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-

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

Defendants-Respondents.

REPLY

INDEX NO. 2137-13

RJI NO. 01-13-ST-4541

George B. Ceresia, Jr. Assigned Justice

Plaintiff-Petitioner Protect the Adirondacks! Inc. ("Plaintiff" or "PROTECT"), for its verified reply to the answer of the Defendants-Respondents herein dated September 25, 2013 ("Answer") and Defendants-Respondents' answering affidavits, by its attorneys, Caffry & Flower, states as follows:

Reply to the First Affirmative Defense (Answer ¶A)

1. The Combined Complaint-Petition herein ("Complaint") and the record demonstrate that the Defendants-Respondents New York State Department of Environmental Conservation ("DEC") and Adirondack Park Agency ("APA") (collectively "Defendants") have planned and approved a comprehensive system of "Class II" or "Community Connector" snowmobile trails in the Adirondack Forest

Preserve. See e.g. Answer ¶¶ 63 & 65 admitting that DEC plans to construct a "system" of such trails. See also Answer ¶¶ 69-70 admitting that DEC has already approved the construction of approximately 44 miles of such trails in the Forest Preserve; Answer ¶¶ 78-79 admitting the existence of a plan to construct a "Park-wide community connection snowmobile trail system", in part on Forest Preserve lands; and Complaint ¶¶ 67-70 listing the planned and approved trails.

2. The construction of this trail system will result in the clearing of dozens of acres of Forever Wild Forest Preserve land, and the destruction of at least 8,000 trees. Complaint ¶¶ 70-71, 84-96. To date, the actions of the Defendants in approving and beginning construction of this trail system have resulted in the destruction of over 2,000 trees in the Forest Preserve. Complaint ¶¶ 85-88; Answer ¶¶ 85-88. So far, approximately 15 acres of the Forest Preserve have been cleared. Complaint ¶¶ 71, fn 18, 74, 85-92; Answer ¶¶ 71, 74, 85-92.

3. The Defendants have admitted that they intend to continue to construct this system of Class II trails as additional Unit Management Plans ("UMPs") and work plans for this project are approved. Answer ¶72 admits that DEC "is preparing to construct other community connector trails". See also, Affidavit of Kristofer A. Alberga, sworn to on September 24, 2013, submitted in response to Plaintiff's September 13, 2013

motion for a preliminary injunction (describing the administrative process that DEC will use to continue the construction of these trails).

4. These actions of the Defendants are prohibited by Article 14, § 1 of the Constitution.

5. These actions of the Defendants are not speculative and the First Cause of Action (Complaint (¶¶ 81-118) is ripe for adjudication.

Reply to the Second Affirmative Defense (Answer ¶B)

6. The Second Cause of Action (Complaint ¶¶ 119-169), which 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, violates the Adirondack Park State Land Master Plan ("APSLMP"), is timely.

7. Defendants argue that this cause of action is an untimely collateral attack on a 2009 APA resolution which approved the "Management Guidance: Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park" ("2009 Management Guidance"). However, Plaintiff does not seek to challenge either that resolution or the 2009 Management Guidance.

8. The Second Cause of Action challenges five individual permits that were issued by DEC on December 17, 2012 and January 2, 2013.[1] Complaint ¶121. The issuance of these permits were actions taken by DEC separately from APA's approval of the 2009 Management Guidance.

9. The Complaint was filed on April 15, 2013, which, as to those five permits, was within the applicable four month limitation period provided by CPLR § 217. Therefore, as to those five permits, and any other such permits and agreements issued by DEC on or after December 15, 2012 which allow grooming the snow on snowmobile trails with motor vehicles other than snowmobiles, this Cause of Action is timely.

10. In addition, the "Management Guidance: Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park" (hereinafter "2009 Management Guidance") is mere guidance, and is not binding on APA, DEC or any other party. As such it was not subject to judicial review, nor was it ripe for review in 2009. See Plaintiff's Memorandum of Law of even date submitted herewith ("Mem. Law") Point II. Therefore, the APA's resolution approving it was also not ripe for review at that time.

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[1] The Second Cause of Action also challenges similar permits and agreements issued by DEC, the exact nature and dates of which were unknown to Plaintiff at the time of the filing of the Complaint. Complaint ¶122.

11. Now that actual permits and agreements for grooming the snow on snowmobile trails with motor vehicles other than snowmobiles have been issued, the issue is ripe. As discussed above, the action is timely with regard to at least five such permits.

Reply to the Third Affirmative Defense (Answer ¶C)

12. The Third Cause of Action (Complaint ¶¶ 170-184), which demonstrates that the grooming of the snow on snowmobile trails in the Adirondack Forest Preserve with motor vehicles such as snowcats violates 6 NYCRR § 196.1, is timely.

13. The Third Cause of Action challenges the issuance of five permits that were issued on December 17, 2012 and January 2, 2013.[2] Complaint ¶¶ 121, 170, 184. The Complaint was filed on April 15, 2013, which, as to those five permits, was within the applicable four month limitation period provided by CPLR § 217. Therefore, as to those five permits, and any other such permits and agreements issued by DEC on or after December 15, 2012, which allow grooming the snow on snowmobile trails with motor vehicles other than snowmobiles, this Cause of Action is timely. Mem. Law Point III.

[2] The Third Cause of Action also challenges similar permits and agreements issued by DEC, the exact nature and dates of which were unknown to Plaintiff at the time of the filing of the Complaint. Complaint ¶¶ 122, 170, 184.

Reply to the Allegations of the Answer

14. Answer ¶50(iii) alleges that a 2011 decision of Supreme Court, Albany County in Adirondack Council v. APA and DEC[3] previously denied claims that amendments to the Jessup River Wild Forest Unit Management Plan ("UMP") which authorized the construction and relocation of certain snowmobile trails violated Constitution Article 14, § 1 and the APSLMP. This claim is false. The petition in that proceeding was not an Article 14 action. That decision found that the mention of Article 14 in that proceeding was made in the context of the question of whether or not the approval of certain parts of the 2009 Management Guidance was arbitrary and capricious. Adirondack Council v. APA and DEC, at 4-5 (Exhibit A). No ruling was made on whether or not the 2009 Management Guidance violated Article 14 (id.), which is the issue in the First Cause of Action herein (Complaint ¶¶ 81-118).

15. That court did find that certain aspects of the 2009 Management Guidance did not violate the APSLMP. However, the issues therein concerned the location of certain trails. Adirondack Council v. APA and DEC, at 5-8 (Exhibit A). Those

[3] Adirondack Council v. APA and DEC, Sup. Ct. Albany Co., Oct. 7, 2011, Devine, J., Index No. 7991-101. Answer ¶50(iii) incorrectly states that a copy of this decision is attached to the Answer as Appendix A. However, it is not attached thereto. For the convenience of the Court, a copy is annexed hereto as Exhibit A. Counsel for the Plaintiff herein has been told by the attorney for the petitioner therein that no appeal was filed in that case.

issues are not presented in the Second Cause of Action in this case, which raises the question of whether or not grooming snow on snowmobile trails in the Adirondack Forest Preserve with motor vehicle groomers violates the APSLMP. Complaint ¶¶ 119-169. That issue was not adjudicated in Adirondack Council v. APA and DEC (Exhibit A), which did not address the issue of grooming at all. Therefore, that decision has no effect on the present case.

16. Answer ¶72 alleges that any challenge to the construction of community connector trails in the Jessup River Wild Forest is time-barred. The construction of such trails is challenged in First Cause of Action herein, which alleges that such construction would violate Article 14, § 1 of the Constitution. There is no statute of limitations that bars an action to remedy an ongoing violation of the Constitution. See Cash v. Bates, 301 N.Y. 258, 261 (1950).

17. Even if such claims were time-barred as to the Jessup River Wild Forest, that would not bar claims as to other Wild Forest units of the Forest Preserve, including the five other units listed in Complaint ¶121.

18. Answer ¶72 also alleges that any challenge to the construction of community connector trails in the Jessup River Wild Forest is barred by the doctrine of *stare decisis*. Again, this allegation appears to relate to the First Cause of Action under Article 14, § 1 of the Constitution. While Answer ¶72 does

not specify which decision or decisions would impose a *stare decisis* effect on the present action, this appears to be a reference to Adirondack Council v. APA and DEC, supra. As shown at ¶¶ 14-15, supra, and in Exhibit A hereto, that decision did not decide the issues which are presented in the present action.

19. Moreover, a decision of a Supreme Court Justice (in a case in which the Plaintiff herein was not a party) can not create a *stare decisis* effect that would be binding on another trial level court, such as the Court in the present action. See 22 N.Y.Jur.2d Courts and Judges § 220.

20. Even if such claims as to the Jessup River Wild Forest were barred by the doctrine of *stare decisis*, this would not bar claims regarding other units of the Forest Preserve, including the five other units listed in Complaint ¶121.

21. Answer ¶92 alleges that only trees of over 3" or more dbh (diameter at breast height) are of constitutional concern, and cites to two prior court cases for that unfounded proposition. This purported definition of "timber" as being limited to trees 3" dbh or more is not found in Article 14, § 1. As stated in Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852, 853-854 (3d Dept. 1993), this is merely a DEC administrative policy. It has no basis in the Constitution. Therefore, there is no constitutional basis for this Court to ignore trees under 3" dbh.

22. Answer ¶158 denies the allegation of Complaint ¶158 that the use of tracked motor vehicles for grooming the snow on snowmobile trails leads to the trails becoming wider. However, this denial is contradicted by Connolly Aff.[4] ¶27 and Richards Aff.[5] ¶¶ 23, 27, in which the Defendants admit that the use of such machines has led to the widening of snowmobile trails to accommodate their use.

23. Answer ¶167 denies the allegation of Complaint ¶167 that the grooming of snow on trails with motor vehicles other than snowmobiles is only desirable, and is not "necessary", as required by APSLMP p. 33, ¶(2)(a).[6] However, this denial is contradicted by the Defendants' admission at Richards Aff. ¶42 that on Class I snowmobile trails, the use of motor vehicles other than snowmobiles for the grooming of snow on trails is not permitted pursuant to the 2009 Management Guidance, and that only

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[4] Affidavit of James E. Connolly, sworn to September 24, 2103.

[5] Affidavit of Karyn B. Richards, sworn to September 25, 2103.

[6] **Motor vehicles, motorized equipment and aircraft ...**

2. In addition, the use of motor vehicles, snowmobiles, motorized equipment and aircraft will be allowed as follows:

(a) by administrative personnel where necessary to reach, maintain or construct permitted structures and improvements, for appropriate law enforcement and general supervision of public use, or for appropriate purposes, including research, to preserve and enhance the fish and wildlife or other natural resources of the area (emphasis added).

snowmobiles may be used for this purpose. If this is not permitted on Class I trails, then it is clearly not "necessary" and permitting it on Class II snowmobile trails does not comply with the requirements of the APSLMP.

Reply to the Affidavit of Karyn B. Richards

24. The September 25, 2103 affidavit of DEC employee Karyn B. Richards ("Richards Aff.") falsely claims (¶¶ 6, 45) that the Defendants' regulation of snowmobile use in the Adirondack Forest Preserve has become more restrictive with the passage of time. This is contradicted by the record, as summarized in the Richards Aff.

25. While at one time, snowmobile use was unregulated ("Richards Aff. ¶7), since DEC began regulating it in 1986, the trails have become wider and wider. Initially, in 1986, snowmobile trails were limited to being 8 feet wide, and certain trails were allowed to be up to 12 feet wide on curves and steep grades. Richards Aff. ¶17. In the 1990s, some trails were widened even more to accommodate grooming of the snow with larger motor vehicles and equipment. Richards Aff. ¶17. In 1998, trails could only be 12 feet wide on curves and steep slopes if no trees larger than 3 inches dbh needed to be cut. Richards Aff. ¶ 21.

26. In 2006, the allowable width was increased by 12-1/2%, as trails were now permitted to be 9 feet wide, and up to 12 feet wide on slopes and curves. Richards Aff. ¶¶ 33, fn 7, 36, 40(d). In addition, 12 foot wide trails were no longer limited to situations where no trees larger than 3 inches dbh needed to be cut. Compare Richards Aff. ¶ 21 (1998) to Richards Aff. ¶¶ 33, fn 7, 36, 40(d) (2006). Thus, the rules on the width of snowmobile trails have grown looser over the years, not more restrictive, as alleged.

27. The Richards Aff. (¶¶ 16-46) contains a long litany of various DEC and APA policies, guidances, and procedures that purport to allow the grooming of the snow on snowmobile trails in the Adirondack Forest Preserve with large tracked motor vehicles such as snowcats. However, these internal documents are not binding and they do not supercede the APSLMP, which prohibits the use of such vehicles for that purpose. Complaint ¶¶ 130-169; Mem. Law Points I.B & I.C. Therefore, these documents are irrelevant and the Court should disregard them.

28. Richards Aff. ¶18 claims that grooming of snow on snowmobile trails was considered by DEC to be "maintenance" of the trails pursuant to its 1986 internal policy on snowmobile trails (Record Exhibit 19). The significance of this claim lies in the fact that the use of motor vehicles, other than snowmobiles, on snowmobile trails, is prohibited by the APSLMP.

Complaint ¶¶ 130-137. An exception to this prohibition exists for certain construction and maintenance activities relating to permitted structures and improvements. APSLMP (p. 33, ¶2(a).

29. By arguing that grooming is maintenance, ¶18 seems to imply that grooming with motor vehicles is permissible under the APSLMP (p. 33, ¶2(a)). As shown by Complaint ¶¶ 138-145, 163-167, grooming is not "maintenance" under the APSLMP.

30. Defendants' argument is also unavailing because:

a. The 1986 DEC policy was only an internal policy, not a regulation, and has no legal, binding effect. Mem. Law Point I.C.

b. A mere policy does not supercede the APSLMP, which has the force and effect of law. Mem. Law Point I.A.

c. By its own terms, the 1986 DEC policy actually discouraged the practice of grooming, expressly finding that it was "not to be a function of the Department." Record Exhibit 19, p. 12. Therefore, grooming could not have been considered to be permissible "maintenance" of trails under the APSLMP (p. 33, ¶2(a)), which only permits the use of motor vehicles for maintenance by "administrative personnel." APSLMP p. 33, ¶2(a). As the Defendants themselves point out, when municipalities and private clubs undertake grooming, they do so as agents of the State, or "administrative personnel". Richards Aff. ¶¶ 51-52. See also Protect the Adirondacks v. DEC and APA, Sup. Ct. Albany

Co., August 22, 2013, Ceresia, J., Index No. 2137-13, at 18. Because grooming was “not to be a function of the Department”, and grooming by private entities can only be done as an agent “of the Department”, this provision of the 1986 DEC policy can not be considered to be a finding that grooming was permissible “maintenance” under the APSLMP.

d. By its own terms, the 1986 DEC policy did not say that motor vehicles, or anything else besides snowmobiles, could be used for grooming. Richards Aff. ¶18.

e. Even if grooming is considered to be “maintenance” under the APSLMP (p. 33, ¶(2)(a)), the use of motor vehicles other than snowmobiles to perform it is still not permissible under the APSLMP because the use of such motor vehicles to perform this function is not “necessary”, as required by APSLMP p. 33, ¶(2)(a). <u>See</u> ¶44, <u>infra</u>; <u>see</u> <u>also</u> Complaint ¶¶ 166-167.

f. DEC’s own 2006 “Snowmobile Plan for the Adirondack Park” (Record Exhibit 3), does not define grooming as maintenance. Paragraph 11 on page 191 of that document discusses the “use of motor vehicles for construction and maintenance”, which is permitted by APSLMP p. 33, (2)(a) in some circumstances. Paragraph 12 on page 191 of that document separately discusses “snowmobile route grooming”. In particular, it states that “[t]rail grooming is solely a manipulation of snow, and does not result in any physical alteration of the underlying ground.”

Thus, in addition to differentiating between "construction and maintenance" and "grooming", it shows that the grooming of the snow is not the same as maintaining the trail itself. Record Exhibit 3, p. 191.

g. Likewise, pages 58-63 of Record Exhibit 3 differentiate between the use of motor vehicles for "construction and maintenance" and for "snowmobile route grooming", which it defines as "the process of using equipment to prepare the trail snow surface". Id. at 61.

31. Although Richards Aff. ¶18 claims that grooming is "maintenance", the definitions in the APSLMP (p. 16) differentiate between the two activities, as shown by the distinction made between a "cross country ski trail", where grooming with motor vehicles other than snowmobiles is not allowed, and an "improved cross country ski trail", where this is allowed. Also, such grooming is limited to "improved" trails located in Intensive Use areas and is not permitted in Wild Forest areas. See Complaint ¶¶ 140-145. This shows that when APA wanted to allow such grooming, it did so (Mem. Law Point I.E), but no such provision for snowmobile trails is included in the APSLMP. Complaint ¶¶ 140-145.

32. Furthermore, when the definition of "improved cross country ski trail" was added to the APSLMP in 1979 to address the use of grooming machines on such trails, no such revision was

made so as to allow such grooming on snowmobile trails. If APA went to such lengths at that time to allow grooming of certain cross country ski trails, there is no rational basis to assume that it intended to allow such grooming on snowmobile trails when it did not make an equivalent amendment to allow grooming on snowmobile trails. The pertinent pages of the 1979 version of the APSLMP are annexed hereto as Exhibit B.

33. In 1986 the definition of "snowmobile trail" was amended to require them to have "essentially the same character as a foot trail". The pertinent pages of the 1987 version[7] of the APSLMP are annexed hereto as Exhibit C. Again, no amendment was made to allow for snowmobile trail grooming even though APA was otherwise amending the definition of "snowmobile trail". Indeed, the revised definition of "snowmobile trail" restricted such trails, rather than expanding them. Compare Exhibit B to Exhibit C.

34. It should also be noted that in 1986, DEC was already considering allowing grooming of snowmobile trails (Richards Aff. ¶18), yet when APA revised the APSLMP only a year later, it took no action to permit this activity.

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[7] Revisions to the APSLMP were prepared and approved by APA in 1986 and approved by Governor Mario M. Cuomo in 1987. Thus, this version of the APSLMP is referred to herein as the 1987 APSLMP. See Exhibit C.

35. The claim that grooming is "maintenance" is also contrary to the requirement of the APSLMP (p. 18, no. 31) which requires snowmobile trails to have "essentially the same character as a foot trail". Foot trails (APSLMP p. 16, no. 12) are not groomed, nor are large motor vehicles operated on them on a constant basis, as is required for grooming snowmobile trails. See Affidavit of Stephen C. Lewis, sworn to September 24, 2013.

36. Finally, Ms. Richards herself admits that to "maintain" and to "groom" are separate activities. Richards Aff. ¶¶ 25, 26.

37. Richards Aff. ¶22 claims that as of 1998 grooming snowmobile trails with tracked motor vehicles "was already an established practice in the Adirondack Park." No evidence is offered to support this claim. Moreover, even if such activity was occurring here and there, nothing in the Record shows that this was "an established practice." Most importantly, even assuming *arguendo* that it was a wide-spread and "established practice", and was occurring with DEC's support or acquiescence, it was still not legal under the APSLMP. See Complaint ¶¶ 119-169. Mere "practice" can not supercede the APSLMP, which has the force and effect of law.[8] Mem. Law Points I.A & I.C.

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[8] Respondents have admitted "that actions by the Agency [APA] and DEC must conform to the Master Plan". Answer ¶161. In a recent case involving the APSLMP (Adirondack Mtn. Club and Protect the Adirondacks! v. APA, 33 M.3d 383, 387 (Sup. Ct. Albany Co. 2011)), APA admitted that "the Master Plan has the 'force of a legislative enactment' and the Agency and DEC must comply with it...". Answering Affidavit of John S. Banta, APA

38. Richards Aff. ¶¶ 25 and 26 claim that a 2000 policy clarification issued by DEC (Record Exhibit 21) limited the use of motor vehicles for snowmobile trail grooming. To the contrary, this document was the first written policy that purported to authorize such use. As set forth at Richards Aff. ¶18, a prior 1986 DEC policy did not authorize this practice. Therefore, DEC did not officially begin to permit this until 2000. It then did so, despite the lack of an amendment to the APSLMP to permit it.

39. Richards Aff. ¶28 states that DEC began issuing Temporary Revocable Permits ("TRP"s) and Adopt-a-Natural-Resource agreements ("AANR"s) for the use of tracked grooming machines in 2001. The APSLMP, as in effect at that time, did not authorize this practice. Complaint ¶¶ 119-169. Therefore, this fact is irrelevant to this proceeding. Id.

40. Richards Aff. ¶29 claims that DEC's 2000 Interim Guidelines (Record Exhibit 21) defined "maintenance" as including grooming of snow. However, DEC simultaneously issued a "clarification" that differentiated between "the use of motor vehicles for snowmobile trail maintenance, construction and grooming activities". Record Exhibit 21, p. 303. That document

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Counsel, sworn to on December 13, 2010, ¶73; see also ¶¶ 12, 15. A copy of the pertinent parts thereof are annexed hereto as Exhibit D.

also listed "Trail Maintenance" and "Grooming" in entirely separate sections. Record Exhibit 21, pp. 303, 306.

41. In addition, those 2000 guidelines were only "interim" and are no longer in effect. More importantly, they do not supercede the plain language of the APSLMP and are irrelevant to the Second Cause of Action. Mem. Law Point I.C. See also ¶¶ 27, 30, 37, supra.

42. Also, at that time, even though DEC believed that such grooming with non-snowmobile motor vehicles was permissible, APA did not agree. As shown by a memo by APA's then-Director of Planning[9] John Banta to then-APA Chairman Dick Lefebvre, dated September 22, 2000, a copy of which is annexed hereto as Exhibit E, APA and DEC met to try to resolved this difference. Going into the meeting, it was APA's opinion that DEC's "Clarification" document (Record Exhibit 21) was "contrary to the SLMP and DEC regulations insofar as it permits a motor vehicle (i.e. a tracked groomer) to operate on a snowmobile trail." Exhibit E, p. 2. The memo concluded that DEC's "short term strategy is illegal on its face." Exhibit E, p. 3.

43. Richards Aff. ¶42 claims that the 2009 Management Guidance document "allows Class II community connector trails to be groomed with a tracked motor vehicle (tracked groomer) and drag of a width less than the trail width." However, the 2009

[9] Exhibit D, p. 1.

Guidance must still be consistent with the APSLMP and it can not be implemented if it is inconsistent with the APSLMP. Mem. Law Point I.C. Therefore, whether or not this practice conforms to the 2009 Management Guidance is completely irrelevant to the question of whether or not the TRPs and AANRs which are at issue in the Second Cause of Action comply with the APSLMP. Mem. Law Point I.C.

44. Richards Aff. ¶42 also concedes that grooming snow with tracked motor vehicles is not permitted on "Class I" snowmobile trails. The APSLMP (p. 33) only permits "the use of motor vehicles" ... "by administrative personnel <u>where necessary</u> to reach, maintain or construct permitted structures and improvements ..." (emphasis added). Even if, *arguendo*, grooming with motor vehicles was something that was allowed under the APSLMP to be done to "maintain" snowmobile trails, the fact that the Defendants found that they can "maintain" Class I snowmobile trails without such vehicles shows that it is not "necessary" to use them to "maintain" Class II trails. Therefore, the grooming of Class II trails with such vehicles is not permitted by the APSLMP. Complaint ¶¶ 166-167; ¶30, <u>supra</u>.

45. Richards Aff. ¶¶ 49-53 claim that the prohibition of 6 NYCRR § 196.1 on the use of motor vehicles on trails in the Forest Preserve by any "person" does not apply to the State or its agents because ECL § 9-0101(7) excludes the State from the

definition of "person". That claim is incorrect because the definition applies only to the statute. It is not found anywhere in 6 NYCRR and so it does not affect the interpretation of 6 NYCRR § 196.1.

46. The definitions applicable to 6 NYCRR Chapter II, including Part 196, are found in 6 NYCRR § 190.0(b).[10] Section 190.0(b) does not include a definition of "person". Nor does it incorporate by reference the definitions found in the ECL.

47. Therefore, the use of motor vehicles by any person, including a person who is an employee or agent of the State, to groom the snow on snowmobile trails is prohibited. Complaint ¶¶ 166-167.

Reply to the Affidavit of James E. Connolly

48. The September 24, 2103 Affidavit of now-retired APA employee James E. Connolly ("Connolly Aff.")(¶6) claims that neither the 1972 APSLMP or the 1979 revision included a definition of "snowmobile trail". This claim is false, as both of these versions of the APSLMP contained such a definition. See Record Exhibit 14, p. 8, no. 19 (1972 APSLMP) and Exhibit 15, p. 19, no. 30 (1979 APSLMP). Thus, it appears that Mr. Connolly knows little, if anything, about the development of the APSLMP

[10] 6 NYCRR § 190.0(b) provides that the definitions contained therein apply to "this Chapter", a reference to Chapter II of 6 NYCRR, which includes § 196.1.

and the evolution of its regulation of snowmobile trails. Indeed, he was not even employed by APA at the relevant time. Connolly Aff. ¶1.

49. Building on the erroneous claims in ¶6, Connolly Aff. ¶7 makes certain claims about the adoption of the definition of "snowmobile trail" in the 1987 version of the APSLMP. He claims that in 1986 the APA staff proposed to define "snowmobile trail", when if fact, the APSLMP already contained such a definition.

50. What actually occurred in 1986 is that APA amended the existing definition of "snowmobile trail" to limit the size of such trails by requiring them to have "essentially the same character as a foot trail". Record Exhibit 15, p. 19, no. 30. This language was intended, *inter alia*, to prevent the use of large tracked motor vehicles for grooming the snow on such trails. See ¶¶ 30-31, 33, infra.

51. Mr. Connolly states in ¶7 that the APA staff proposed a definition of snowmobile trails as "having 'essentially the same character and dimensions as a foot trail'", but then settled on the current language of "essentially the same character as a foot trail", removing the proposed words "and dimensions". He then claims that these words were deleted to allow for grooming. However, there is no evidence provided to support this claim. At the time in question, Mr. Connolly was employed by DEC, not APA (Connolly Aff. ¶1), so he would have no first-hand knowledge

of these alleged facts. This claim, and Mr. Connolly's entire affidavit, lack credibility.

52. Moreover, as Connolly Aff. ¶7 itself shows, the grooming in question at that point was grooming by snowmobiles, which was, and is, permitted under the APSLMP. It provides no support for the Defendants' claim that larger machines may be used for grooming snow on snowmobile trails.

53. Connolly Aff. ¶26 states, quite correctly, that page 12 of the APSLMP authorizes APA to interpret it. However, APA is also bound by the APSLMP and can not just make things up which are clearly contrary to its terms. Mem. Law Points I.A & I.C.

54. Connolly Aff. ¶26 also claims that nothing in the APSLMP "explicitly bars the use of tracked groomers pulling motorized equipment from grooming snowmobile trails". As set forth above, and in the Second Cause of Action, this claim is false.

55. Moreover, Connolly Aff. ¶26 misreads the way that the APSLMP's restrictions on the use of the various classifications of Forest Preserve areas works. As is repeatedly set forth in the State's Answer, the APSLMP's "guidelines must be read together with all of the other Wilderness and Wild Forest guidelines". Answer ¶41. The APSLMP does not allow any conceivable use of motor vehicles and motorized equipment in the Forest Preserve unless that use is "explicitly" barred, as Mr.

Connolly alleges. To the contrary, all uses of motor vehicles and motorized equipment are barred unless they are specifically permitted. As the APSLMP works its way from the most restrictive category (Wilderness) to the least restrictive (Intensive Use), the list of allowable uses of motor vehicles and motorized equipment expands. See APSLMP pp. 22-23 (Wilderness areas), pp. 27-28 (Primitive areas), p. 30 (Canoe areas), pp. 33-35 (Wild Forest areas).

56. Thus, Mr. Connolly's claim that grooming with motor vehicles and motorized equipment is allowed because it is not specifically barred is not supported by the actual language of the APSLMP and lacks a rational basis. Instead, such uses are only allowed if they are expressly permitted. Nothing in the plain language of the APSLMP allows motor vehicles and motorized equipment other than snowmobiles to be used for grooming snow on snowmobile trails, so this practice is barred.

57. In Wild Forest areas, such vehicles and equipment are barred on trails, including snowmobile trails. Defendants' attempt to avoid this prohibition by alleging that grooming with such vehicles and equipment constitutes "maintenance", which is an exception to the general prohibition. APSLMP p. 33, ¶2(a). However, other than their assertions, there is nothing in the APSLMP to support this claim.

58. Connolly Aff. ¶27 claims that the distinction made in the APSLMP between a “cross country ski trail” where such grooming is not allowed and an “improved cross country ski trail” where it is allowed, has no bearing on the question of whether or not such grooming can occur on snowmobile trails. As set forth above at ¶¶ 31-32, the contrary is true.

59. Connolly Aff. ¶27 also misstates the nature of Plaintiff’s position on this issue. Plaintiff does not claim that the ski trail definitions directly apply to snowmobile trails, as Connolly Aff. ¶27 alleges. What Plaintiff shows is that, when examined in the context of the entire APSLMP (see Answer, *passim*), the lack of similar definitions creating two similar types of snowmobile trails proves that such grooming is not allowed on snowmobile trails. Mr. Connolly’s straw man argument should be rejected.

60. Connolly Aff. ¶28 makes yet another straw man argument that misreads the Complaint. Contrary to the claims of Connolly Aff. ¶28, Plaintiff does not assert anywhere in the Complaint that the APSLMP’s prohibition on the use of motor vehicles other than snowmobiles, and motorized equipment, to groom the snow on snowmobile trails, is contained in the APSLMP’s definitions of “motor vehicle” and “motorized equipment”. Mr. Connolly does not even cite to any such alleged statement in the Complaint.

61. Not only did Plaintiff not make any such assertion, it would be nonsensical to do so. Nothing in those definitions (APSLMP pp. 16-17, no. 19, no. 21) allows or disallows any particular use of the machines defined therein. Those restrictions are found elsewhere in the APSLMP, primarily in the guidelines for the various types of Forest Preserve areas, e.g. pp. 22-23 (Wilderness areas) and pp. 33-35 (Wild Forest areas).

62. What the Complaint does prove is that these types of machines may not be used for grooming snow on snowmobile trails.

Plaintiff's Reply Affidavits Rebut the
Defendants' Unfounded Claims About the APSLMP

63. Ms. Richards' and Mr. Connolly's allegations are thoroughly rebutted by the affidavits of Peter S. Paine, Jr. and George Davis, which will be filed simultaneously herewith. Mr. Paine was a member of the APA from 1971 to 1995, and was the principal drafter of the original APSLMP and of its 1979 and 1987 revisions. See Adirondack Mtn. Club v. APA, 33 M.3d at 393. Mr. Paine was involved in the drafting of all of the provisions of the APSLMP that are at issue in this case. His affidavit traces the history of the evolution of the APSLMP's regulation of snowmobiles. He states, among other things, that the APSLMP does not allow the use of tracked motor vehicles to groom snow on snowmobile trails in the Forest Preserve. He also states that the 1987 addition of the APSLMP's requirement that snowmobile

trails must have "essentially the same character as a foot trail" was intended, *inter alia*, to prevent the use of large tracked groomers such as the ones at issue in this case.

64. Mr. Davis was the APA's Director of Planning from the Agency's creation until 1976. He was a co-author of the original APSLMP. As shown by his affidavit, grooming machines were never intended to be allowed on snowmobile trails without an amendment to the APSLMP.

65. By contrast, Mr. Connolly was not employed by APA until 2002 (Connolly Aff. ¶1) and Ms. Richards was only employed there from 1996-2000 (Richards Aff. ¶1). Neither of them had any role in the drafting of the APSLMP or its revisions. During their employment at APA no revisions to the APSLMP were undertaken. Therefore, their opinions on the meaning and intent of the APSLMP are entitled to little weight, if any.

Reply to the Affidavit of Stephen C. Lewis

66. The September 24, 2013 affidavit of Stephen C. Lewis ("Lewis Aff."), an employee of the Office of Parks, Recreation and Historic Preservation ("OPRHP")[11] proffers a lengthy defense of the practice of grooming the snow on snowmobile trails with

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[11] OPRHP has no legal role in the management of the Adirondack Forest Preserve. Compare ECL § 3-0301(1)(d) and § 9-0903(1) vs. the entire Parks, Recreation and Historic Preservation Law.

large motor vehicles, such as snowcats, rather than with snowmobiles. However, all of this is irrelevant.

67. Nothing in the Lewis affidavit overrides the plain wording of the APSLMP, which prohibits such activities. Complaint ¶¶ 119-169. Unlike the opinions of Mr. Lewis, the APSLMP has the force and effect of law. Mem. Law Point I.A. Regardless of what he may see as the desirability of such grooming, it is simply not permitted under the APSLMP.

68. Similarly, Mr. Lewis claims that “snowmobile administrators place grooming within the scope of maintaining a trail.” Lewis Aff. ¶13. Absolutely no factual foundation is given for this claim. Moreover, it is contrary to the plain language of the APSLMP (p. 33, ¶2(a))(Complaint ¶¶ 166-167) and must be disregarded. Mem. Law Point I.C.

69. Moreover, Mr. Lewis does not dispute the fact that OPRHP’s guidelines for the grooming of snowmobile trails call for the creation of “snow pavement”. See Complaint ¶¶ 114, 129; Return Exhibit 10, pp. 8, 17, 20, 21, 33.

70. Such an action is not consistent with the requirements of the APSLMP that snowmobile trails must have the “character of a foot trail”. APSLMP p. 18, no. 31; Complaint ¶¶ 114, 128-129, 158. Nor is it consistent with preserving the wild forest nature of the Forest Preserve and avoiding the creation of man-made settings thereon. See Complaint, First Cause of Action.

WHEREFORE, it is requested that judgment be granted:

(A) Enjoining Defendants from constructing, in the Forest Preserve, Class II Community Connector snowmobile trails, and other trails having similar characteristics or requiring like amounts of tree cutting, trails requiring construction techniques that are not consistent with the wild forest nature of the Forest Preserve, or trails that result in the creation of a man-made setting for the sport of snowmobiling;

(B) Ordering Defendants to rehabilitate the damage done to the Forest Preserve so far by the construction of said trails, including, but not limited to, the replanting of trees on said trails;

(C) Enjoining Defendants from using or permitting the use of motor vehicles such as snowcats, and motorized equipment, for the grooming of snow on the snowmobile trails in the Forest Preserve;

(D) Annulling TRPs number 6715, 6716, 7056, 7057, and 7241, and all other TRPs and AANR agreements described in the Complaint, Answer, affidavits, and exhibits herein;

(E) Denying the relief requested in Defendants' Answer;

(F) Awarding Plaintiff the costs and disbursements of this action-proceeding;

(G) Awarding Plaintiff its legal fees and other expenses pursuant to the New York State Equal Access to Justice Act, CPLR Article 86; and

(H) Granting such other and further relief as may be deemed just and proper by the Court.

Dated: October 15, 2013

/s/ John W. Caffry
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STATE OF NEW YORK)
)SS.:
COUNTY OF WARREN)

John W. Caffry, being duly sworn, deposes and says that deponent is an attorney for the Plaintiff herein; that deponent has read the foregoing reply and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true; and that this verification is made by the deponent because the material allegations thereof are within my personal knowledge, and because I am a Director of Plaintiff Protect the Adirondacks! Inc.

/s/ John W. Caffry
John W. Caffry

Sworn to before me this

______ day of October, 2013

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NOTARY PUBLIC

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