

April 9, 2014

VIA FACSMILIE and OVERNIGHT MAIL

Leilani Ulrich, Chairwoman, and Members of the Board
NYS Adirondack Park Agency
P.O. Box 99
1133 NYS Route 86
Ray Brook, NY 12977

Re: Draft Amendment to the 2010 Jay Mountain Wilderness Unit Management Plan

Dear Chairwoman Ulrich and Members of the Board:

On behalf of Adirondack Wild: Friends of the Forest Preserve, Atlantic States Legal Foundation, Protect the Adirondacks!, and the Atlantic Chapter of the Sierra Club, we respectfully submit these comments on the Draft Amendment to the 2010 Jay Mountain Wilderness Unit Management Plan ("Draft UMP Amendment") announced by the New York State Department of Environmental Conservation ("DEC") in a press release and in the Environmental Notice Bulletin on April 2, 2014. The Draft UMP Amendment purports to authorize NYCO Minerals, Inc. ("NYCO") to engage in mineral sampling operations within approximately 200 acres of Adirondack Forest Preserve land contained in lot 8, Stowers survey, town of Lewis, Essex county ("Lot 8"). Pursuant to the Adirondack Park State Land Master Plan ("APSLMP"), Lot 8 currently lies within the Jay Mountain Wilderness and therefore is entitled to the most stringent protections afforded under the APSLMP.

As is explained in our letter of January 17, 2014 ("January Letter," a copy of which is annexed hereto as Exhibit A), it is unlawful for the Agency to take any action with respect to the amendment of the Jay Mountain Wilderness UMP at this time. The Draft UMP Amendment is inherently inconsistent with the APSLMP guidelines for designated Wilderness, which bar the operation of motorized vehicles and equipment, the construction of new roads, and other activities required for mineral sampling.¹ Until the APSLMP is amended in the same manner as it was initially adopted, the Agency may not approve any UMP amendment authorizing those activities on Lot 8.²

¹ APSLMP at 19-24.

² Section 807(3) of the original Adirondack Park Agency Act authorized amendments of either the APSLMP or any UMP "in the same manner as initially adopted." APSLMP, App. I. Moreover, mineral sampling could not proceed lawfully on Lot 8 even following amendment of the APSLMP and Jay Mountain Wilderness UMP, unless the Legislature and DEC also amended relevant provisions of New York Environmental Conservation Law ("ECL") §§ 9-0101 *et seq.*; New York Codes, Rules and Regulations ("NYCRR"), tit. 6, parts 190-99 (the "Part 190 Regulations"); and DEC Program Policy, ONR-3, Temporary Revocable Permits for State Lands and Conservation Easements.

In addition, scheduling a public comment period at this time would represent a radical departure from the Agency's longstanding practice. The Draft UMP Amendment, Temporary Revocable Permit ("TRP"), and Work Plan for the proposed mineral sampling do not provide an accurate description of existing conditions at the site, offer an insufficient account of the potential environmental impacts of exploratory drilling, and fail to describe adequate measures to avoid or to mitigate the adverse impacts of NYCO operations. As we explain below, all of those analyses must be submitted to the Agency before it schedules a public comment period on the conformance of the Jay Mountain Wilderness UMP amendment with the APSLMP. We therefore urge the Agency not to take any action at this time with respect to the Draft UMP Amendment.

There will be more than enough time to undertake the necessary statutory and regulatory revisions, without material impact on NYCO, because at the very time that NYCO is seeking to conduct exploratory drilling on Wilderness land, it also is seeking approval of a major southeasterly expansion of its Lewis Mine.³ NYCO proposes to enlarge the mine by almost 50 percent, from 90 acres to 132 acres—the largest single increase the company has sought since the Agency began regulating NYCO's activities. Following review under the State Environmental Quality Review Act ("SEQRA"), mining may proceed expeditiously in that area—which is not state-owned land or designated Wilderness—providing all the more reason not to rush the proposed sampling on Lot 8. Instead, the Agency should ensure that all required statutory and regulatory revisions are lawfully adopted, that all the requisite environmental studies are complete and properly released for public scrutiny, and that all disputed facts are resolved in a formal adjudicatory hearing, before scheduling statewide public legislative hearings and a comment period on its proposed conformance determination.

I. The APSLMP Must Be Revised before the Agency May Consider the Draft UMP Amendment.

Both DEC and Agency staff offer an interpretation of the November 2013 constitutional amendment that has no basis in law or logic. DEC asserts: "This UMP amendment is based on the implicit repeal by the 2013 constitutional amendment of SLMP Wilderness guidelines that would otherwise prohibit NYCO's mineral sampling operations within the Jay Mountain Wilderness area."⁴ Similarly, the transmittal memorandum to Terry Martino from Jim Townsend, dated April 2, 2014 ("Transmittal Memorandum"), states: "The legal effect of the constitutional amendment is that the SLMP's Wilderness Guidelines do not apply to Lot 8; thus there is no discretion for the Agency or DEC whether to permit this activity and no question about the activity's conformance with the SLMP." Transmittal Memorandum at 1. Neither of these claims is supported with legal authority.

³ Permit Application 2013-138, <http://apa.ny.gov/Hearings/index.cfm>.

⁴ Draft UMP Amendment at 4.

As we explained in our January Letter, the constitutional amendment did nothing more than suspend—temporarily and for the limited purposes expressly stated in the amendment’s text—the otherwise absolute mandates under article XIV, section 1, of the New York Constitution that Lot 8 “be forever kept as wild forest lands” and that timber not be “sold, removed, or destroyed.” Even DEC admits that, notwithstanding the constitutional amendment, “Lot 8 is still part of the Forest Preserve” at this time.⁵

Because Lot 8 remains part of the Forest Preserve, and neither the Legislature nor the voters suspended *non-constitutional* protections for Forest Preserve, all of the usual statutory and regulatory protections for Forest Preserve—including the APSLMP—are still fully in effect.⁶ Before passage of the constitutional amendment, the Agency could not amend the APSLMP to permit mineral sampling on Lot 8. Now, the Agency can amend the APSLMP to authorize the exploration, without violating the New York Constitution, but the Agency *must* do so, before the APSLMP will allow what the Draft UMP Amendment proposes.

The staff assertions to the contrary not only are legally unsupported but also make no sense. DEC’s claim that the constitutional amendment “implicitly” repealed the APSLMP guidelines for designated Wilderness, without providing alternative language to govern Lot 8, leaves both DEC and the Agency without any standard whatsoever to apply when deciding whether the Draft UMP Amendment is consistent with the APSLMP.⁷ Mr. Townsend’s assertion that the guidelines do not apply to Lot 8 similarly leaves the site wholly untethered to otherwise applicable safeguards for Forest Preserve. There is nothing in the language of the constitutional amendment to suggest, however, that by suspending Article XIV’s “forever wild” and timber preservation guarantees, either the Legislature or the voters intended to exempt Lot 8 from *all* legal provisions applicable to Forest Preserve—and even DEC does not insist upon that extreme position.⁸ Rather, the non-constitutional requirements identified in our January Letter remain in effect, and they must be amended before the Agency or DEC will have any legal basis on which to allow mineral sampling on Lot 8.⁹

⁵ *Id.*

⁶ It is well established that the APSLMP has the force of a legislative enactment. *See Adirondack Mtn. Club and Protect the Adirondacks! v. Adirondack Park Agency*, 33 Misc. 3d 383, 389-391 (Sup. Ct. Albany Cnty. 2011); *Helms v. Reid*, 90 Misc. 2d 583, 604 (Sup. Ct. Hamilton Cnty. 1977),

⁷ Indeed, it would leave the Agency without any standard to apply when evaluating *all* future UMPs or UMP amendments for Forest Preserve land classified as Wilderness.

⁸ DEC acknowledges that, at this point, Lot 8 remains subject to some constitutional protection. *See id.* DEC also acknowledges that the APSLMP requires amendment of the Jay Mountain Wilderness UMP and that the APSLMP’s area description of the Jay Mountain Wilderness Area must be amended before Lot 8 may be conveyed to NYCO. *See* Draft UMP Amendment at 4. n. 1. How DEC has decided which provisions of the APSLMP were “implicitly” repealed and which remain in effect is a mystery.

⁹ For further argument why there is no reason to conclude that the APSLMP or any other legal provision was repealed by implication, see Exhibit A at 10-11.

If the Agency adopts the position that current APSLMP guidelines do not control Lot 8 and refuses to amend the APSLMP to provide new governing standards, the Agency's conformance determination will be inherently arbitrary and capricious and contrary to law.¹⁰ For the first time in its history, the Agency will allow industrial activity to proceed on designated Wilderness in state Forest Preserve land—before legislative approval of a land swap—in the complete absence of any legitimate standards on which to base its decision. In doing so, the Agency also will violate the express requirements of the APSLMP, which provides in part:

*The unit management plans must apply the general guidelines and criteria in the master plan and cannot amend the master plan itself. Unit management plans shall be regarded as a mechanism to refine and apply the general guidelines and criteria in the master plan to specific conditions on the ground, at a level of detail appropriate to administration and management.*¹¹

The 2010 Memorandum of Understanding (“MOU”) between the Agency and DEC confirms that the APSLMP must be amended before adopting any proposed UMP not in conformance with existing guidelines, stating:

A UMP cannot amend the APSLMP and as finally adopted shall be in conformance with the general guidelines and criteria of the APSLMP. Any issues with respect to conformance of a proposed UMP with the APSLMP will be resolved and any necessary Amendments to the APSLMP acted on . . . prior to [DEC] providing the AGENCY with a proposed Final UMP for final review and determination as to whether such UMP complies with the general guidelines and criteria set forth in the APSLMP.¹²

The same requirements apply to UMP amendments.¹³ Therefore, if the existing guidelines do not apply to Lot 8 the proposed amendment of the Jay Mountain Wilderness UMP cannot

¹⁰ Mr. Townsend admits that a conformance determination will be necessary. See Transmittal Memorandum at 2 (“Once the comment periods are complete, a final version of the amendment will be presented for a conformance determination by the Agency.”).

¹¹ APSLMP at 12 (emphasis added).

¹² Memorandum of Understanding Between the Adirondack Park Agency and the Department of Environmental Conservation Concerning Implementation of the State Land Master Plan for the Adirondack Park 7 (March 2010), available at http://www.apa.ny.gov/State_Land/2010-APA-DEC-MOU.pdf.

¹³ The APSLMP expressly states that “[a]ny material modification in adopted [UMPs] will be made following the procedure for original unit plan preparation.” APSLMP at 11; see also MOU at 13 (“Any modification involving new or expanded improvements to an adopted UMP prior to the periodic five-year update must be processed as an Amendment to the UMP following the procedure for original UMP preparation.”).

proceed in a legal vacuum, as Agency staff suggests, but rather must await consideration until the APSLMP is amended to provide binding standards.

Finally, the APSLMP must be amended, or the public comment period recommended in the Transmittal Memorandum will be an utter sham. Comments necessarily will be addressed to a potential conformance determination, when there will be no operative guidelines to which the Draft UMP Amendment could possibly conform. The Agency should refuse to participate in this unprecedented and spurious process and send the Draft UMP Amendment back to DEC, for resubmission once the APSLMP is properly amended.

II. The Agency Should Not Depart from Normal Procedures under the MOU and the Public Comment Policy.

The Agency appears poised to substitute a public comment period that runs concurrently with DEC's ongoing public comment period on the Draft UMP Amendment and the TRP for the public comment period normally addressed to proposed final UMP amendments. Doing so would violate the MOU and the Agency's Public Comment Policy. Unless the Agency chooses to authorize two comment periods—or invents a brand new procedure uniquely designed to curtail scrutiny of the proposed mineral sampling on Lot 8—its public review process may occur only after completion of DEC's public comment period under SEQRA, which occurs for “at least 30 days” and is scheduled “prior to development of a final draft UMP.”¹⁴

At this point, DEC has submitted to the Agency only the Public Draft UMP Amendment, with an associated TRP and Work Plan. According to the MOU: “Upon release of the Public Draft, [DEC] staff will provide a presentation to the Agency on the proposed management actions contained in the Public Draft”¹⁵ Notably, only “*after* completion of public review and comment” on the Public Draft and DEC's preparation of “a response to public comments” does DEC prepare a “proposed Final UMP” amendment.¹⁶ The proposed Final UMP amendment must “include a summary of all public comments received and [DEC] responses to comments,” and it is the proposed Final UMP amendment that is presented to the Agency as a “first reading” prior to Agency review for APSLMP conformance.¹⁷

Under both the MOU and the Public Comment Policy, the Agency's public review process begins only after the “first reading” by DEC of the proposed Final UMP amendment. The MOU specifies that the Agency “accept written public comments on the conformance of the proposed Final UMP with the APSLMP for a minimum of two weeks *subsequent to the ‘First Reading’ by [DEC] staff*”¹⁸ The Public Comment Policy confirms that this “minimum two week comment period” is “established *after the ‘First Reading’* of the Unit Management Plan by DEC

¹⁴ Public Comment Policy at 2.

¹⁵ MOU at 10.

¹⁶ *Id.* at 11.

¹⁷ *Id.*

¹⁸ *Id.* (emphasis added).

staff.”¹⁹ In short, the Agency’s determination of the proposed amendment’s conformance with the APSLMP, and its public comment period concerning this question, are supposed to occur *subsequent to* DEC’s public review process under SEQRA and following the submission of a “proposed Final UMP” amendment.

According to Agency staff, DEC plans to ignore the MOU, to present the Public Draft UMP Amendment to the Agency on April 11, and—before DEC completes the required public review under SEQRA and develops a proposed Final UMP amendment—to ask the Agency to open a public comment period on APSLMP conformance concurrent with the DEC’s ongoing public comment period.²⁰ The Agency agenda for the April 11 meeting condones this unprecedented departure from normal procedure by describing DEC’s presentation as a “First Reading.”²¹ This description is inconsistent with the MOU, under which the “first reading” is of the *proposed Final UMP amendment* developed “after completion of public review and comment.”²² Moreover, the Agency’s public review process is intended “to allow for comment on *the final draft plan’s compliance with the SLMP*,” and that process is supposed to take place only after DEC completes its own public review under SEQRA, revises the Public Draft UMP amendment into a proposed Final UMP amendment, and submits the final proposal to the Agency for determination on compliance with the APSLMP.²³ In its rush to allow drilling on Lot 8, DEC asks the Agency to sidestep its own Public Comment Policy and the MOU by holding a public comment period concurrent with DEC’s own. The Agency should reject the invitation to proceed in violation of “lawful procedure.”²⁴

III. The Draft UMP Amendment Presented to the Agency Fails to Satisfy the Requirements of SEQRA.

A. DEC Has Not Submitted Legally Required Documentation.

Amendment of the Jay Mountain Wilderness UMP is subject to SEQRA, as a Type I action that “carries with it the presumption that it is likely to have a significant adverse impact on the environment.”²⁵ Type I actions include any unlisted actions approved by an agency “occurring wholly or partially within . . . any historic . . . site . . . that is listed on the National Register of

¹⁹ Public Comment Policy at 3 (emphasis added); *see also id.* at 2 (“Once DEC has submitted the UMP to the Agency for determination on compliance with the SLMP, the Agency will initiate a public review process and comment period.”).

²⁰ *See* Transmittal Memorandum at 2 (explaining that DEC staff “will ask the Agency to authorize a public comment process to be held concurrently with DEC’s public comment period,” and “[o]nce the comment periods are complete, a final version of the amendment will be presented for a conformance determination by the Agency”).

²¹ *See* APA Preliminary Agenda 3 (April 11, 2014), http://apa.ny.gov/Mailing/2014/04/FullAgency/PreliminaryAgencyAgendaApril2014_4-sas.pdf.

²² MOU at 11 (emphasis added); *see also* Public Comment Policy at 2-3.

²³ MOU at 11 (emphasis added); Public Comment Policy at 2-3.

²⁴ N.Y. C.P.L.R. § 7803.

²⁵ 6 NYCRR § 617.4(a)(1).

Historic Places.”²⁶ The Adirondack Forest Preserve in which Lot 8 is located is listed on the National Register of Historic Places as a Natural Historic Landmark.²⁷

The MOU provides that, when preparing UMPs, DEC normally will serve as lead agency and the Agency will serve as an involved agency in the process undertaken pursuant to SEQRA.²⁸ The Agency’s Public Comment Policy also states that:

NYS DEC as lead agency conducts an extensive public input process as an integral component for development of final draft [UMPs]. APA is officially an involved State agency within the SEQR process. This process, which includes extensive input from APA staff on a broad range of issues primarily focused on compliance with the [APSLMP], is conducted in accordance with the SEQR process and includes public meetings and formal comment periods.²⁹

According to the MOU, the “Public Draft” of the UMP amendment that “is released by [DEC] for public review and comment *will contain appropriate SEQRA documents.*”³⁰ For a Type I action, these documents at a minimum include a full Environmental Assessment Form.³¹ The subsequent “proposed Final UMP” also must be accompanied by “necessary SEQR documentation.”³²

In contravention of SEQRA and the MOU, the public Draft UMP Amendment released on April 2, 2014, does not contain any SEQRA documents. Under the Agency’s own regulations implementing SEQRA, “[n]o application or submission pursuant to . . . any . . . statute or regulation, shall be considered complete” until the submission of information, “including a completed environmental assessment form,” that is “necessary to assist” the Agency in

²⁶ *Id.* § 617.4(b)(9).

²⁷ See 34 Fed. Reg. 2580, 2590 (Feb. 25, 1969). The UMP amendment also is a Type 1 action because the sampling operations it purports to allow, together with edge effects created by forest fragmentation, will “involve[] the physical alteration of 10 acres.” 6 NYCRR § 617.4(b)(6)(i). Moreover, before the Agency may allow mineral sampling to proceed on Lot 8, it must amend the APSLMP to suspend the Wilderness Guidelines applicable to the Jay Mountain Wilderness Area or temporarily downgrade the classification of Lot 8 to permit exploratory drilling. APA’s own regulations implementing SEQRA specify that amendments to the APSLMP that reclassify land from a more restrictive to a less restrictive category are Type I actions “likely to have a significant effect on the environment.” 9 NYCRR § 586.5(a).

²⁸ MOU at 9.

²⁹ Public Comment Policy at 2.

³⁰ MOU at 10 (emphasis added).

³¹ 6 NYCRR § 617.6(a)(2); see also *id.* § 617.20 App. C.

³² MOU at 11.

“determining whether an action may have a significant effect on the environment.”³³ DEC’s failure to include a completed full environmental assessment form with its Draft UMP thus provides yet another reason why the Agency should refuse to open a public comment period on the draft and instead should send it back to DEC.

B. SEQRA Requires Far More Thorough Study, Documentation, Analysis, and Mitigation than Is Provided in the UMP Amendment, TRP, and Work Plan.

Lot 8 is located within the Jay Mountain Wilderness, which enjoys the most stringent protections of all state Forest Preserve lands classified under the APSLMP. The constitutional amendment allows the State to revise current statutory and regulatory requirements so as to allow mineral sampling in Lot 8, but for as long as Lot 8 remains state Forest Preserve, the Agency should insist upon all possible precautions to ensure minimal ecosystem disruption over both the short and long term. If the State undertakes the revisions and authorizes the drilling, Wilderness land will be transformed into an industrial zone—unquestionably a significant adverse impact requiring the preparation of an environmental impact statement (“EIS”). DEC has failed to submit any documentation pursuant to SEQRA, much less the mandatory EIS. The Agency should decline to consider the Draft UMP Amendment, until DEC cures that deficiency.

The documents submitted with the Draft UMP Amendment—the TRP and Work Plan—fall far short of the requirements of SEQRA. Especially because mining in Lot 8 may turn out not to be economically feasible, and the reclaimed site may revert to fully protected Wilderness, documentation should include field studies of the baseline characteristics of potentially affected areas both on and within 300 feet of the footprint of roads and drilling pads, to account for new forest edge and to provide an objective standard against which post-drilling restoration and compensation for damage can be assessed. In addition, the materials should describe possible environmental impacts and the measures necessary to avoid or to mitigate adverse effects. As is explained below, DEC’s submission does not begin to satisfy those requirements.

1. DEC Has Not Conducted Adequate Baseline Studies of Flora, Fauna, and Water Resources on Lot 8.

An adequate description of the environmental impacts of a proposed action cannot be developed without an accurate and comprehensive account of existing conditions. Such an account also is necessary if there is to be any hope of meaningful reclamation or restoration of Lot 8 after mineral sampling or ultimate mining. At the very least, field studies and photographs should be prepared by a qualified professional ecologist, certified forester, or landscape architect with demonstrated experience in restoration ecology, documenting all

³³ See 9 NYCRR § 586.6(b). Here, DEC submits the Draft UMP Amendment to the Agency for a determination on APSLMP conformance pursuant to the Adirondack Park Agency Act, N.Y. Exec. L. § 816 (requiring that UMPs “shall conform to the general guidelines and criteria set forth in the master plan”).

parameters necessary to establish the baseline for complete site restoration following NYCO operations. For the entirety of Lot 8, those parameters include, at a minimum:

- Land contours,
- Drainage patterns,
- Soil characteristics,
- Extent and location of wetlands, streams, vernal pools, and other water resources throughout a full year-long hydrological cycle,
- Identity, numbers, and location of threatened and endangered (“T&E”) species, and other species of special concern, and location of key wildlife habitats,
- Identity, numbers, and location of migratory birds, during both migration and breeding seasons, and location of their habitat and nests,
- Type and density of native plant community, including a full census of mature trees, and
- All nine components of DEC’s criteria for “old growth” forest, including a comprehensive inventory, with statistically based tree sampling and core-aging.

The documents submitted to the Agency do not begin to provide the requisite baseline data. The wetlands mapping described in the Draft UMP Amendment included only aerial photography, not actual field studies, and the photography was undertaken on January 29, 2014, when water bodies almost certainly were frozen and covered by snow. Even the consultant that prepared the aerial wetlands map stated that it was “[s]ubject to field verification.” That verification should be performed when wetlands and other water resources reach their maximum extent. In addition, spring field sampling and biological surveys should be performed late this April and in early May, to locate amphibian, reptile, and herpetofaunal species, including rare, threatened, and endangered salamanders breeding and foraging within vernal pool sites—some of the largest and potentially biologically rich vernal pools in the Adirondack Park.

Other materials addressing existing site conditions are similarly deficient. Land contours, soil characteristics, and drainage patterns have not been documented. There are no field studies of T&E species, other species of special concern, migratory birds, or key wildlife habitats. There is no description of non-native species that should be excluded from any restoration effort.

The report prepared by the New York Natural Heritage Program also is seriously flawed. Under New York law:

The term “old-growth forest” shall mean a parcel of at least ten acres which includes all of the following: an abundance of late successional tree species, at least one hundred eighty to two

hundred years of age in a contiguous forested landscape that has evolved and reproduced itself naturally, with the capacity for self-perpetuation, arranged in a stratified forest structure consisting of multiple growth layers throughout the canopy and forest floor, featuring canopy gaps formed by natural disturbances creating an uneven canopy and conspicuous absence of multiple stemmed trees and coppices. Typically, old-growth forest sites are also characterized by an irregular forest floor containing an abundance of coarse woody materials which are often covered by mosses and lichens, show limited signs of human disturbance since European settlement, have distinct soil horizons that include definite, organic, mineral, alluvial accumulation, and unconsolidated layers, and have an understory that displays well developed and diverse herbaceous layers.³⁴

The Natural Heritage Program staff parsed this definition into nine components, characterizing old-growth forest as forest: (1) at least 10 acres in size, (2) with an abundance of late successional tree species, at least 180-200 years old, (3) in contiguous forested landscape with natural, self-perpetuating reproduction, (4) with stratified forest structure, (5) featuring a mosaic of canopy gaps and mature patches, (6) characterized by an abundance of coarse woody debris, often covered with mosses and lichens, (7) limited signs of human disturbance, (8) distinct soil horizons, and (9) diverse herbaceous understory.³⁵ The staff's analysis of these criteria is at odds with its conclusion that Lot 8 does not qualify as old-growth forest.

The staff concluded that the forest on Lot 8 unquestionably satisfied six of the nine criteria for old-growth forest, including items (1), (3), (4), (5), (7), and (9). In addition, the staff found that "late-successional species are the most abundant at [their] observation points," but they core-sampled only three trees and missed significant sections of the site.³⁶ The photographs annexed to these comments as Exhibit B suggest that a more complete survey would reveal trees at least 180 years of age, in satisfaction of item (2). The staff also found "some indicator species for old-growth forests" on tree trunks and admitted that the methodologies they used to measure coarse woody debris with moss and lichens resulted in a "potential loss in accuracy and complete representativeness," suggesting that a more scientifically defensible examination would show satisfaction of item (6). There was little assessment of soil characteristics at the site, so there was no basis for any determination with respect to item (8). With clear satisfaction of

³⁴ ECL § 45-0105(6). The definition of "old-growth forest" under New York law also appears to be stricter than most definitions applied in eastern states, under which forests of 120-150 years in age qualify.

³⁵ Draft UMP Amendment, App. B at 1.

³⁶ *Id.* at 2. The additional five core samples taken in March 2014 from four randomly chosen locations in Lot 8 do not cure this problem. A scientifically designed comprehensive survey is required to assess forest stand age in this rich, high quality, northern hardwood forest ecosystem with levels of biological integrity rarely seen in the Forest Preserve.

six criteria, and inadequate study with respect to the final three, Lot 8 cannot be ruled out as old-growth forest. A thorough investigation should be completed to provide an accurate account of existing conditions at the site.

2. DEC Has Not Adequately Identified Likely Natural Resource and Ecosystem Impacts from the Proposed Mineral Sampling.

The TRP and Work Plan do not constitute an adequate substitute for the environmental impact analysis required under SEQRA. There is virtually no assessment of the likely effects of pre-drilling construction or mineral sampling. Lot 8 overlies or is in close proximity to one of the largest stratified aquifers in the eastern Adirondacks, serving northern New Russia, all of Elizabethtown, and areas northward into Lewis. An EIS should examine the potential impacts from drilling to depths of 400 feet. Moreover, the applicant admits that it is likely to use toxic additives for the drilling process, but there is no discussion of potential water impacts from spills or other accidents, including seepage to groundwater, especially in the absence of lined drilling pads or secondary containment for toxic fluids.

Other crucial analyses also are missing, including evaluations of:

- impacts on wildlife from the noise of drilling and other motorized equipment, human presence during operations, or the clearing of forest, including especially on Black Bear foraging and winter denning habitat,
- the creation of new edge habitat conducive to invasive or otherwise destructive species,
- visual impacts of the planned tree-felling for roads and well pads from within Lot 8, from major roadways and the scenic Northway corridor (I-87),
- scenic impacts from critical Wilderness viewshed destinations, such as the bluffs and peaks of Slip, Bald and Seventy Mountains,
- impacts on recreational, aesthetic, and experiential opportunities for solitude and sense of remoteness in a Wilderness setting, and
- the implications of soil compaction along access road and on the pads, which will exacerbate stormwater runoff and impede revegetation following the completion of NYCO's operations.

In the long term, even if mining does not proceed, there will be adverse water quality and ecosystem impacts from deforestation and forest fragmentation and reduced recreational and aesthetic values, especially from the loss of old-growth trees. These direct and indirect impacts of the mineral sampling represent just a few examples of key missing information that must be included in an adequate EIS for the project.

In addition to direct and indirect impacts of the exploratory drilling, adequate SEQRA documents must include an analysis of cumulative impacts, including those caused by the

existing Lewis mine and NYCO's proposed Derby Brook expansion.³⁷ Cumulative impacts are impacts that occur "when multiple actions affect the same resource(s)."³⁸

[Cumulative] impacts can occur when the incremental or increased impacts of an action, or actions, are added to other past, present and reasonably foreseeable future actions. Cumulative impacts can result from a single action or from a number of individually minor but collectively significant actions taking place over a period of time They may include indirect or secondary impacts, long term impacts and synergistic effects.³⁹

Cumulative impacts are to be assessed "when actions are proposed, or can be foreseen as likely, to take place simultaneously or sequentially in a way that the combined impacts may be significant."⁴⁰

Here, it is plainly foreseeable that the proposed tree clearing and drilling in the untouched Wilderness of Lot 8; the devastation already caused by the existing NYCO mine; and the additional harm anticipated from NYCO's planned Derby Brook expansion will have cumulatively significant impacts. The existing Lewis mine is "a massive pit" plunging eight stories deep into the earth,⁴¹ from which up to 63 truckloads of ore are extracted each day.⁴² The Derby Brook expansion would increase the footprint of NYCO's current permitted impacts by nearly fifty percent—from 89.9 acres to 132.4 acres—and would permanently harm 1.06 acres of wetlands and 1,502 feet of a tributary to the Derby Brook.⁴³ NYCO also is seeking for the first time at the Lewis mine to extract and sell the overburden, substantially increasing truck traffic and its attendant noise impacts on residents along the local road providing access to the mine. Viewed as an incremental impact in the context of this existing and reasonably anticipated harm, the ecological damage that will be caused by the clearing of 1,254 trees in Lot 8 and the fragmentation of its intact forests and wildlife habitat clearly raise the prospect of significant cumulative impacts, which the agencies must consider. None of the impacts of the Lewis mine or its proposed expansion are so much as mentioned in the materials before the Agency.

³⁷ 6 NYCRR § 617.9(b)(5)(iii)(a).

³⁸ DEC, SEQR Handbook 83 (3d ed. 2010), *available at* http://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Brian Mann, *Mining Company Pushes for Adirondack Land Swap* (Oct. 9, 2013), http://www.dec.ny.gov/enb/20140402_not5.html.

⁴² Adirondack Park Agency Completed Applications, http://www.dec.ny.gov/enb/20140402_not5.html.

⁴³ *Id.*

3. More Stringent Terms and Conditions Must Be Included in the TRP and Work Plan to Protect Forest Preserve Ecosystems.

The TRP lists 26 “special terms and conditions” applicable to the mineral sampling operation. DEC’s effort to reduce the most obvious damage to Lot 8 is welcome, but it cannot pretend to meet the standards appropriate for Wilderness land. In addition to the items that DEC identifies, at least the following measures also should be required prior to construction:

- Submission of a comprehensive written restoration plan, prepared by an independent qualified professional, detailing measures designed to return the site to baseline conditions to the extent technically feasible, including lists of required tree species and specification of stem counts needed for forest recovery,
- Submission of an invasive species plan, prepared by an independent qualified professional, detailing measures designed to protect long-term viability of native vegetation and wildlife,
- Application for an individual State Pollution Discharge Elimination System permit, rather than coverage under the DEC General Permit for Stormwater Discharges Associated with Industrial Activity (GP-0-12-001),
- Development and implementation of a strengthened Stormwater Pollution Prevention Plan (“SWPPP”) that clearly addresses the impacts of deforestation and soil compaction, with maps and drawings clearly depicting the site perimeter, major roadways, water sumps, discharge locations, surface water bodies, and other site features that purport to be included but in fact are not clearly marked in the current Work Plan, and
- Prohibition of the use of eco-toxic drilling muds or any products for which the absence of ecotoxicity has not been established.

During the exploratory drilling, the following measures should be required, at a minimum:

- Relocation of drilling pads to avoid clearance of any trees more than 12” in diameter and disruption of key wildlife habitats,
- Implementation of improved erosion and sedimentation controls,
- Installation of pad liners and secondary containment for toxic fluids or semi-fluids, including mandatory use of drip pans for all parked equipment,
- Prohibition of operations during bird migration and breeding seasons, and
- Interim reclamation to ensure maximum protection during operations and post-operation restoration in compliance with the written restoration plan.

Following mineral sampling, if mining is not anticipated, the following requirements should be imposed:

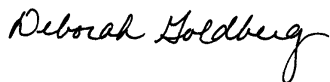
- Implementation of mitigation measures for impairment of wetlands, streams, and other water resources; degradation of soils; and harms to native vegetation, wildlife, habitat, and ecosystems,
- Implementation of the invasive species plan,
- Implementation of the written restoration plan,
- Quarterly inspection for the first three years and annual inspection for the following ten years, of all mitigation measures, invasive species control measures, and restoration measures to ensure successful implementation and ecosystem recovery and, where necessary, prompt repair, replacement, or redesign of any unsuccessful measures, and
- Where adverse impacts cannot be fully mitigated, or resources cannot be fully restored, payment of natural resources damages, including for loss of habitat and injury to species from the creation of new forest edge.

IV. Conclusion

The passage of ballot Proposal Number Five last November removed only one layer of legal protection for Lot 8 and only for expressly specified purposes. Because no enabling legislation has been passed to implement the amendment of article XIV, section 1, of the New York Constitution, mineral sampling operations may not proceed on Lot 8, and Lot 8 may not be exchanged for other land, until, the laws, regulations, plans, and policies identified in our January Letter are lawfully revised. In addition, the Agency and DEC must comply fully with SEQRA and the MOU, including by providing for public comment as is also required under the Agency's Public Comment Policy. Because none of those legal requirements have yet been fulfilled, the Agency should decline to consider the Draft UMP Amendment or to open a public comment period at its meeting on April 11, 2014.

Should you have any questions, you may call my direct line: 212-845-7377 or reach me via e-mail at dgoldberg@earthjustice.org. Thank you for your consideration.

Respectfully,



Deborah Goldberg
Managing Attorney

cc: Andrew Cuomo, Governor (via First Class Mail only)
Basil Seggos, Deputy Secretary for Environment
Eric Schneiderman, Attorney General
Lisa M. Burianek, Deputy Chief, Environmental Protection Bureau, OAG
Dean Skelos, Senate Majority Leader
Sheldon Silver, Assembly Speaker

Mark J. Grisanti, Chair, Environmental Conservation Committee, Senate
Robert Sweeney, Chair, Environmental Conservation Committee, Assembly
James T. Townsend, General Counsel, APA
Terry Martino, Executive Director, APA
Joseph P. Martens, Commissioner, DEC
Marc Gerstman, Executive Deputy Commissioner, DEC
Kathy Moser, Deputy Commissioner for Natural Resources, DEC
Edward F. McTiernan, General Counsel, DEC
Robert K. Davies, Director, Division of Lands and Forests, DEC
Bradley Field, Director, Division of Mineral Resources, DEC
Robert S. Stegemann, Director, Region 5, DEC

Exhibit A



January 17, 2014

VIA E-MAIL and FIRST CLASS MAIL

Joseph Martens, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-0001

Re: Potential Mining Operations in Jay Mountain Wilderness, Adirondack Forest Preserve

Dear Commissioner Martens:

We understand that, at a meeting of the Forest Preserve Advisory Committee ("FPAC") on January 10, 2014, the New York State Department of Environmental Conservation ("DEC" or the "Department") announced that it intends to publish a draft temporary revocable permit ("TRP") authorizing NYCO Minerals, Inc. ("NYCO") to engage in mineral sampling operations on designated wilderness land within the Adirondack forest preserve, notwithstanding the protections afforded to such land under the following statutes, regulations, plans, and policies:

- the Adirondack Park Agency Act, N.Y. Exec. L. §§ 800 *et seq.* (the "APA Act" or the "Act"),
- the Adirondack Park State Land Master Plan ("APSLMP"),
- the adopted Jay Mountain Wilderness Unit Management Plan ("UMP"),
- New York Environmental Conservation Law ("ECL") §§ 9-0101 *et seq.*,
- New York Codes, Rules and Regulations ("NYCRR"), tit. 6, parts 190-99 (the "Part 190 Regulations"), and
- DEC Program Policy, ONR-3, Temporary Revocable Permits for State Lands and Conservation Easements.

At the FPAC meeting, DEC evidently contended that, under *Durante v. Evans*, 464 N.Y.S.2d 264 (3d Dep't 1983), *aff'd*, 476 N.Y.S.2d 828 (N.Y. 1984), all of the foregoing law governing wilderness areas within the state forest preserve was abrogated with respect to "approximately 200 acres of forest preserve land contained in lot 8, Stowers survey, town of Lewis, Essex county" ("Lot 8"), when the voters approved Proposal Number Five last November.¹

On behalf of Adirondack Wild: Friends of the Forest Preserve, Atlantic States Legal Foundation, Protect the Adirondacks!, and the Sierra Club, Atlantic Chapter, we respectfully suggest that *Durante v. Evans* does not support DEC's contention and that the provisions listed above remain in full force and effect. Although Proposal Number Five exempted Lot 8 from the "forever

¹ See New York State Board of Elections, Form of Submission of Proposal Number Five, An Amendment (2013), <http://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalFiveFinal.pdf>.

wild" mandate and other protections in article XIV, section 1, of the New York State Constitution, for the narrow purposes approved by the voters, the listed requirements remain unchanged, and the amendment imposed new requirements for implementing legislation. Accordingly, we request that within 15 business days DEC confirm the continuing applicability to Lot 8 of all non-constitutional protections for wilderness areas on forest preserve land, including those listed above and the following provisions:

- the State Environmental Quality Review Act ("SEQRA"), ECL article 8,
- 6 NYCRR Part 617 (State Environmental Quality Review),
- the State Administrative Procedures Act ("SAPA"),
- the Mined Land Reclamation Law ("MLRL"), ECL §§ 23-2701 *et seq.*,
- 6 NYCRR subch. D (Mineral Resources), and
- the Freshwater Wetlands Act, ECL article 24.

We also ask for confirmation at the same time that DEC will fulfill its obligations under all of those unaltered, non-constitutional provisions before permitting NYCO to conduct any minerals sampling operations in Lot 8 and that the Department will await passage of the implementing legislation required under the new constitutional amendment before authorizing any exchange of Lot 8 (in whole or in part) for other land. The legal analysis underlying our requests is set forth in brief below.

BACKGROUND

As long ago as 1885, the New York Legislature declared that State-owned lands in eight Adirondack counties were protected forest preserve.² In 1892, after the designation proved inadequate to afford the desired protection, the Legislature created the Adirondack Park, encompassing both the state forest preserve and private lands in the central region. *See id.* The Park now is "the largest publicly protected area in the contiguous United States, greater in size than Yellowstone, Everglades, Glacier, and Grand Canyon National Park combined."³

In 1894, the voters of New York amended the State Constitution, to give forest preserve land within the Adirondack Park a layer of protection beyond that afforded by previously enacted legislation. The new constitutional provision, effective in 1895, stated:

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.⁴

² Adirondack Park Agency, State Land, http://apa.ny.gov/State_Land/index.html.

³ Adirondack Park Agency, About the Adirondack Park, http://www.apa.ny.gov/About_Park/index.html.

⁴ N.Y. Const. art. XIV, § 1 (formerly art. VII, § 7).

We understand that the State acquired Lot 8 at a tax sale in the early 1890s, prior to passage of the constitutional amendment in 1894. Lot 8 has remained forest preserve land since that time.

NYCO operates a wollastonite mine (the Lewis mine) on land it owns adjacent Lot 8. The open pit mine now plunges nearly eight stories down, and “[t]rucks the size of small buildings” haul out the rock.⁵ NYCO hopes to expand the Lewis mine into Lot 8, but first it must conduct mineral sampling operations to determine the quality and quantity of wollastonite that exists there. The sampling operations initially would involve geologic mapping, core drilling, and trenching; if the initial exploration shows favorable results, “it is then necessary to extract a bulk sample of representative material from the deposit for additional testing to determine what marketable products can be produced.”⁶ If mining proceeds, it will require drilling and blasting to fragment the wollastonite prior to removal.⁷ As is explained below, none of these activities are permissible on Lot 8 under current law.

LEGAL ANALYSIS

I. Passage of Proposal Number Five Gave the State the Option to Permit Exploratory Drilling on Lot 8, Subject to Compliance with Non-Constitutional Requirements Protecting Forest Preserve Land.

The recent passage of Proposal Number Five removed from Lot 8 the permanent and absolute constitutional protection afforded to other state-designated wilderness areas in the Adirondack forest preserve, for specific purposes identified in the text of the Proposal, but the amendment of article XIV, section 1, of the New York Constitution left intact all protections established in non-constitutional requirements. Those requirements must be followed if the State chooses to exercise its newly granted option to authorize mineral sampling operations on Lot 8. The following analysis outlines the implications of the constitutional amendment, summarizes the key applicable non-constitutional protections for Lot 8, and explains why *Durante v. Evans* does not excuse compliance with those provisions.

A. New York Constitution, Article XIV, Section 1

The constitutional amendment approved by the voters on November 5, 2013, directly addressed the provisions of article XIV, section 1, of the New York Constitution requiring that state forest preserve “be forever kept as wild forest lands,” forbidding sale or exchange of forest preserve lands, and barring the sale, removal, or destruction of timber on those lands.⁸ The amendment stated in pertinent part:

⁵ Brian Mann, *Mining Company Pushes for Adirondack Land Swap* (Oct. 9, 2013), <http://www.northcountrypublicradio.org/news/story/22951/mining-company-pushes-for-adirondack-land-swap>.

⁶ Jessica E. Kogel, et al., *Industrial Minerals & Rocks: Commodities, Markets and Uses* 1031 (7th ed. 2006).

⁷ See *id.*

⁸ N.Y. Const. art. XIV, § 1.

Notwithstanding the foregoing provisions, the state *may* authorize NYCO Minerals, Inc. to engage in mineral sampling operations, solely at its expense, to determine the quantity and quality of wollastonite on approximately 200 acres of forest preserve land contained in lot 8, Stowers survey, town of Lewis, Essex county provided that NYCO Minerals, Inc. shall provide the data and information derived from such drilling to the state for appraisal purposes. *Subject to legislative approval of the tracts to be exchanged* prior to the actual transfer of title, the state *may* subsequently convey said lot 8 to NYCO Minerals, Inc.. . . on condition that *the legislature shall determine* that the lands to be received by the state are equal to or greater than the value of the land to be conveyed by the state and on condition that the assessed value of the land to be conveyed to the state shall total not less than one million dollars.⁹

Following passage of Proposal Number Five, Lot 8 no longer must “be forever kept as wild,” and the state may choose to allow its use for the limited purposes expressly stated in the text, but the amendment did not abrogate any other legal requirements.

Moreover, when it passed the concurrent resolution approving Ballot Proposal Five and sent it to the voters, the Legislature did not enact companion legislation enabling the relevant state agencies to change the use of forest preserve land or to exchange it for other land (as it did, for example, with Proposal Number Four), and such implementing legislation has not even been introduced. Therefore, all of the non-constitutional substantive and procedural safeguards for state forest preserve land, including Lot 8, continue in full force and effect, until they are amended in accordance with law. The amendment lifts the *constitutional* prohibition on mineral sampling operations in Lot 8 and on the exchange of Lot 8 for other land, but it does so subject to other unchanged legal requirements, subsequent legislative approval of the tracts to be exchanged, and legislative confirmation that the value of the land to be given to the State equals or exceeds the value of the forest land and have an assessed value of at least \$1 million.

The language of the proposal that appeared on the November 2013 ballot confirms that the voters amended the Constitution to allow (but not require) the transfer under article XIV. In relevant part, the proposal stated:

The proposed amendment to section 1 of article 14 of the Constitution would *authorize* the Legislature to convey forest preserve land located in the town of Lewis, Essex County, to

⁹ New York State Board of Elections, Text of Proposal Number Five, An Amendment (2013), <http://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalFiveFinal.pdf> (emphasis added).

NYCO Minerals, a private company that plans on expanding an existing mine that adjoins the forest preserve land.¹⁰

The proposal presented to the voters on the ballot also stated that, in exchange for Lot 8, NYCO would give the State land of at least equal value, which would be added to the forest preserve, and that NYCO would restore Lot 8 and return it to the forest preserve upon completion of the mining.¹¹

In sum, the passage of Proposal Number Five removed for limited purposes the layer of special protection conferred by the New York Constitution, so the questions whether and to what extent Lot 8 may be developed or transferred now are governed only by non-constitutional legal requirements. Those statutory and regulatory requirements remain in effect, and they provide substantial, multi-layered protections for state forest preserve land. The State therefore may not approve mineral sampling operations on Lot 8 or conveyance of Lot 8 to NYCO, unless both approvals comply fully with those requirements, the key provisions of which are summarized below.

B. Adirondack Park Agency Act

In 1971, New York's Legislature enacted the APA Act "to insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack park."¹² To those ends, the Legislature also established the Adirondack Park Agency ("APA" or the "Agency") and gave the Agency until June 1, 1972, to adopt a master plan for management of state lands within the park.¹³ Following gubernatorial approval of the APSLMP, as required under the Act, DEC was "authorized and directed to develop, in consultation with the agency, individual management plans for units of land classified in the master plan," which were to guide the development and management of State lands in the Park.¹⁴ The Act also required periodic review, and permitted amendment, of both the APSLMP and the individual management plans, in the same manner as initially adopted.¹⁵

¹⁰ New York State Board of Elections, Form of Submission of Proposal Number Five, An Amendment (2013) (the "Ballot Language"), <http://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalFiveFinal.pdf>; see also New York State Board of Elections, Abstract of Proposal Number Five, An Amendment (2013), <http://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalFiveFinal.pdf> ("The proposed amendment would *allow* the State to convey approximately 200 forest preserve acres to NYCO Minerals for mining.") (emphasis added).

¹¹ See Ballot Language, *supra* note 10.

¹² N.Y. Exec. L. § 801.

¹³ See *id.* § 803; APA, APSLMP, App. I (Oct. 2011) (setting forth original section 807(1) of the Act).

¹⁴ APSLMP, App. I (setting forth original section 807(2) of the Act); see N.Y. Exec. L. § 816(1).

¹⁵ See APSLMP, App. I (setting forth original section 807(3) of the Act).

1. Adirondack Park State Land Master Plan

The APSLMP, as amended by the Agency in consultation with DEC and approved by the Governor, currently provides a legally binding classification system and guidelines for the preservation, management, and use of state lands within the Park.¹⁶ Recognizing that “the protection and preservation of the natural resources of the state lands within the Park must be paramount[,]” the APSLMP states unequivocally that “[h]uman use and enjoyment of those lands should be permitted and encouraged, so long as the resources in their physical and biological context as well as their social or psychological aspects are not degraded.”¹⁷ The land classification system developed with that theme in mind includes nine basic categories, and the most strictly protected category is “wilderness.”¹⁸

“Wilderness” is defined by the APSLMP as an area of state land “where the earth and its community of life are untrammelled by man.”¹⁹ Such land has “a primeval character, . . . which is protected and managed so as to preserve, enhance and restore, where necessary, its natural conditions.”²⁰ There are 16 officially designated wilderness areas within the Park, representing nearly 85 percent of the designated wilderness in eleven northeastern states.²¹ Lot 8 is within the Jay Mountain Wilderness Area.²²

Guidelines for management and use of state lands within the Park are tailored to each category within the land classification system. The APSLMP provides: “The primary wilderness management guideline will be to achieve and perpetuate a natural plant and animal community where man’s influence is not apparent.”²³ Specifically, the APSLMP prohibits any new non-conforming uses within any designated wilderness area as well as any new structures or improvements that are not in conformity with finally adopted unit management plans.²⁴ All structures and improvements other than those specifically permitted are deemed to be non-conforming, and no structures or improvements associated with mining are listed.²⁵ Specifically, new roads are prohibited, and individuals other than administrative personnel are barred entirely from using motorized vehicles or equipment in wilderness areas.²⁶ Under the

¹⁶ See APSLMP at 1. Because the APSLMP is subject to gubernatorial approval, “it has been construed as having ‘the force of a legislative enactment.’” *Adirondack Mountain Club Inc. v. Adirondack Park Agency*, 33 Misc. 3d 383, 837 (Sup. Ct. Albany Cnty. 2011) (citing *Helms v. Reid*, 90 Misc. 2d 583, 604 (Hamilton Cnty. 1977)).

¹⁷ *Id.* (emphasis added).

¹⁸ See *id.* at 14.

¹⁹ *Id.* at 19.

²⁰ *Id.*

²¹ See *id.* at 19, 24.

²² See *id.* at 62.

²³ *Id.* at 19.

²⁴ See *id.* at 19-20.

²⁵ See *id.* at 20-21.

²⁶ See *id.* at 21-22.

APSLMP, Lot 8 thus may not be used for minerals sampling operations; any approval of such operations will require the prior amendment of the APSLMP.

2. Jay Mountain Wilderness Area Unit Management Plan

Management of Lot 8 is governed by the UMP.²⁷ “The UMP provides a proactive and unified strategy for protecting the natural resources of the unit while allowing for public recreation.”²⁸ The document also sets forth 15 management principles specific to wilderness areas, which guide management of the Jay Mountain Wilderness Area, including Lot 8. For example, the UMP states that “[a]ll management actions must consider their effect on the wilderness resource so that *no harm* comes to it.”²⁹ Adirondack wilderness areas are to be preserved “as wild and natural as possible.”³⁰

The UMP specifically addresses the permissible extent of “Man-made Facilities,” including boundary lines, trails, trail-heads, campsites or lean-tos, and signs.³¹ Notably, the UMP recognizes that there is not a single maintained facility or improvement within the unit, and that the small size of the Jay Mountain Wilderness Area increases the risk that its wilderness character will be compromised by improvements.³² Accordingly, the UMP provides:

Therefore, no new trails are being proposed . . . in order to preserve the opportunities for solitude and primitive unconfined recreation that characterize the unit at present. In future revisions of this plan, new trails should only be proposed if necessary for resource protection.³³

The UMP notes that there is not even a campsite or a lean-to in the Jay Mountain Wilderness Area and that none are needed, none are being proposed, and none will be proposed unless they are “absolutely necessary” for resource protection.³⁴ Rather, the overall management objective is to “[k]eep area wild/undeveloped.”³⁵ Similarly, because “[p]ublic use is permitted to the extent that it does not degrade the physical, biological, and social characteristics of the area,” the UMP recommends adoption of new regulations limiting the size of groups visiting the area for recreational purposes.³⁶

²⁷ See DEC, UMP (Aug. 2010), available at http://www.dec.ny.gov/docs/lands_forests_pdf/jmwump.pdf.

²⁸ *Id.* at ii.

²⁹ *Id.* at 71 (emphasis added).

³⁰ *Id.* at 72.

³¹ See *id.* at 86-92.

³² See *id.* at 46, 88.

³³ *Id.*

³⁴ *Id.* at 90.

³⁵ *Id.*

³⁶ *Id.* at 92

No use other than recreation is permitted by the UMP. A single half-mile dirt road of undetermined legal status is the only non-conforming use identified within the entire Jay Mountain Wilderness Area.³⁷ The use of the area for mining, including minerals sampling operations, plainly would be inconsistent with the current UMP. Accordingly, the fundamental premises of the UMP would have to be revised before Lot 8 could be used for such purposes.

C. Article 9 of the ECL, the Part 190 Regulations, and DEC Guidance

The UMP is designed to comply not only with the APSLMP but also with article 9 of the ECL ("Article 9") and its implementing regulations.³⁸ Article 9 confirms that all state-owned lands within Essex County (with a few exceptions inapplicable here) are "forest preserve" and confers upon DEC the "power, duty and authority to: 1. Exercise care, custody and control" of those lands.³⁹ Article 9 also empowers DEC to "[i]dentify, manage and conserve" rare plants, animals, and ecological communities on state-owned land under DEC's jurisdiction and to "[m]ake rules and regulations and issue permits for the temporary use of the forest preserve."⁴⁰

To protect the state lands governed by Article 9, the Legislature banned the cutting, removal, injury, or destruction of trees (except in specific circumstances not relevant here), and prohibited the building of any structures without a DEC permit.⁴¹ Article 9 also flatly proscribes—with no exceptions—the depositing of rubbish or any other waste on forest preserve lands or the lease or transfer of any such lands.⁴² Thus, the Legislature would have to amend Article 9 before DEC could approve any use of Lot 8 that would require tree clearance or the depositing of waste or any transfer of Lot 8 in exchange for other land.

Pursuant to Article 9, the APA Act, and other provisions of federal and state law, DEC promulgated the Part 190 regulations, which govern the use of state lands.⁴³ To preserve the character of the lands governed by the Part 190 Regulations, DEC bars the erection of any permanent tent platforms or lean-tos on the lands.⁴⁴ The Part 190 Regulations also specifically provide: "The use of State lands . . . for private revenue or commercial purposes is prohibited" (except under circumstances not relevant here).⁴⁵

Some of the Part 190 Regulations apply specifically to "Wilderness Areas in the Adirondack Park" and to the forest preserve.⁴⁶ Section 196.1 forbids the use of motorized vehicles in the

³⁷ *Id.* at 96.

³⁸ *See id.* at 64.

³⁹ ECL §§ 9-0101(6), 9-0105(1).

⁴⁰ *Id.* § 9-0105(15), (19).

⁴¹ *See id.* § 9-0309(1)-(2).

⁴² *See id.* § 9-0309(4)-(5).

⁴³ *See* 6 NYCRR parts 190-99, available at <http://www.dec.ny.gov/regs/2493.html>.

⁴⁴ *See id.* § 190.5.

⁴⁵ *Id.* § 190.8(a).

⁴⁶ *Id.* §§ 190.13, 196.1-196.8.

forest preserve, except on specified roads and pursuant to a TRP. Even bicycles are prohibited in the Jay Mountain Wilderness Area.⁴⁷ The use or possession of motorized equipment within wilderness areas also requires DEC authorization or legal permission under an easement or use reservation, neither of which applies to Lot 8.

DEC also has published a formal program policy governing issuance of TRPs (the "TRP Policy"), which it revised in 2011. The TRP Policy states in pertinent part:

The Department issues TRPs in its sole discretion for the temporary use of State Lands . . . *only* for activities that are in compliance with *all* constitutional, statutory and regulatory requirements; the Adirondack and Catskill State Land Master Plans; adopted Unit Management Plans . . . ; the APA/DEC MOU; Department policies; approved work plans and guidance documents; *and that have negligible or no permanent impact on the environment.*⁴⁸

It will take more than 100 years to recover from the destruction of old growth trees that will be cut for roads through Lot 8, and any pit needed for bulk sampling or mining could be open indefinitely. Because NYCO's proposed mining operations within the Jay Mountain Wilderness Area, including sampling, thus are not in compliance with "all" of the listed requirements, plans, memoranda, policies, and guidance documents, and because those operations will have a far more than negligible or temporary impact on Lot 8, issuance of a TRP would violate DEC's stated policy and thus constitute an abuse of discretion.

Specifically, the TRP Policy identifies three types of TRPs: (1) an Expedited TRP, (2) a Routine TRP, and (3) a Non-Routine TRP.⁴⁹ An Expedited TRP may not be issued if trees will be cut, and thus may not be issued for the proposed mining.⁵⁰ A Routine TRP may be issued only for listed activities, none of which covers mining, and thus is inapplicable to the activities that NYCO proposes to undertake on Lot 8.⁵¹

To obtain permission to conduct minerals sampling operations on Lot 8, NYCO may attempt to invoke provisions of the TRP Policy that allow issuance of Non-Routine TRPs for "collection of . . . minerals . . . on State Land," for "surveying State Land for exploration purposes, including seismic (with required lease agreement), geodetic and mineral exploration," or for "any activity

⁴⁷ See *id.* § 196.7(b).

⁴⁸ See DEC, DEC Program Policy, ONR-3, Temporary Revocable Permits for State Lands and Conservation Easements (May 26, 2011), http://www.dec.ny.gov/lands_forests_pdf/trppolicyfinal.pdf (emphasis added).

⁴⁹ TRP Policy at 2-4.

⁵⁰ See *id.* at 2,

⁵¹ See *id.* at 3.

involving motorized equipment.”⁵² Even those provisions do not permit DEC to authorize NYCO’s activities, however, because the TRP Policy expressly states that “Non-Routine TRPs will be issued only where they will result in negligible or no permanent impacts if conducted in compliance with the terms and conditions of the TRP.”⁵³ Minerals sampling operations cannot be undertaken without permanently destroying the rich and complex forest of Lot 8, which contains ecologically significant stands of old growth, including trees more than 100 years old and 100 feet high.

Moreover, the TRP Policy expressly forbids issuance of a TRP for many of the activities inherent in minerals sampling operations. Under “Activities on State Land for which TRPs will not be issued,” DEC lists:

- (2) Any activity which could . . . change the mandated use of the State Land.
- (3) Any construction or installation of permanent facilities such as roads, bridges, trails, [or] structures . . . not authorized by law, deeded right or easement.
-
- (8) Any activity not compatible with the purpose for which the State land was acquired or is managed.⁵⁴

Those prohibitions, individually and collectively, preclude issuance of a TRP for NYCO’s exploratory mining, unless the Legislature passes new legislation amending provisions of the New York Executive Law and ECL applicable to Lot 8 and enabling the APA and DEC to revise the APSLMP, the UMP, the Part 190 Regulations, and the TRP Policy. Only after all of those laws, plans, regulations, and policies are revised to allow mineral sampling operations within Lot 8, may DEC consider issuance of a TRP.

D. The State May Not Ignore Non-Constitutional Protections for Lot 8.

DEC has cited *Durante v. Evans* as grounds for disregarding the non-constitutional protections for Lot 8 described above. That case involved constitutional amendments that, read together, vested complete administrative powers with respect to all of the New York courts in the Chief Judge of the Court of Appeals. See 464 N.Y.S.2d at 266. Notwithstanding the amendments, five County Clerks claimed that they had the power to appoint deputy county clerks and counsel to the county clerks under two provisions of the County Law, see N.Y. County L. §§ 911-12 (last amended 1950), which conferred that power on them. Noting that the New York Court of Appeals previously had ruled that the constitutionally defined powers of the Chief Judge were

⁵² *Id.*

⁵³ *Id.* at 4.

⁵⁴ See *id.* at 5-6.

“complete” and embraced “the power to deal with all personnel matters,” the *Durante v. Evans* court held that the statutory provisions contravened what the Constitution “necessarily implies” and thus were abrogated by the amendments. *Id.* at 266-67 (citations omitted). Moreover, “[s]tatutes enacted as a result of the aforementioned constitutional amendments” reinforced the court’s conclusion. *Id.*

The situation with respect to Lot 8 is very different. The constitutional amendment passed in 2013 states that the State “may” (has the option to, but is not required to) authorize minerals sampling in Lot 8 and potentially the conveyance of all or part of Lot 8 to NYCO. It is perfectly consistent with that amendment for the State to comply fully with existing non-constitutional legal requirements in deciding whether or not to allow the drilling or land transfer, and if the State did so the authorization would be denied, for the reasons explained above. It is also perfectly consistent with the 2013 amendment for the State to revise the statutes, plans, regulations, and policies that currently foreclose exploratory drilling on Lot 8 or its transfer to NYCO and, following those revisions and in compliance with applicable law, to permit NYCO to proceed. The Constitution does not mandate a decision either way; nor does it suggest that, if the State wishes to allow sampling operations on Lot 8, a permit may be granted in complete disregard of more than a century of vigilant protection for state forest preserve land. Rather, the 2013 amendment simply gives the State a choice that it previously did not have. The non-constitutional law described earlier does not prevent the State from making that choice and thus does not contravene “what the Constitution necessarily implies.”

In addition, DEC’s reading of *Durante v. Evans* has highly implausible consequences. The relevant constitutional amendments in *Durante v. Evans* abrogated the entirety of sections 911 and 912 of the County Law. The Department surely does not contend, however, that the 2013 amendment abrogated all of the non-constitutional protections for state forest preserve land outlined above. Rather, DEC must be suggesting that the amendment supersedes those requirements only as to Lot 8, and only temporarily, given that Lot 8 ultimately must be reclaimed and returned to the forest preserve, at which time it would receive the benefit of all of the protections allegedly voided by the amendment. We are familiar with no precedent holding that a constitutional amendment may carve out from otherwise fully effective law a partial abrogation that affects only one parcel over only a limited time, especially when—as is the case here—the amendment is not in direct conflict with the allegedly superseded law.

II. Any Agency Action Amending Plans and Regulations Applicable to Lot 8 Must Comply with Applicable Provisions of SEQRA and SAPA.

If the Legislature were to pass legislation enabling the APA and DEC to revise the APSLMP, the UMP, and the Part 190 Regulations, as required to permit mineral sampling on Lot 8 and its potential transfer to NYCO, the approval of those revisions would require compliance with SEQRA and, with respect to the regulations, SAPA. Under the regulations promulgated by the APA, the amendment of the APSLMP to reclassify Lot 8 from wilderness to a less restrictive category, which would be necessary before sampling could begin, is a Type I action likely to

require preparation of an environmental impact statement ("EIS") because it is "likely to have a significant impact on the environment."⁵⁵ Revisions of the UMP and the Part 190 Regulations to allow for minerals sampling within Lot 8 also would require preparation of an EIS, because the introduction of roads, motorized vehicles and equipment, and other elements of such operations into an area valued for more than 100 years for its primeval character unquestionably "may have a significant impact on the environment."⁵⁶ Only upon completion of the environmental review and applicable SAPA processes for, and approval (including gubernatorial approval, where required) of, the amendments of the APSLMP, UMP, and Part 190 Regulations could DEC revise its TRP Policy to allow issuance of a TRP for exploratory mining on Lot 8. Typically, revision of the TRP Policy would be subject to public review and comment, as it was when it was amended in 2011.⁵⁷

III. Even After the Law Has Been Amended as Required, NYCO's Operations Remain Subject to Permitting Requirements under the APA Act, the MLRL, and the Freshwater Wetlands Act.

Assuming that the State lawfully revises all applicable non-constitutional provisions governing potential minerals sampling on and transfer of Lot 8, NYCO's operations still will be subject to the APA Act, the MLRL, and the Freshwater Wetlands Act.⁵⁸ Pursuant to those statutes and their implementing regulations, NYCO has operated its Lewis mine under APA and DEC permits, which have been amended numerous times as the scope of operations has changed. For example, NYCO obtained permit amendments in 2013, when it sought to expand the Excavation Area Boundary within the previously approved life of mine and to revise the Lot 8 setback description. If providing access to Lot 8 will require additional road building or other industrial operations on land owned by NYCO but outside the scope of its current permits, those permits will have to be amended again.⁵⁹

A number of permits, in addition to the TRP required under article 9 of the ECL, will be needed for NYCO operations on Lot 8. APA approval will have to be obtained for sampling operations, if they affect freshwater wetlands.⁶⁰ Depending on the amount of material to be removed during those operations, a DEC permit under the MLRL also may be required.⁶¹ If mining proceeds on Lot 8, new or amended permits would have to be obtained from both the APA and DEC. All of the permit approvals, as well as any agency approval of land transfer documents, would be governed by SEQRA. If more than 100 acres are involved in the exchange, it is likely that an EIS will be required.⁶²

⁵⁵ 9 NYCRR § 586.5(a)(6).

⁵⁶ 6 NYCRR § 617.1(c).

⁵⁷ See DEC, Guidance and Policy Documents, <http://www.dec.ny.gov/regulations/397.html>.

⁵⁸ See ECL §§ 24-0105(6), 24-0301(8), 24-0511, 24-0801, 24-0805.

⁵⁹ See 6 NYCRR parts 421-22. The permit amendments also would be governed by SEQRA.

⁶⁰ See N.Y. Exec. L. § 810; 9 NYCRR § 573.5(a); see also 9 NYCRR part 578 (governing freshwater wetlands).

⁶¹ See MLRL § 23-2711.

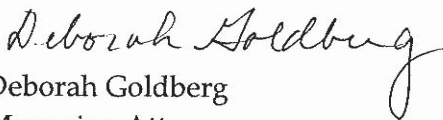
⁶² See 6 NYCRR § 617.4(b)(4), (6).

IV. Conclusion

The passage of Proposal Number Five removed only one layer of legal protection for Lot 8 and only for expressly specified purposes. Because no enabling legislation has been passed to implement the amendment of article XIV, section 1, of the New York Constitution, minerals sampling operations may not proceed on Lot 8, and Lot 8 may not be exchanged for other land, until, at a minimum, the Legislature passes new legislation revising the Executive Law and the ECL, and the relevant agencies implement the newly amended statutes by revising the APSLMP, UMP, Part 190 Regulations, and TRP Policy in compliance with SEQRA and SAPA. Following those revisions, additional land clearance on the Lewis mine site needed for the sampling operations on Lot 8 will be subject to the requirements of the APA Act, MLRL, and Freshwater Wetlands Act, and those laws will constrain activity directly on Lot 8 as well. To confirm DEC's agreement with our analysis, we respectfully request written notice within 15 business days of receipt of this letter that the Department acknowledges all of the foregoing legal prerequisites and intends to comply fully with them.

Should you have any questions, you may call my direct line: 212-845-7377 or reach me via e-mail at dgoldberg@earthjustice.org. Thank you for your consideration.

Respectfully,



Deborah Goldberg
Managing Attorney

cc: Andrew Cuomo, Governor (via First Class Mail only)
Basil Seggos, Deputy Secretary for Environment
Eric Schneiderman, Attorney General
Lisa M. Burianek, Deputy Chief, Environmental Protection Bureau, OAG
Dean Skelos, Senate Majority Leader
Sheldon Silver, Assembly Speaker
Mark J. Grisanti, Chair, Environmental Conservation Committee, Senate
Robert Sweeney, Chair, Environmental Conservation Committee, Assembly
Edward F. McTiernan, General Counsel, DEC
Marc Gerstman, Executive Deputy Commissioner, DEC
Kathy Moser, Deputy Commissioner for Natural Resources, DEC
Robert K. Davies, Director, Division of Lands and Forests, DEC
Bradley Field, Director, Division of Mineral Resources, DEC
Robert S. Stegemann, Director, Region 5, DEC
Leilani Ulrich, Chairwoman, and Members of the Board, APA (via First Class Mail only)
James T. Townsend, General Counsel, APA
Terry Martino, Executive Director, APA

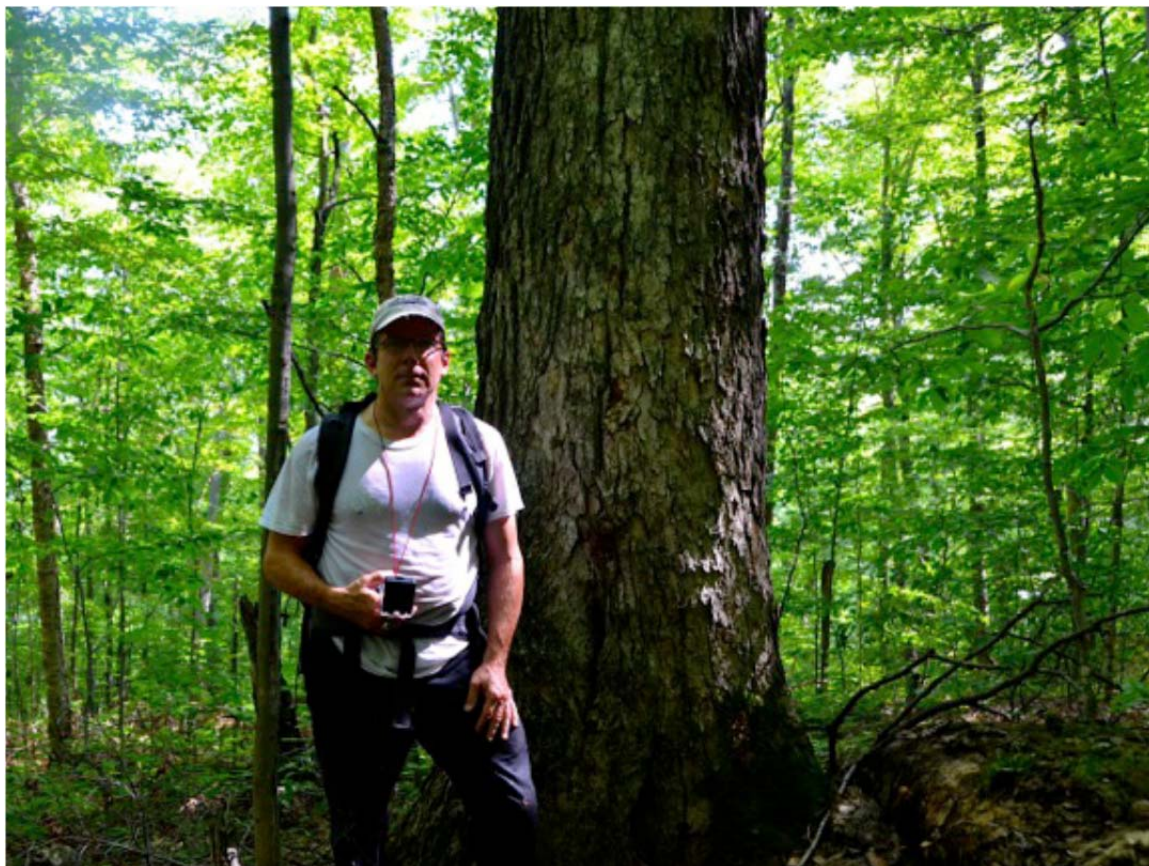
Exhibit B



Stands of large Sugar Maple trees estimated to have seeded in Lot 8 more than 175 years ago



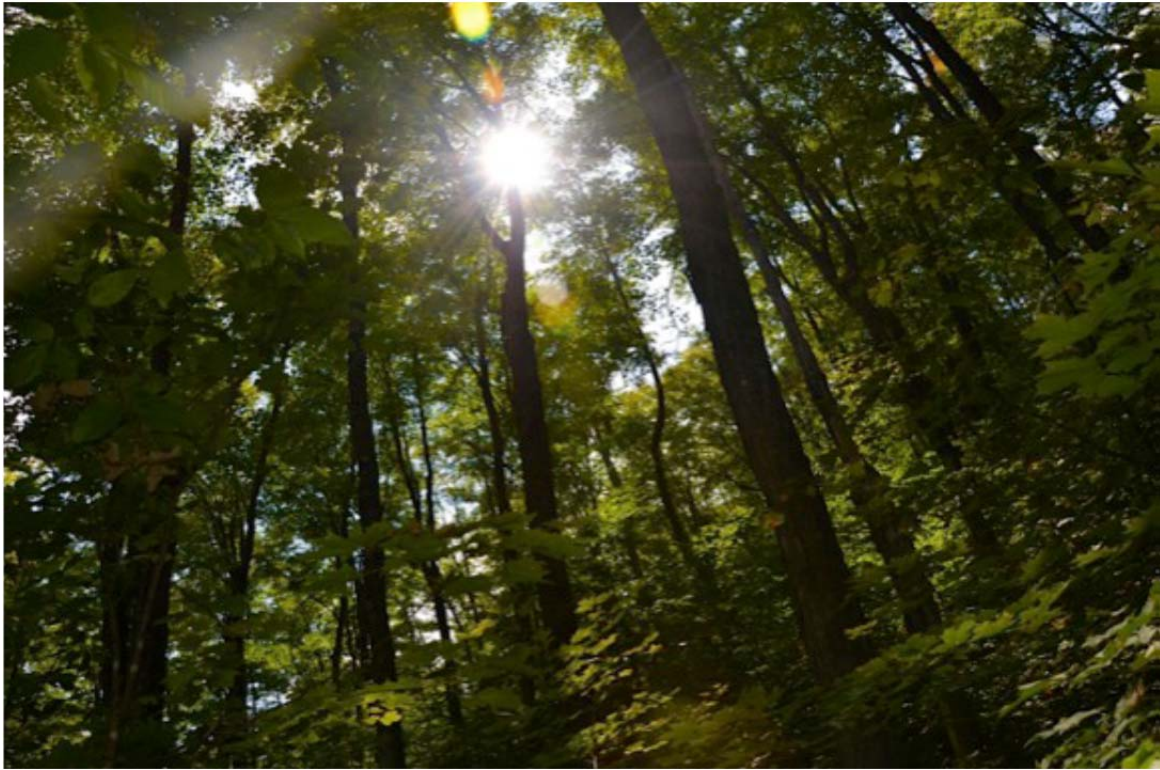
This Eastern Hop Hornbeam, or “Ironwood” tree, is a possible candidate for New York State’s “Giant Tree Registry” and may well reach 400 years in age.



This Sugar Maple, 32 inches in diameter, is likely to be 160 years old and may be more than 200 years old.



This stand of trees is representative of the biologically rich, diverse, and high quality northern hardwood tree species that dominate Lot 8, reflecting a calcium-rich forest floor.



A closed canopy of giant trees with just enough sunlight
for a lower strata of more shade-tolerant species.



This large American Beech tree has claw marks from a Black Bear.



A vernal pool, filled with water during the springtime, provides crucial habitat for breeding frogs and salamanders. This pool lies less than 100 feet from the existing Lewis mine.



Maidenhair Ferns are among the beautiful plants that grow on the forest floor of Lot 8.