CORRECT TYPE OF ACTION

The New York State Constitution authorizes citizen suits to restrain violations of Article 14 of the Constitution so long as the consent of the Appellate Division is obtained prior to commencing the action. See Const. Art. 14, § 5; People v. System Properties, 281 A.D. 433, 445 (3d Dept. 1953). Once granted consent by the Appellate Division, the citizen is authorized to commence a specific "type of action" - a "suit to restrain violations of the article" - and the citizen must look to other legal vehicles to invoke any additional legal remedies. Oneida County Forest Preserve Council v. Wehle, 309 N.Y. 152, 156 (1955).

Here, Plaintiff sought, and successfully obtained, the consent of the Appellate Division to "maintain suit pursuant" to Article 14, § 5. Caffry Aff. Ex. B. The First Cause of Action of the Complaint, brought pursuant to Article 14, § 5, seeks to enjoin the construction of "Class II Community Connector snowmobile trails and any similar trails" because they violate Article 14, § 1. Complaint ¶82. Article 14, § 1 mandates that the Forest Preserve shall remain "Forever Wild" and prohibits the timber on the Forest Preserve from being "sold, removed or destroyed".

Plaintiff's Article 14 claim is limited to a single, specific cause of action based upon the Defendants' violation of the New York State Constitution. Complaint ¶¶ 82-83, 97-98, 111, 116-117. The Article 14 cause of action is not a challenge to the Defendants' creation and approval of the various Unit Management Plans ("UMP's") that apply to the trails at issue in the Complaint, or to DEC's adoption of the Final Snowmobile Plan for the Adirondack Park. Compare Residents' Committee to Protect the Adirondacks, Inc.[13] v. Adirondack Park Agency, 24 M.3d 1221(A) (Sup. Ct. Albany Co. 2009) (Article 78 proceeding challenging approval of amended UMP).

The Article 14 cause of action challenges the Defendants' actions as violative of Article 14 because: (a) a substantial amount of timber will be cut and destroyed in the construction of these trails; (b) these trails are not consistent with the wild forest nature of the Forest Preserve; and (c) the construction of these trails will result in the creation of a man-made setting in the Forest Preserve. Complaint ¶82. These are exactly the kind of violations that Article 14, § 5 contemplates being enjoined by a citizen suit. See Const. Art. 14, § 1 (the "lands of the state . . . constituting the forest preserve . . . shall be forever

[13] Plaintiff is the successor organization to Residents' Committee to Protect the Adirondacks, Inc. Complaint ¶4.

kept as wild forest lands . . . nor shall timber thereon be sold, removed, or destroyed.").

The Defendants' motion to convert the Plaintiff's First Cause of Action to an Article 78 proceeding (Affidavit of Lawrence A. Rappoport, sworn to June 21, 2013 ("First Rappoport Aff." ¶3; Defendants' Memorandum of Law dated June 21, 2013 ("First DefMemLaw") Point I) should be denied because the Plaintiff brought the correct type of suit: an action against the Defendants. See Oneida, supra; see generally Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73 (3d Dept. 1930), aff'd 253 N.Y. 234 (1930). A challenge to the constitutionality of "various uses undertaken within the forest preserve in the past and present by [DEC], which the plaintiff[] contend[s] destroy the wild forest nature of the preserve because they all entail cutting significant amounts of timber and over use of the forest preserve" is properly commenced as an action, served as a complaint, and "decided after a trial". Helms v. Reid, 90 M.2d 583, 586, 588 (Sup. Ct. Hamilton Co. 1977) (noting that the first cause of action in the complaint - for DEC's violations of the "forever wild" clause - "raises questions of fact which can only be decided after a trial").

The Constitution gives to both "the people" and "any citizen" (provided consent is obtained by the citizen) the authorization to commence a "suit". Article 14, § 5. The

Constitution does not differentiate between a suit that the Attorney General may commence on behalf of the People and a suit that a citizen may commence. If the State can bring an action for declaratory judgment based upon a constitutional violation (see State v. Town of Horicon, 46 A.D.3d 1287 (3d Dept. 2007), then Plaintiff's action, based upon a violation of Article 14, § 1, is also permissible. The cause of action in Plaintiff's Complaint that alleges a violation of Article 14, § 1 (the First Cause of Action) should not be converted from an action merely because the defendants in this particular citizen suit are agencies of the State.

The cases cited by the Defendants in support of their argument for conversion of the action to an CPLR Article 78 proceeding are inapposite to an action brought under the authority of Article 14, § 5. In Town of Stony Point, cited by the Defendants (see First DefMemLaw, Point I), the cause of action alleging a constitutional violation was dismissed as untimely because that claim challenged the validity of the adoption of a regulation, which was "'a quasi-legislative act or decision'" subject to a four-month statute of limitations.

Here, Plaintiff's Article 14 action does not challenge DEC's decision-making, analysis, or any other quasi-legislative act or decision, but challenges DEC's physical construction of certain snowmobile trails, and the cutting of trees in the Forest

Preserve, as activities conducted by DEC in violation of Article 14, § 5. Through its Article 14 action, Plaintiff seeks a declaration of the unconstitutionality of these activities, and an injunction preventing such activities. Therefore, considering the remedies sought, and that the Complaint "seek[s] more than just a review of a single determination" of the Defendants and seeks a "review of the legality" of the Defendants' allegedly "illegal activities", an action is proper, not a CPLR Article 78 proceeding. Zuckerman v. Board of Ed. of City School Dist. of City of New York, 44 N.Y.2d 336, 341, 344 (1978); see Chandler v. Coughlin, 131 M.2d 442, 444 (Sup. Ct. Albany Co. 1986), rev'd on other grounds, 126 A.D.2d 886 (3d Dept. 1987).

In Matter of Aubin (see First DefMemLaw, Point I), the court reviewed whether the action was more like a CPLR Article 78 proceeding than an action because there was a question regarding the timeliness of the complaint. The court determined that the shorter CPLR Article 78 limitations period, rather than the "catch-all limitations period" for an action for declaratory judgment, applied to the causes of action that could have been reviewed in a CPLR Article 78 proceeding.

In this case, the court does not need to determine which limitations period "will govern" because there is no question as to the timeliness of Plaintiff's Complaint. Id. The Defendants did not raise a statute of limitations question in their motion

to convert the First Cause of Action (or in their CPLR § 3211 motion to dismiss the other causes of action). See CPLR § 3211(a)(5); CPLR § 3211(e).

Additionally, "even if the four-month statute of limitations were held to apply, the instant action would be timely since", *inter alia*, the Complaint was filed and served by April 19, 2013 (Caffry Aff. Ex. A), and DEC's public notice of its intention to construct the Gilmantown Trail was published on December 26, 2012. Chandler v. Coughlin, supra; Caffry Aff. Ex. D. Also, a challenge to the Defendants' "substantively illegal" actions is not governed by the "shorter statute of limitations periods for procedural issues relating to" quasi-legislative decisions. Riccelli Enterprises, Inc. v. New York State Department of Environmental Conservation, 30 M.3d 573, 576 (Sup. Ct. Onondaga Co. 2010). Therefore, there is no need to categorize the action as a CPLR Article 78 proceeding for statute of limitations purposes, or to convert it to such a proceeding for consideration and review.

Finally, converting the Article 14 cause of action to a CPLR Article 78 proceeding would be improper because the CPLR Article 78 standard of review applicable to an agency decision is not applicable to the determination of whether the Defendants' actions in building snowmobile trails and cutting trees in the forest preserve violate Article 14, § 1. In a CPLR Article 78

proceeding, the respondent's decisions are evaluated by whether they "are arbitrary and capricious and are affected by an error of law", and those decisions are "afforded judicial deference". Adirondack Council, Inc. v. Adirondack Park Agency, Albany County Index No. 7991-10 (Sup. Ct. Albany Co. 2011) (First DefMemLaw, Addendum B).

In contrast, in an Article 14, § 1 case, the defendant's actions are evaluated by looking to the clear constitutional mandate found in Article 14, § 1, and by reviewing "the history and strict interpretation of the mandate for many years". Ass'n for the Protection of the Adirondacks, supra, 228 A.D. at 81. This is the standard that should apply to the Defendants' actions in this case. Therefore, the Defendants' motion to convert the First Cause of Action into a cause of action reviewable pursuant to CPLR Article 78 should be denied.

POINT IV:

DEFENDANTS' MOTION TO DISMISS THE FIRST CAUSE OF ACTION REGARDING THE GILMANTOWN TRAIL AS UNRIPE SHOULD BE DENIED SO THAT THE DESTRUCTION OF TIMBER ON THE FOREST PRESERVE CAN BE RESTRAINED BEFORE IT OCCURS, NOT AFTERWARDS

Article 14, § 5 of the Constitution provides in pertinent part that:

> [a] violation of any of the provisions of this article [14] may be restrained at the suit of the people or, with the consent of the supreme court in appellate division, on notice to the attorney-general at the suit of any citizen. (emphasis added)

Article 14, § 1 of the Constitution provides in pertinent part that:

> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. (emphasis added)

The First Cause of Action seeks to restrain the Defendants from constructing certain new snowmobile trails in the Adirondack Forest Preserve, and the cutting of a substantial number of trees in furtherance thereof, because such destruction of timber would be a violation of Section 1 of Article 14. Complaint pp. 1-2, 15-28, 39-40. Thus, the claim falls squarely within the scope of Article 14, § 5, as a suit to restrain a violation of Article 14, § 1.

Defendants have moved to dismiss this claim as it relates to the planned Gilmantown snowmobile trail on the grounds that the claim is not ripe because said trail has not yet been constructed. See First Rappoport Aff. ¶3; Frank Aff. ¶3, fn. 1; First DefMemLaw p. 7, fn. 3.

The planned Gilmantown Trail would be about one-half mile long and its construction would destroy some 123 trees on the Forest Preserve. Complaint ¶¶ 69(c), 76, 86. DEC has already determined the number of trees that will be destroyed and has published that information in the Environmental Notice Bulletin on December 26, 2012. Caffry Aff. Ex. D.

Defendants' motion turns Article 14, § 5 on its head. The purposes of Article 14, § 1 include preventing the timber on the Forest Preserve from being destroyed. The purposes of Article 14, § 5 include allowing any citizen to bring an action "to restrain" the destruction of said timber. Under the Defendants' theory, no such action would be ripe for adjudication until after the timber has already been destroyed, when it is too late to restrain its destruction.

To put it bluntly, this argument is kafkaesque. Once 123 trees have been destroyed, it will be too late for their destruction to be restrained under Article 14, § 5. If this theory were adopted by the Court, over 8,000 trees in the Forest Preserve could be destroyed before the issue of the

constitutionality of destroying them could be subjected to judicial review. See Complaint ¶¶ 90-97.

In a prior case involving related Adirondack Forest Preserve snowmobile trail issues, the Appellate Division held that:

> In determining whether an administrative action is ripe for review, [a court] must first consider whether it is final and whether the controversy may be determined as a purely legal question. An action will be deemed final if a pragmatic evaluation reveals that the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury. [The court] must then consider whether the anticipated harm is insignificant, remote or contingent [;] . . . if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party, the matter is not ripe. That is, if the claimed harm is contingent upon events which may not come to pass, the claim . . . is nonjusticiable as wholly speculative and abstract. (internal quotation marks and citations omitted)

Adirondack Council v. APA, 92 A.D.3d 188, 190 (3d Dept. 2012). The court dismissed that case as unripe, because there were not yet specific plans for the construction of specific snowmobile trails on the Forest Preserve. Id., at 191. Now, there are specific plans for specific trails, some of which are already being built, and any issues related to their construction, and the resultant destruction of timber, are now ripe for review.

In the present case, Plaintiff has no further administrative actions or steps available to it. Id. Notably, DEC does not claim in its motion papers (Frank Aff., First Rappoport Aff.; First DefMemLaw p. 7, fn. 3) that there are any other

administrative approvals or contingencies remaining to be satisfied.

DEC has stated that "[c]onstruction of this trail has not yet commenced but will do so soon" (Frank Aff. ¶3, fn. 1), so the anticipated harm is not "remote or contingent", and DEC has obviously arrived at a definitive position. Id. Therefore, the question is ripe for review with regard to the Gilmantown Trail. Id.

An action is ripe for judicial review when an agency has taken a definitive position on the action, and "there is nothing in the record to suggest that [the position] ... [is] not the defendant's definitive position on the question...". Compass Adjusters v. Comm'r of Taxation and Finance, 197 A.D.2d 38, 41 (3d Dept. 1994). A matter is ripe when there are no further avenues of administrative relief available to the plaintiff. Ward v. Bennett, 79 N.Y.2d 394, 400 (1992). In the present case, there are no further administrative remedies available to the Plaintiff, and DEC has made it clear that its position is definitive and that it intends to continue with the destruction of timber in the Forest Preserve. Frank Aff. ¶3, fn. 1, ¶11.

If this motion is granted, and judicial review of the constitutionality of the planned Gilmantown Trail is delayed until after at least 123 more Forest Preserve trees are destroyed, Plaintiff, and the Forest Preserve, will suffer a

concrete, irreparable harm. Green Harbour Homeowners' Ass'n v. Ermiger, 67 A.D.3d 1116, 1118-1119 (3d Dept. 2009); Walsh v. St. Mary's Church, 248 A.D.2d 792, 794 (3d Dept. 1998); The Gramercy Company v. Benenson, 223 A.D.2d 497, 498 (1st Dept. 1996); Wiederspiel v. Bernholz, 163 A.D.2d 774, 775 (3d Dept. 1990); see also Adirondack Council, supra (issue is ripe when party would suffer concrete harm).

The issue is therefore ripe for review, and the motion to dismiss it should be denied. Compass Adjusters, supra; Ward, supra.

POINT V:

DEFENDANTS' MOTION TO DISMISS THE SECOND AND THIRD CAUSES OF ACTION FOR FAILURE TO JOIN NECESSARY PARTIES SHOULD BE DENIED BECAUSE SAID PARTIES ARE UNITED IN INTEREST WITH THE DEFENDANTS

The Second and Third Causes of Action seek to annul certain Temporary Revocable Permits ("TRP") and Adopt-A-Natural-Resource Agreements ("AANR") issued by DEC to various municipalities and snowmobile clubs (collectively "Groomers") to operate motor vehicles such as snowcats, and mechanized grooming equipment, to groom the snow on snowmobile trails on the Adirondack Forest Preserve because said TRPs and AANR agreements were issued in violation of, respectively, the Adirondack Park State Land Master Plan ("APSLMP") and DEC's regulations at 6 NYCRR Part 196. Complaint pp. 2, 7-12, 28-39. Defendants have moved to dismiss these causes of action on the theory that the Groomers are necessary parties.[14] This motion should be denied because the Groomers have no rights in either the lands in question, or in the permits, they are mere agents of DEC, and they are united in interest with that agency.

CPLR § 1001(a) provides that "persons ... who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants". Such persons are generally referred

[14] First Rappoport Aff. p. 3; Affidavit of Maxwell Wolckenhauer, sworn to June 20, 2013 ("Wolckenhauer Aff.") pp. 1-7; First DefMemLaw Point II.

to as "necessary parties". In this case, the Groomers will not be "inequitably affected", and it is not necessary to make them parties hereto.

"Joinder is not necessary where 'the interests of the nonjoined party and a party who has been joined stand or fall together'". Country Village Towers Corp. v. Preston Communications, 289 A.D.2d 363, 364 (2d Dept 2001), quoting Doner v. Comptroller of State of New York, 262 A.D.2d 750, 751 (3d Dept. 1999). Country Village held that sublicensees would not be inequitably affected and so were not necessary parties, because the licensee was already joined, and "they possessed no rights independent of their contract with the licensee." Id. See also Ruck v. Greene County Board of Elections, 24 M.3d 1232(A), *5 (Sup. Ct. Albany Co. 2007)(party whose interests stand and fall with existing party's interests is not necessary); Awwad v. Capital Region Otolaryngology, 18 M.3d 1111(A), *10 (Sup. Ct. Albany Co. 2007)(not every party who might be affected is a necessary party).

Even if the Groomers were necessary parties, their absence may be excused because "the interests of the named party and the nonjoined party are so intertwined that there is virtually no prejudice to the nonjoined party." Long Is. Contractors Ass'n v. Town of Riverhead, 17 A.D.3d 590, 594 (2d Dept. 2005)(no grounds for dismissal of action where interests of nonjoined party are

"adequately protected" and interests are identical). See also Shanor Electric Supply v. FAC Continental, LLC, 73 A.D.3d 1445, 1446 (4th Dept. 2010).[15]

Pursuant to official departmental policies, DEC issues TRPs to local municipal governments and AANRs to snowmobile clubs so that they may operate motor vehicles and grooming equipment to groom snowmobile trails in the Adirondack Forest Preserve. See Complaint pp. 28-29; Wolckenhauer Aff. pp. 1-7. "TRPs and AANRs are typically issued for a one year period...". Wolckenhauer Aff. ¶6. As defined on page 1 of DEC Policy ONR-3, entitled "Temporary Revocable Permit Policy",[16] "the Department issues TRPs in its sole discretion for the temporary use of state lands...". Section II.H(2) of Policy ONR-3 states that "TRPs may be revoked or suspended at any time in the sole discretion of the Department". Caffry Aff. Ex. E. Section II.I(2) of Policy ONR-3 provides that "TRPs shall be issued for a term not to exceed one (1) year...". Caffry Aff. Ex. E. A TRP is merely a revocable license that can be revoked by the State at any time. Ski-View, Inc. v. State of New York, 129 M.2d 106, 109 (Ct. Claims 1985).

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[15] If the Court were to find that the Groomers might be inequitably affected by a judgment in this action, joinder of such parties can be excused under CPLR § 1001(b). See Red Hook/Gowanus Chamber of Commerce v. New York City, 5 N.Y.3d 452, 457-462 (2005).

[16] A copy of DEC Policy ONR-3 is Caffry Aff. Ex. E.

Environmental Conservation Law ("ECL") § 9-0113 governs the issuance of AANRs. It provides in pertinent part that a "stewardship agreement may be modified in scope or altered in any other manner at the sole discretion of the department...". ECL § 9-0113(6). Like a TRP, an AANR is merely a revocable license that can be revoked by the State at any time. See Ski-View, supra.

Indeed, a private party can not acquire vested rights of any kind on Forest Preserve lands. "It is impossible under the Constitution for individuals to acquire vested rights in the forest preserve by means of adverse possession, long use, or a prescriptive right." Helms v. Diamond, 76 M.2d 253, 257-258 (Sup. Ct. Schen. Co., 1973); see also State v. Moore, 298 A.D.2d 814, 815 (3d Dept. 2002); People v. Douglas, 217 A.D. 328, 332 (3d Dept. 1926); People v. Baldwin, 197 A.D. 285, 291 (3d Dept. 1921) (adverse possession does not accrue against the Forest Preserve). Nor can any state official grant such rights, either by commission or omission. People v. Baldwin, supra.

Because the Groomers have no rights in the TRPs and AANRs, which may be revoked at any time, and no rights in the lands affected thereby, they have no rights which might be affected, inequitably or otherwise, by a ruling in this case, so the motion must be denied. See Country Village Towers Corp., supra; Doner, supra.

Assuming for the sake of discussion that the operation of such motor vehicles and motorized equipment on the Forest Preserve were permissible under the APSLMP, the ability to do so would be limited to "administrative personnel". The APSLMP (p. 33) permits "the use of motor vehicles" ... "by administrative personnel where necessary to reach, maintain or construct permitted structures and improvements ...". Local governments and the general public may not engage in such actions unless they are acting as "administrative personnel" on behalf of the State. Thus, when the municipalities and snowmobile clubs groom snowmobile trails, they do so as agents of DEC, not on their own behalf.

Indeed, Defendants' motion papers show that the Groomers merely act as administrative personnel of the State:

> the Department often delegates its stewardship responsibilities to municipalities through TRPs and private entities such as snowmobile clubs through AANRs ... because it lacks sufficient personnel and equipment to fulfill its stewardship responsibilities exclusively through DEC personnel. Wolckenhauer Aff. ¶4.

The Defendants have also characterized the Groomers as "partners" of DEC. Wolckenhauer Aff. ¶4.

Because the Groomers are merely agents of defendant DEC, their interests in this case are identical and stand and fall with DEC's interests, so that their interests are adequately protected by DEC. See Shanor Electric Supply, supra; Long Is. Contractors Ass'n, supra.; Country Village Towers Corp., supra.

The cases relied upon by Defendants (First DefMemLaw p. 8) are not on point. In each of those cases, the nonjoined necessary party was a person who had applied for and received a permit to undertake certain actions on their own private property. Red Hook/Gowanus, supra; Salvador v. Town of Lake George, 31 A.D.3d 906, 907 (3d Dept. 2006); Baker v. Town of Roxbury, 220 A.D.2d 961, 963 ((3d Dept. 1995). The courts in those cases found that there was no unity of interest because a developer's financial interests are not adequately protected by a municipality's "divergent long-term interests" in the "regulatory and administrative consequences" of the action. Red Hook/Gowanus, supra, at 457. In the present case, the interests of the Groomers and the Defendants are identical. The Groomers are working as agents of DEC, on State Forest Preserve land, and their permits and agreements are both temporary, and revocable at will by DEC. Ski-View, supra. Therefore, the cases relied upon by Defendants are totally inapplicable herein.

The Groomers will not be inequitably affected by a ruling in this case, and Defendants' motion to dismiss the Second and Third Causes of Action for failure to join necessary parties must be denied. Id.

CONCLUSION

Plaintiff has demonstrated that it has a meritorious case on the First Cause of Action, and its motions for a default judgment and injunctive relief to restrain the violation of Article 14, § 1 should be granted. Defendant clearly defaulted and has offered no reasonable excuse for doing so. Defendants' various motions are without merit and should be denied.

Dated: July 12, 2013

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