STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

In the Matter of the Application of

PROTECT THE ADIRONDACKS! INC.,

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.

INDEX NO. 2137-13

RJI NO.01-13-ST-4541

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF-PETITIONER'S ARTICLE 78 CAUSES OF ACTION

Dated: October 15, 2013

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PRELIMINARY STATEMENT

This memorandum of law is submitted by plaintiff-petitioner Protect the Adirondacks! Inc. ("PROTECT" or "Plaintiff") in support of the Second and Third Causes of Action of the Plaintiff's verified complaint-petition ("Complaint") which are made pursuant to CPLR Article 78.[1] The Second Cause of Action demonstrates that the grooming of the snow on snowmobile trails in the Adirondack Forest Preserve by the use of tracked motor vehicles such as snowcats, and motorized equipment attached to such vehicles, is in violation of the Adirondack Park State Land Master Plan ("APSLMP"). The Third Cause of Action demonstrates that such activities are in violation of 6 NYCRR Part 196.

The facts of this proceeding are set forth in the Complaint and other pleadings, and in the affidavits of the parties.

[1] The First Cause of Action is in the form of an action which alleges violations of Article 14, § 1 of the Constitution, and will be considered by the Court at a later date.

STANDARD OF REVIEW

To determine if an agency acted without, or in excess of, its jurisdiction, or contrary to the law, the court must look to the relevant statutory language. See Lighthouse Pointe Property Associates LLC v. New York State Dept. of Environmental Conservation, 14 N.Y.3d 161, 176-177 (2010). If, after reviewing that language, the agency's actions are found to be contrary to the law, or in excess of its jurisdiction, then the actions must be annulled. See id.

In determining whether an action violates a particular law, the court is free to conduct its own analysis when the question is one of "'pure legal interpretation' of clear and unambiguous statutory terms". Lewis Family Farm, Inc. v. Adirondack Park Agency, 64 A.D.3d 1009, 1013 (3d Dept. 2009). The court is not required to defer to an agency's interpretation of the language at issue when "there is little or no need to rely on any special expertise on the agency's part". Id. See also Kee v. Daines, 68 A.D.3d 1503, 1504 (3d Dept. 2009); Madison-Oneida Board of Cooperative Educational Services v. Mills, 4 N.Y.3d 51, 58-59 (2004).

Because the APSLMP has the force and effect of law (Point I.A, infra), the Court herein is not required to defer to the Adirondack Park Agency's interpretation thereof. Adirondack Mtn.

Club and Protect the Adirondacks! v. Adirondack Park Agency, 33 M.3d 383, 389-390 (Sup. Ct. Albany Co. 2011).

The defendants allege that the Second and Third Causes of Action are untimely. An Article 78 proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner". CPLR § 217.

However, the statute of limitations does not begin to run until the challenged action is a final agency determination. Paulsen Development Co. of Albany, LLC v. County of Schenectady Dept. of Engineering and Public Works, 47 A.D.3d 1031, 1033 (3d Dept. 2008). Furthermore, the four month statute of limitations does not apply to a proceeding challenging an agency's action as lacking statutory authority or being in excess of the agency's jurisdiction. See Foy v. Schechter, 1 N.Y.2d 604, 612 (1956).

POINT I:

THE APSLMP BARS THE USE OF TRACKED MOTOR VEHICLES TO GROOM SNOW ON SNOWMOBILE TRAILS IN THE ADIRONDACK FOREST PRESERVE

The Second Cause of Action establishes that the use of tracked motor vehicles such as snowcats to groom snowmobile trails in the Adirondack Forest Preserve is prohibited by the APSLMP. Because the APSLMP is binding and has the force and effect of law, all permits and agreements issued for such purposes must be annulled.

A. The APSLMP is Binding Upon the Defendants

The APSLMP has the force and effect of law and is binding upon defendants-respondents New York State Department of Environmental Conservation ("DEC") and Adirondack Park Agency ("APA") (collectively "Defendants"). Helms v. Reid, 90 M.2d 583, 604 (Sup. Ct. Hamilton Co. 1977)(APSLMP has "the force of a legislative enactment"). Defendants have admitted "that actions by the Agency [APA] and DEC must conform to the Master Plan". Answer[2] ¶161. See also Plaintiff's Reply herein, at fn 8 and Exhibit D thereto. APA lacks the authority to avoid its requirements under the guises of "discretion" or "interpretation". Adirondack Mtn. Club v. APA, 33 M.3d at 389-

[2] Defendants' Objections in Point of Law, Answer, and Return dated September 25, 2013 (hereinafter "Answer").

390. APA has a "duty" to follow the APSLMP's requirements. Id. at 391.

Therefore, in their management of the Adirondack Forest Preserve, APA and DEC must adhere to the requirements of the APSLMP. Any action which is contrary thereto will be annulled. See Adirondack Mtn. Club v. APA, 33 M.3d at 391, 397 (annulling APA's refusal to classify state land under water); Adirondack Council v. APA, Sup. Ct. Essex Co., August 18, 1988, Viscardi, J., at 5-7 (annulling APA's decision to allow floatplane use in a Wilderness area beyond the time limits allowed by the APSLMP)(a copy of this decision is appended hereto).

B. The Plain Language of the APSLMP Prohibits Grooming Snow on Snowmobile Trails With Tracked Motor Vehicles

As set forth more specifically in ¶¶ 30-35, 124-169 of the Complaint, multiple provisions of the APSLMP (Record Exhibit 1) prohibit the use of tracked motor vehicles such as snowcats, and motorized equipment attached to such vehicles, for the grooming of snow on snowmobile trails in the Adirondack Forest Preserve. These provisions include the following:

- The only motor vehicles that the APSLMP allows to be used on snowmobile trails are snowmobiles. No other motor vehicles, such as snowcats, are permitted. APSLMP pp. 16-17, 22-23, 33-35. Therefore, non-snowmobile vehicles may not be used to groom snow

on snowmobile trails. Complaint ¶¶ 30-35 & 130-137; Reply ¶¶ 31-35, 42, 54-58, 63-64.

- All types of motor vehicles may be used to "maintain or construct permitted structures and improvements" in Wild Forest areas under certain circumstances. APSLMP p. 33, ¶(2)(a). However, grooming of the snow on a snowmobile trail is not maintenance of the trail (Reply ¶30(f)), and so non-snowmobile motor vehicles may not be used to groom snow under the guise of calling grooming maintenance. Complaint ¶¶ 138-145; Reply ¶¶ 28-31, 35-36, 40, 57-58.

- Motor vehicles may only be used to "maintain or construct permitted structures and improvements" when it is "necessary" to do so. APSLMP p. 33, ¶(2)(a). However, some trails are groomed solely with snowmobiles, so it is not "necessary" to use non-snowmobile motor vehicles for trail grooming, so it is not permissible. Complaint ¶¶ 166-167; Reply ¶¶ 23, 44.

- The APSLMP also prohibits the use of "motorized equipment", such as that which is towed behind snowcats for grooming purposes, on snowmobile trails. APSLMP pp. 17, 33-34; Complaint ¶¶ 146-150.

- Grooming is not listed in the APSLMP as an allowed use for motor vehicles and motorized equipment in Wild Forest areas. See APSLMP pp. 33-35. Complaint ¶151.

All of these provisions of the APSLMP clearly prohibit the use of non-snowmobile motor vehicles and motorized equipment to groom the snow on snowmobile trails in the Adirondack Forest Preserve.

C. Defendants' Multiple Policies, Practices, Plans and Guidances Do Not Supercede the APSLMP

Lacking any legal basis in the plain language of the APSLMP to support the legality of non-snowmobile grooming, and apparently wishing to avoid the process of duly amending the APSLMP, the Defendants have instead resorted to adopting various policies, practices, plans and guidance documents that purport to override and/or interpret the APSLMP so as to allow this activity on the Forest Preserve. See Connolly Aff. ¶¶ 8-24; Richards Aff. ¶¶ 8-46. However, these various documents conflict with the plain language of the APSLMP. Complaint ¶¶ 119-169; Reply ¶¶ 27-30, 37-43. As a matter of law, they can not supercede the APSLMP, and so they must be disregarded by the Court.

A state agency may not legislate by adopting "guidance" and similar documents which contain rules that are not authorized by statute. Destiny USA Development v. DEC, 63 A.D.3d 1568, 1570 (4th Dept. 2009). See also 29 Flatbush Associates v. DEC, 27 M.3d 1217(A), *3 (Sup. Ct. Kings Co. 2010). Likewise, APA and DEC may not legislate so as to allow practices which are not

permitted under the APSLMP, which has the force and effect of law, and is binding on the Defendants. Point I.A, supra.

Because the policies, practices, plans and guidance documents adopted by APA and DEC are not consistent with the APSLMP's prohibition on grooming the snow on snowmobile trails with non-snowmobile motor vehicles (Point I.B, supra; Complaint ¶¶ 119-169; Reply ¶¶ 27-30, 37-43), they are *ultra vires* and provide no legal grounds for permitting such grooming. See Destiny USA Development v. DEC, 63 A.D.3d at 1570; 29 Flatbush Associates v. DEC, 27 M.3d 1217(A) at *3.

The courts have consistently applied this rule to APA in its administration of the APSLMP. In Adirondack Mtn. Club v. APA, 33 M.3d at 389-391, the court rejected APA's claim that it had "discretion" as to when to follow the APSLMP and when not to. In Adirondack Council v. APA, 92 A.D.3d 188, 191 (3d Dept. 2012) the Court held that the APA/DEC joint "Management Guidance: Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park" (hereinafter "2009 Management Guidance") must still be consistent with the APSLMP and it can not be implemented if it is inconsistent with the APSLMP. Id. See also Adirondack Council v. APA, August 18, 1988, at 5-7 (attached hereto).

D. The Court Is Not Required to Defer To APA's Interpretation of the APSLMP

Although courts must sometimes defer to an agency's exercise of its judgment and expertise, they will not do so on questions of statutory interpretation. Lighthouse Pointe Property Associates v. DEC, 14 N.Y.3d at 176-177; Destiny USA Development v. DEC, 63 A.D.3d at 867; Lewis Family Farm v. APA, 64 A.D.3d at 1013. "[A]gency determinations that conflict with the clear wording of a statute are entitled to little or no weight." Destiny USA Development v. DEC, 63 A.D.3d at 867. Interpretation of the APSLMP is "a matter of statutory interpretation" and a "court is not required to defer to the APA's interpretation." Adirondack Mtn. Club v. APA, 33 M.3d at 390. See also Point I.A, supra.

Likewise, APA and DEC's policies, manuals, and guidelines do not warrant much deference from the courts, and unwritten past practices should get little or no deference. See Zelanis v. APA, 27 M.3d 1229(A), *6-7 (Sup. Ct. Essex Co. 2010). Where they are not consistent with a statute or regulations, they will not be followed. Id. When APA's interpretation of its own regulations, or in this case, the APSLMP, has no rational basis, its action will be overturned. See Simonson v. APA, 21 M.3d 775, 784-785 (Sup. Ct. Warren Co. 2008).

In the present case, APA insists upon reading into the APSLMP the authority to permit the use of non-snowmobile motor

vehicles to groom the snow on snowmobile trails. This is contrary to the clear wording of the APSLMP, and Defendants' interpretation thereof is entitled to no deference. Adirondack Mtn. Club v. APA, 33 M.3d at 390. See also Point I.A, supra.

E. Defendants' Interpretation of the APSLMP Is Arbitrary and Capricious

The Defendants' Answer and answering affidavits cite to no authority in the APSLMP that supports their theory about the use of motor vehicles for grooming. None of the arguments that they do present are supported by the APSLMP's clear wording.

The primary interpretation of the APSLMP offered by the Defendants is that the terms of the APSLMP do not need to be interpreted as "strictly as Protect urges". Connolly Aff. ¶28. Not only does this argument ignore the plain language of the APSLMP, it offers no rational argument or construction of the language of the APSLMP to support Defendants' interpretation.

Defendants' argument is not supported by the rules of statutory construction. The interpretation of statutory language should consider the legislative history, the circumstances surrounding its passage, and the history of the times. See McKinney's Statutes § 124. Here, the APSLMP was intended to, consistent with the "rigid constitutional safeguards for the public lands in the Adirondack park", "insure optimum overall conservation, protection, preservation, development and use of

the unique scenic, historic, ecological and natural resources of the Adirondack park." APA Act § 801; former APA Act § 807, now § 816.

The circumstances surrounding the adoption of the pertinent language of the APSLMP show that there was an ongoing effort by the initial drafters and later revisers of the APSLMP to restrict the use of snowmobiles and the grooming of snowmobile trails. Affidavit of Peter S. Paine, Jr., sworn to October 15, 2013 ("Paine Aff."); Affidavit of George Davis, sworn to March 15, 2011 ("Davis Aff.").

The interpretation of a statute should also further its object, spirit and purpose. See McKinney's Statutes § 96. Here, the purpose of preserving the constitutionally-protected wild forest nature of the State-owned Forest Preserve lands should be "'the great and controlling principle'" guiding the Court's interpretation of the APSLMP. Long v. APA, 76 N.Y.2d 416, 422 (1990) (quoting Ferres v. City of New Rochelle, 68 N.Y.2d 446, 451 [1986]). APA has an "environmental mandate". Association for the Protection of the Adirondacks v. APA, 64 A.D.3d 825, 826 (3d Dept. 2009) (interpreting APA's private land regulatory powers).

In light of the fact that grooming with motor vehicles is specifically permitted on certain cross country ski trails in Intensive Use areas, and the omission from the APSLMP of such

authorization for grooming snowmobile trails in Wild Forest areas (Complaint ¶¶ 119-169) the rational interpretation of the APSLMP is that the drafters of the APSLMP intentionally omitted any authority for grooming by non-snowmobile motor vehicles in Wild Forest areas. See McKinney's Statutes §§ 74, 97. In fact, the drafters of the APSLMP did not intend to allow grooming by motor vehicles in Wild Forest areas. See Paine Aff. ¶11. Accordingly, neither APA or the Court can, by implication, supply a provision where there is an indication that the drafters intended to omit it. See McKinney's Statutes § 74.

Contrary to Defendants' claims that the terms of the APSLMP do not need to be interpreted as "strictly as Protect urges" (Connolly Aff. ¶28), the "framers ... apparently intended a strict interpretation" thereof. Helms v. Reid, 90 M.2d at 593 (discussing interpretation of Constitution Article 14). See Paine Aff.; Davis Aff. Therefore, the court should give effect to the intention of the drafters of the APSLMP, by interpreting the APSLMP strictly. See McKinney's Statutes § 92; Adirondack Mtn. Club v. APA, 33 M.3d at 390; Adirondack Council v. APA, August 18, 1988, at 5-7 (attached).

Unlike its express authorization for grooming certain "improved cross country ski trails" (APSLMP p. 16, no. 15), the APSLMP makes no provision for the grooming of snowmobile trails with non-snowmobile tracked motor vehicles and motorized

equipment. Nor does grooming come under the exception to the rules for use of motor vehicles for maintenance. APSLMP p. 33, ¶2(a); Complaint ¶¶ 138-145; Reply ¶¶ 28-31, 35-36, 40, 57-58. Any other interpretation is not consistent with the intent of the drafters of the APSLMP. The Defendants' interpretations that purportedly allowed them to issue the approvals for grooming that are at issue herein are arbitrary and capricious, and should be annulled. Adirondack Mtn. Club v. APA, 33 M.3d at 390; Adirondack Council v. APA, August 18, 1988, at 5-7.

POINT II:

THE SECOND CAUSE OF ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS

The Second Cause of Action seeks to annul the temporary revocable permits ("TRP") and Adopt-A-Natural Resource ("AANR") agreements that allow the grooming of the snow on snowmobile trails in the Adirondack Forest Preserve with non-snowmobile motor vehicles such as snowcats, and with motorized equipment. The Second Cause of Action shows that the five TRPs specifically listed in ¶121 of the Complaint, and any other TRPs and AANRs allowing such grooming (Complaint ¶122), are in violation of the APSLMP, are arbitrary and capricious, in excess of DEC's jurisdiction, affected by error of law, and should be annulled. Complaint ¶¶ 119-169.

The five TRPs specifically listed in Complaint ¶121 were issued on December 17, 2012 and January 2, 2013. This proceeding was commenced on April 15, 2013, within four months of these TRPs being issued, as required by CPLR § 217. Therefore, the Second Cause of Action was timely as to those five TRPS and as to any TRPs and AANRs issued after December 15, 2012 (Complaint ¶122). Defendants can not, and do not, directly challenge the timeliness of the Second Cause of Action.

Instead, the Defendants claim that the Second Cause of Action "is an untimely collateral attack on the Agency's finding made November 13, 2009 that the use of tracked groomers on trails in Wild Forest areas of the Adirondack Park was appropriate and conformed to the Master Plan". Answer ¶B. Defendants' objection is specious because the Second Cause of Action does not challenge the November 13, 2009 APA resolution by which it approved the 2009 Management Guidance. That resolution was not a final agency action subject to judicial review of the issues raised in this proceeding. See Gordon v. Rush, 100 N.Y.2d 236, 242 (2003); New York Blue Line Council v. APA, 86 A.D.3d 756, 760-762 (3d Dept. 2011).

First, the November 13, 2009 APA resolution did not itself issue any TRPs or AANRs allowing the illegal use of tracked groomers. Instead, the November 13, 2009 resolution stated that "small tracked groomers will be allowed" on Class II Community

Connector Snowmobile Trails "through [TRPs] and [AANRs] with snowmobile clubs and communities". Record Exhibit 11, p. 3.

Second, the purpose of the November 13, 2009 APA resolution was to approve the 2009 Management Guidance (Record Exhibit 8), which stated that the "[t]ype and dimensions of grooming equipment [were] to be identified and approved in an AANR [or] TRP". Record Exhibit 11, Attachment 1, p. 14. Therefore, no applicable statute of limitations began to run from the time of the adoption of that resolution because further agency action was needed. See Paulsen Development Co. of Albany, LLC v. County of Schenectady Dept. of Engineering and Public Works, 47 A.D.3d 1031, 1033 (3d Dept. 2008). Furthermore, a challenge to the November 13, 2009 resolution regarding the type of grooming equipment used to groom the Class II Community Connector Snowmobile trails would have been fruitless until now, when the exact type and dimensions of grooming equipment have been identified and approved in current AANRs and TRPs.

Indeed, the Third Department has already ruled that a challenge by another party to the November 13, 2009 resolution and the 2009 Management Guidance as violating the APSLMP was "not ripe for review" because further administrative action was needed to implement the 2009 Management Guidance. Adirondack Council v. APA, 92 A.D.3d at 190-191. Thus, this argument by Defendants is disingenuous. If this proceeding had been brought in 2009, DEC

and APA, as they routinely do, would certainly have made a motion to dismiss it based upon an argument that the November 13, 2009 resolution merely approved a guidance document that was not yet ripe for review. In fact, DEC and APA did make, and win, just such an argument when that action was challenged on other grounds just after its adoption. See id.

Therefore, Plaintiff was not required to challenge APA"s approval of the 2009 Management Guidance, and its not doing so does not render the current proceeding untimely.

POINT III:

THE THIRD CAUSE OF ACTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS

The Third Cause of Action seeks to annul the TRPs and AANRs at issue because they violate DEC's regulations, which prohibit the use of motor vehicles on snowmobile trails. Complaint ¶¶ 170-184. The five TRPs specifically listed in the Complaint (¶121) were issued on December 17, 2012 and January 2, 2013. This proceeding was commenced on April 15, 2013, within four months of these TRPs being issued, and is timely under CPLR § 217. Therefore, the Third Cause of Action seeking annulment of those five TRPs and any TRPs and AANRs issued after December 15, 2012 (Complaint ¶122) was timely.

Answer ¶C claims that the proceeding is an untimely collateral attack on two certain AANRs from 2001, which are set

forth at Record Exhibit 22. Because these AANRs had terms of only five years (Record Exhibit 22, page 1 of each AANR), the relevance of this claim is unclear.

TRPs and AANRs are explicitly only temporary delegations of DEC's authority, and can be revoked or amended by DEC at any time. See ECL § 9-0105(15) & § 9-0113(6). 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). "TRPs and AANRs are typically issued for a one year period...". Affidavit of Maxwell Wolckenhauer, sworn to June 20, 2013, submitted in support of Defendants' motion to dismiss, ¶6.

Answer ¶C also alleges that the Third Cause of Action is "an untimely collateral attack on DEC's 2000 'Clarification of Practice'" (Record Exhibit 2, Appendix N) which purported to allow grooming with non-snowmobile motor vehicles. This document was merely an internal DEC policy and procedure document. As with the 2009 Management Guidance, the adoption of this document was not ripe for judicial review because further agency action was required. See Point II, supra.

Therefore, the statute of limitations does not bar the Third Cause of Action.

CONCLUSION

Plaintiff has demonstrated that the Second and Third Causes of Action have merit. Neither claim is barred by the Statute of Limitations. Therefore, the Second and Third Causes of Action should be granted.

Dated: October 15, 2013

/s/ John W. Caffry

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