NEW YORK SUPREME COURT
SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of
PROTECT THE ADIRONDACKS! INC.,

Plaintiff-Petitioner,

Index No. 2137-13
RJI No. 01-13-st-4541

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

Hon. Gerald W. Connolly

-against-

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

Defendants-Respondents.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS/RESPONDENTS' MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The New York State Department of Environmental Conservation (DEC or Department) and the Adirondack Park Agency (APA or Agency) have together developed Class II Community Connector Trails, which are intended to move trails allowing snowmobile use from remote interior areas to the perimeter of state land units, closer to roadways, to preserve the wild character of the area. The Class II system is also intended to create reasonable public access to these state lands. Because construction on these trails involves an immaterial amount of tree cutting, Class II trails are consistent with article XIV, § 1, of the New York State Constitution, known as the "forever wild" clause. Accordingly, defendants DEC and the APA are entitled to summary judgment on plaintiff's sole remaining claim in this proceeding.

No material facts are in dispute. All relevant facts regarding construction of each trail during the time period covered by this litigation are known, including the width and mileage of each trail, the number, size and species of trees cut, the number of bridges constructed, and details of erosion control features used. These facts, established through sworn testimony of the individuals who directed and carried out the work, directly contradict the vague and nonspecific allegations by plaintiff Protect the Adirondacks! Inc., that Class II trails are inconsistent with the wild forest character of the area and that a substantial amount of timber would be cut, creating a man-made setting that is inconsistent with the State Constitution. Complaint ¶¶ 1, 82. The record and testimony show that no trail required substantial cutting, and that DEC staff carefully sited and designed the trails to maintain the "character of a foot trail" to ensure protection of natural resources and to preserve the forest lands in a wild state, consistent with the constitutional standard. *See Association for the Protection of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930). Accordingly, the Court should grant defendants' motion for summary judgment and dismiss the remaining cause of action.

STATUTORY AND REGULATORY BACKGROUND

A. New York State's Forest Preserve

Since January 1, 1895, the People of the State of New York have given constitutional protection to the Forest Preserve. A primary purpose of this constitutional protection is to provide unique and healthful public recreation opportunities in a wild, natural environment, and "to preserve it from the interference in any way by the hand of man." *See, e.g., Association for the Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234, 238-239 (1930); *Helms v. Reid*, 90 Misc.2d 583, 590-592 (Sup. Ct., Hamilton County 1977). This protection, set forth in article XIV, § 1, of the New York State Constitution and also known as the "forever wild" clause, requires that Forest Preserve lands "be forever kept as wild forest lands," and further says that such lands may not be leased or sold, "nor shall the timber thereon be sold, removed or destroyed." N.Y. Const., art. XIV, § 1.

History and Development of the "Forever Wild" Clause

Article XIV, § 1, was added to the New York State Constitution following the 1894 Constitutional Convention. David McClure of New York City, Chair of the Convention's Special Committee on State Forest Preservation, proposed it. Rev. Rec. of Const. Conv. of 1894, Vol. II, at 1201. Chief among several reasons for the Convention's adoption of the amendment was the preservation of the Adirondack watershed to meet the needs of New York City's burgeoning metropolitan population. *See id.*, Vol. IV, at 132 ("We will one day need that water stored in the Adirondacks to drink in the city of New York."). Delegates were also deeply concerned with rampant deforestation occurring on the national level and with the fact that commercial logging was still occurring on state land in the Adirondacks despite legislative protections. It was this concern with commercial removal of timber that prompted the delegates

to act. *Id.* at 139 ("We should not sell a tree or a branch of one."); 140 ("[…] our timber should not be sold[]").

Accordingly, Chairman McClure originally proposed language referring only to timber being *sold*. *Id.*, Vol. II at 1201. The additional "destroyed" language arose out of concerns with the vast amounts of timber destroyed by flooding caused by a number of new dams. *Id.*, Vol. IV at 142. Finally – and perhaps most importantly – the delegates perceived the "forever wild" amendment as a means by which to preserve the Adirondack Forest Preserve as a place for the public to recreate and seek solace and refreshment in the outdoors. *Id.* at 131-132. Thus, the framers of article XIV, § 1, had three primary purposes in adopting it: (1) to end commercial logging on state-owned lands in the Adirondacks, (2) to protect the Adirondack watershed for future use, and (3) to ensure that the Adirondacks are preserved for the public use.

Some twenty years later, the Constitutional Convention of 1915 revisited the language of the "forever wild" clause. One of the proposed amendments to the clause was to change "timber thereon" to "trees and timber thereon." Rev. Rec. of the Const. Conv. of 1915, Vol. II at 1448. Although this added language would presumably have broadened the protections afforded by article XIV, some delegates to the convention successfully opposed it. Their comments demonstrate that the commercial destruction of timber, rather than ancillary cuttings, was still of primary concern. *See id.* at 1448 ("It will be impossible, under this provision, for anyone to cut a tent pole, a tent stick, or anything in the Adirondacks"); 1469 ("I don't believe it is a possible thing to control a lumberman if he once takes an axe into a forest"); 1511 ("No cutting should be done which has for its purpose the making of money, the security of revenue, the satisfying of the craving of any industry").

The delegates to the Convention of 1915 also discussed at length the issue of public access to the Adirondack Forest Preserve, since preservation of the Preserve as a public retreat was one of the motivations of the 1894 Convention. Certain delegates were concerned that the wild portions of the Park were not readily accessible to the elderly or those citizens without the disposable income to travel into the Park's interior. *See id.* at 1484-1486. The fear that the addition of "trees and timber" to the forever wild clause would prevent the construction of roads and campsites needed to facilitate greater public access to the Forest Preserve was likely one of the reasons the amendment was opposed. As one of the delegates stated: "It is said that the presence of roads and camps would mar the scenic beauty of the natural forest […]. Is it not better that a *large number* of our people should be able to visit and enjoy a forest of even slightly marred scenic beauty, than that only a *privileged few* should be able to enjoy an unmarred forest?" *Id.* at 1505 (emphasis in original). The delegates voted against the proposed amendment to article XIV and ultimately did not adopt the entire proposed Constitution of 1915. Thus, the framers of the 1915 Constitutional Convention explicitly rejected the interpretation for which plaintiff now advocates.

Definition of "Timber" under article XIV, § 1

As discussed above, the framers of the "forever wild" clause during the 1894 Convention were concerned, in part, with the Forest Preserve's destruction at the hands of commercial logging operations. When the Convention of 1915 revisited the clause, the delegates recognized that the framers of 1894 must have intended a distinction between "trees" and "timber." *See* Rev. Rec. of the Const. Conv. of 1915, Vol. II at 1469; 1505. The fear that adding the word "trees" to the forever wild clause would prevent any cutting of anything whatsoever is one of the reasons that amendment was not adopted by the delegates. *Id.*

Consistent with the Constitution's use of the term "timber," the Department has long recognized 3 inches diameter at breast height (dbh) as the threshold point for distinguishing between trees and timber to be cut in the Forest Preserve for public access and safety. *See* Dep't of Envtl. Cons., Organization and Delegation Memorandum No. 84-06 (1984), Record Exhibit (R. Ex.) 17; *see also* Dep't of Envtl. Cons., Divisional Direction LF91-2, *Cutting, Removal, or Destruction of Trees and Endangered, Threatened, or Rare Plants on Forest Preserve Lands* (1991), R. Ex. 18 at 2,6; *Forest Preserve Policy Manual* (1986), R. Ex 19 at 11. This threshold of 3 inches dbh dates to the tree tallies accepted by the courts in *Association for the Protection of the Adirondacks v. MacDonald* (253 N.Y. 234 [1930]) and *Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conservation* (199 A.D.2d 852 [3d Dep't 1993]), discussed more fully below. *See* Aug. 30, 2016 Affirmation of Loretta Simon, Ex. G (*MacDonald* Record excerpts). Regardless of its origin, DEC's threshold is below other recognized measurement standards for saleable timber. The United States Forest Service's standards for Northeastern forests recognize saplings as being between 1 inch dbh and 4.9 inches dbh. *Northeastern Forest Inventory & Analysis Methodology*, United States Forest Serv., www.fs.fed.us/ne/fia/methodology/def_qz.htm (accessed Aug. 22, 2016). Under federal standards, the smallest point at which a tree becomes timber is at 5 inches. *Id.* In timber harvesting generally, the typical minimum usable diameter for timber is 6 inches dbh for pines and conifers and 8 inches dbh for hardwoods. The lowest minimum usable diameter is 4 inches dbh for softwood pulp production. *See* July 19, 2016 Affidavit of Peter J. Frank ¶ 16. Even in New York, trees measuring less than 5.5 inches dbh are considered saplings (not timber) for the purpose of taxing forest lands. 6 NYCRR § 199.1(k)(1). On private lands in the Adirondack Park, Executive Law § 806(3)(a) limits cutting trees in excess of 6 inches dbh near shorelines

and APA regulations define clearcutting to mean cutting of trees over 6 inches dbh under certain circumstances. 9 NYCRR § 570.3(f). As a result, the Department's calculations of timber to be cut for the purposes of the "forever wild" clause protects trees smaller than the standards adopted by the forestry industry or other governmental entities.

B. The Department of Environmental Conservation as Land Manager of the Forest Preserve

DEC is vested with broad management powers over Forest Preserve lands. ECL § 3-0301(1)(d) empowers DEC to "provide for the care, custody and control of the forest preserve." ECL § 9-0105(1) grants DEC the "power, duty, and authority" to "exercise care, custody and control of the several preserves, parks and other state lands described in this article [ECL Article 9]." ECL § 9-0105(1); *see also Helms v. Reid*, 90 Misc.2d at 594, 600, 607-608 (Sup. Ct., Hamilton County, 1977) (DEC has authority to determine uses in the Forest Preserve, including prohibiting seaplanes on designated lakes); *Flacke v. Town of Fine*, 113 Misc.2d 56 (Sup. Ct., St. Lawrence Co. 1982) (DEC regulation of Town road maintenance on Forest Preserve lands directed by Constitution and statute).

Snowmobiles are a type of "motor vehicle" designed for travel on snow or ice by a combination of tracks and skis. R. Ex. 1 (Master Plan) at 18. Snowmobile use is authorized on Forest Preserve land and is allowed on designated and marked snowmobile trails, including certain frozen lakes and ponds. *See* 6 NYCRR § 196.2.

C. The Adirondack Park Agency and the State Land Master Plan

The Department is not the only State agency responsible for land use in the Adirondack Park.[1] In 1971, the Legislature created the Adirondack Park Agency to ensure that

[1] The terms "Adirondack Park" and "Forest Preserve" are not synonymous. Environmental Conservation Law (ECL) § 9-0101(1) defines the "Adirondack Park" as all lands - public and private - within the forest preserve counties within the described boundaries, referred to often as

"contemporary and future pressures on the park resources are provided for within a land use control framework which recognizes not only matters of local concern but also those of regional and state concern . . . ." Exec. L. § 802. DEC manages Forest Preserve lands in the Adirondack Park pursuant to the State Land Master Plan. Initially adopted in 1972 by Governor Rockefeller, the Master Plan provides the general framework for resource protection and the management of public recreation opportunities on Forest Preserve lands in the Adirondack Park. *See* Exec. L. § 816. In 1973, the Legislature ratified the Master Plan, giving it "the force of a legislative enactment." *Helms v. Reid*, 90 Misc. 2d at 604; *see* L. 1973, ch. 348 (renumbering and amending Executive Law § 807 as § 816). The Adirondack Park Agency last updated the Master Plan in 2014. *See* Aug. 17, 2016 Affidavit of Kathleen Regan ¶¶ 10-21.

The Master Plan organizes State land in the Adirondack Park by classifications that are based on the land's suitability and capacity for use: Wilderness; Primitive; Canoe; Wild Forest; Intensive Use; Historic and State Administrative; Wild, Scenic and Recreational Rivers; and Travel Corridors. *See* Exec. L. § 816; R. Ex. 1 (Master Plan) at 15. Development and use of State land are authorized in a Unit Management Plan (UMP) that complies with applicable Master Plan guidelines. The relationship between the APA and DEC with respect to State land in the Adirondacks is defined by a Memorandum of Understanding (MOU), executed in 1982 and most recently revised in 2010. *See* R. Ex. 2 (MOU); *see also* Sept. 24, 2013 Affidavit of James Connolly ¶ 5; Aug. 17, 2016 Regan Aff. ¶¶ 6, 22, 32-39. Draft UMPs are prepared by DEC staff in consultation with the APA staff, and presented for public review in accordance with the State Land Master Plan, the MOU, and the State Environmental Quality Review Act (SEQRA), ECL article 8. DEC staff then presents a proposed UMP to the APA. Once the APA determines that a

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the "Blue Line." "Forest Preserve" is defined in ECL § 9-0101(6) as lands owned or later acquired by the state within the listed forest preserve counties, with certain exceptions.

proposed UMP "conforms" or complies with the Master Plan, the DEC Commissioner adopts the final UMP. Exec. L. § 816. The agencies periodically update and amend UMPs using the same process.

D. Recreational Snowmobile Use and State Policies in the Adirondack Park

New York State's management of snowmobile use on Adirondack Forest Preserve lands has evolved since the advent of snowmobiles in the 1960s. Initially, no restrictions limited where recreational snowmobiling could occur on State lands within the Adirondack Park, and no guidance existed for trail design, construction or maintenance. *See* Sept. 25, 2013 Affidavit of Karyn Richards ¶¶ 6-10, attached to the Aug. 24, 2016 Affidavit of Peter J. Frank, Ex. A. Over the decades, however, the State developed strict criteria and standards to limit the mileage of snowmobile trails in the Forest Preserve, and to ensure that snowmobile trails are designed to preserve the essential characteristics of a foot trail, protecting natural resources and minimizing safety hazards. Sept. 25, 2013 Richards Aff. ¶¶ 11-18.

When the APA developed the Master Plan in 1972 to guide land management decisions within the Park, it included provisions for continued snowmobile use on lands classified as Wild Forest, and eliminated snowmobile access to the more remote and fragile Wilderness, Primitive and Canoe areas, with the limited exception of certain Primitive corridors. R. Ex. 1 at 27. The Master Plan also directed "no material increase" in snowmobile trail mileage in Wild Forest areas beyond that in existence in 1972. R. Ex. 1 at 32 (4). Based on data of existing snowmobile trail mileage in 1972, DEC limits the total snowmobile trails in the Forest Preserve to 848.88 miles. *See* Aug. 24, 2016 Frank Aff., ¶¶ 5-6, 11.

E. Tree Cutting and Snowmobile Trails on Forest Preserve Lands

DEC policy limits tree cutting on the Forest Preserve. Adopted in 1984, the policy requires DEC approval to cut, remove or destroy trees for construction and maintenance of

facilities in the Forest Preserve and further requires, among other things, that work plans include a count by species of all trees to be cut, that is, trees that measure 3 inches or more dbh. R. Ex. 17 (Policy #84-06) at 2. An addendum to Policy #84-06 requires notice to the public of the location and number of trees in excess of 3 inches dbh to be cut, in the Environmental Notice Bulletin (ENB). R. Ex. 17 (*see* July 29, 1986 Addendum); *see also* Sept. 25, 2013 Richards Aff. ¶ 19.

In 1986, DEC adopted a policy for snowmobile trails that established procedures for siting, construction and maintenance in the Forest Preserve, and also created a trail classification system. Snowmobile trails were permitted only in areas classified "Wild Forest" and "Intensive Use" or within 500 feet of a public highway. R. Ex. 19 (Forest Preserve Manual Policy, Snowmobile Trails) at 1. In addition to limiting the total mileage for snowmobile trails in the Adirondack Forest Preserve to 848.88 miles, the 1986 policy restricted the width of the trail tread to eight feet, twelve feet on curves and steep grades, and to a height clearance of twelve feet. R. Ex. 19 at 7, 11. A 1991 DEC directive to staff established further procedures to implement the 1984 policy and required that a work plan include a count of trees 3 inches dbh or greater to be cut. R. Ex. 18 (Directive LF-91-2) at 2, 6.

In 1998, DEC added procedures for siting, construction and maintenance of trails, and reiterated the maximum trail widths of eight and twelve feet and the limit of 848.88 miles for snowmobile trails in the Adirondack Forest Preserve. R. Ex. 20 at III (Policy ONR-2)[2]; *see also* Sept. 25, 2013 Richards Aff. ¶¶ 20-22. In 1999, the Governor's Office directed DEC to meet with the snowmobiling community and environmental groups to develop a snowmobile plan for the Adirondack Park. Thereafter in 2000, DEC issued interim guidelines for snowmobile trail

[2] DEC's 2009 Snowmobile Guidance superseded Policy ONR-2 for Adirondack Forest Preserve lands. ONR-2 still applies to Forest Preserve lands in the Catskill Park. R. Ex. 20 at 1 ("Note").

grooming, maintenance, and construction in Wild Forest areas of the Park. R. Ex. 3, Appendix N; *see also* Sept. 25, 2013 Richards Aff. ¶¶ 23-31.

F. 2006 Snowmobile Plan

In 2006, DEC and the New York State Department of Parks jointly adopted a conceptual plan to reconfigure the existing snowmobile trail network to establish a system of snowmobile trail connections between communities in the Adirondack Park, while creating a net benefit to Forest Preserve lands by shifting snowmobile trails to the periphery of the Forest Preserve, away from environmentally sensitive and interior lands, and closing or re-designating trails in interior areas for non-motorized use. R. Ex. 3 (*Snowmobile Plan for the Adirondack Park/Final Generic Environmental Impact Statement*" [2006 Snowmobile Plan]) at 3-5. The 2006 Snowmobile Plan identified potential community connection goals, and proposed that certain trails be maintained to a width of nine feet to more safely accommodate two-way snowmobile traffic. R. Ex. 3, at 52-53, *see also* Sept. 25, 2013 Richards Aff. ¶¶ 34, 36. The 2006 Plan also recognized that actual designation of trails on Forest Preserve land would occur through the UMP process, which would provide an opportunity for public comment. R. Ex. 3 at 46.

G. 2009 Snowmobile Trail Guidance

In 2009, DEC and APA separately approved a guidance document that contained specifications for the siting, construction, and maintenance of snowmobile trails on Adirondack Forest Preserve land. R. Ex. 8 (2009 Guidance); *see also* R. Ex. 2 (MOU); Sept. 24, 2013 Connolly Aff. ¶¶ 17-24; Sept. 25, 2013 Richards Aff. ¶¶ 37-45. The 2009 Guidance, among other things, shifts snowmobile use away from remote, wild interior areas by eliminating many snowmobile trails in interior areas, near designated "Wilderness" areas and where trails are redundant, underutilized, or do not provide safe snowmobiling. R. Ex. 8 at 4-6. New and rerouted trails avoid, among other things, environmentally sensitive areas, deer wintering areas

and other significant habitats, so that wilder areas will be less impacted. R. Ex. 8 at 6-8. The 2009 Guidance also established a new classification system for trails open to snowmobiles: Class II trails, which connect communities, or Class I secondary trails, consisting of all other trails. R. Ex. 8 at 3-4. Class II trails not only serve as snowmobile trails in the winter, but are also open year-round for a variety of recreational uses to hikers, horseback riders, and mountain bikers, among others. Class II trail tread cannot exceed nine feet in width, except on sharp curves, steep slopes and bridges, where a twelve foot width is allowed; Class I trails cannot exceed eight feet in width. R. Ex. 8 at 9-10.

The 2009 Guidance seeks to create sustainable trails with less environmental impact on the surrounding forests by imposing certain construction requirements. Tree cutting is minimized and the cutting of "overstory" trees is avoided to maintain a closed tree canopy, allowing only a twelve foot height clearance. R. Ex. 8 at 10. The 2009 Guidance directs that old growth and large trees be protected and, where tree cutting is necessary, trees must be tallied, included in a work plan and cutting must be done pursuant to DEC's tree cutting policy. R. Ex. 8 at 10 and Ex. 18 (LF91-2, DEC tree cutting policy). DEC's tree cutting policy requires a count by species and size, of all trees 3 inches dbh and greater. R. Ex. 18 at 2. In order to preserve the wild forest character of the lands they cross and to ensure public safety, the 2009 Guidance sets criteria for trail route design and construction standards, including use of existing trails where possible, following natural contours, avoiding blind curves in trail alignment, minimizing removal of rocks and boulders, use of slope management and drainage control features to prevent erosion, washouts and wetland impacts and maintaining trail width at nine feet to allow safe passage for two-way snowmobile traffic. R. Ex. 8 at 8-13; *see also* Sept. 25, 2013 Richards Aff.

¶ 40. In addition, bridges are constructed to protect waterways and wetlands. R. Ex. 2, Appendix D (Bridge Guidance); *see also* Sept. 24, 2013 Connolly Aff. ¶¶ 13-14.

H. Snowmobile Trail Work Plans

DEC and APA develop work plans together to identify routes to be followed, trees to be cut, bridges to be built and terrain manipulation required. *See* Sept. 25, 2013 Richards Aff. ¶¶ 43-44. DEC writes the work plans, constructs the trails and oversees maintenance of trails. The APA determines whether a work plan conforms to the Master Plan, and if it does, an APA employee signs the work plan. Once the work plan is signed and before cutting trees in the Forest Preserve, DEC's internal guidelines require a notice to be published in the ENB. R. Ex. 17 at 4. Changes in work plans are identified in work plan "modifications." Works plans and modifications identify the details of trail construction plans, including the number and species of trees 3 inches dbh and greater to be cut, and numerous other trail construction features used for erosion control and trail stabilization including bench cuts, water bars and the like. R. Ex. 8 at 8-13; *see* also Sept. 25, 2013 Richards Aff. ¶¶ 43-44.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This proceeding was commenced by filing of a summons and notice of petition and combined petition and complaint (Complaint) on or about April 15, 2013. *See* Aug 30, 2016 Affirmation of Loretta Simon, Ex. A. Many Supreme Court and Appellate Division decisions and orders resolved various motions and requests for injunctive relief. *See* Aug. 30, 2016 Simon Aff., Ex. D. In December 2014, Supreme Court dismissed plaintiff's second and third causes of action – the CPLR article 78 portion – on the merits. *See* Dec. 12, 2014 Order. Plaintiff appealed the December 12, 2014 Order, by notice dated January 20, 2015. The appeal was not perfected within the nine-month timeframe for abandonment. *See* 22 NYCRR Part 800.12.

Plaintiff's remaining claim, the first cause of action, is that Class II trails are inconsistent with the "forever wild" clause of the constitution. Complaint ¶ 82.

Subsequently, this Court effectively limited the scope of this proceeding to Class II trails constructed or under construction between January 1, 2012 and October 15, 2014. *See* Oct. 15, 2014 Decision and Order, Oct. 20, 2015 Decision and Order (limiting discovery to trails constructed in the stated time period); *see also* Dec. 11, 2013 Affidavit of John W. Caffry ¶ 4 (plaintiff's claim is directed solely at construction of Class II trails, not all snowmobile trails). Complaint ¶ 82.

Sixteen Class II trails, or trail segments, constructed or under construction, fall within the Court's timeframe; an additional Class II trail was built in 2011. These trails are identified in the Affidavit of Maxwell Wolckenhauer, dated August 19, 2016, at Exhibit A, in a chart titled "Tree Tally Class II Trails." The tree tally identifies the total number of trees 3 inches dbh and greater authorized to be cut on each trail as set forth in DEC's work plans and modifications. Exact details of trees cut, bridges constructed, and terrain modification features used on each trail are set forth in the affidavits of DEC staff and exhibits thereto. *See* Aug. 24, 2016 Frank Aff. ¶ 14; *see also* Aug. 30, 2016 Simon Aff., Ex. E (list of affidavits and exhibits).

Approximately 27 miles of Class II trails have been constructed or are under construction. In turn, the Department has closed approximately 53 miles of trails to snowmobiles. *See* Aug. 24, 2016 Frank Aff. ¶ 13; *see also* Aug. 22, 2016 Affidavit of Jonathan DeSantis ¶¶12-14; Aug. 19, 2016 Affidavit of Joshua Clague ¶¶ 8-10 and Exhibits A, B and C (maps showing trail closures). The State now moves for summary judgment on plaintiff's remaining claim that these Class II trails violate the forever wild clause.

ARGUMENT

STANDARD OF REVIEW

Summary judgment is appropriate where no genuine material issue of fact exists and the movant is entitled to judgment as a matter of law. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment is designed to expedite civil cases by eliminating claims that can be resolved as a matter of law. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 363 (1974) (summary judgment granted in negligence suit where defendant admitted negligence). The proponent of a motion for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, which is met by tendering sufficient evidence demonstrating the absence of any material issues of fact. *See Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 320 (2009), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). The moving party need not specifically disprove every remotely possible statement of fact on which its opponent might win the case. *Ferluckaj*, 12 N.Y.3d at 320. A movant's burden can be satisfied through photographic evidence and deposition testimony. *Freese v. Bedford*, 112 A.D.3d 1280, 1282 (3d Dep't 2013) (defendants established threshold burden in summary judgment as to the condition of their property through photographic evidence and deposition testimony).

The facts relevant to plaintiff's claim are those related to the "physical destruction of the Forest Preserve . . . ." *See* Oct. 15, 2014 Order at 8. The material facts for each trail are known, and sworn to in the affidavits of DEC foresters directly involved with construction of each trail. *See* Aug. 24, 2016 Frank Aff. ¶¶ 14-15. The number of trees cut, or authorized to be cut, for each trail, is known. *See* Aug. 19, 2016 Wolckenhauer Aff., Ex. A. Each affidavit and work plan sets forth the number, size and species of trees to be cut, the number of bridges to be constructed, the materials to be used, the erosion control features and drainage devices to be

used, the relocation or trimming of rocks, and the width and mileage of each trail or trail segment. In addition to the sworn statements, the record includes unit management plans, work plans and modifications, photographs, maps, and documents produced in discovery, which provide all material facts related to construction of the trails. As an example, documents before the Court establish the material facts about the Seventh Lake Mountain trail, constructed between January 1, 2012, and December 15, 2013. Evidence in the record shows that this trail is 11.9 miles long, and involved the cutting of fewer than 1,924 live trees[3] and 161 dead trees. R. Ex. 5 (UMP), 36 (work plans), 37 (map), 38 (tree tally charts as clarified by Aug. 11, 2016 Affidavit of James Sessions), 39 (2013 photos); *see also* Aug. 17, 2016 Affidavit of Tate Connor ¶¶ 6-21, Ex. B (2016 Photos); July 14, 2013 Connor Aff. ¶ 6; Sept. 23, 2013 Connor Aff. ¶ 31. Likewise, the facts are undisputed as to Segment 3[4] of the Wilmington Trail, which is 2.96 miles long and involved cutting of 390 trees. R. Ex. 6 (UMP), 40 (map), 41-44 (work plans and permit), 45 (photos); *see also* Aug. 19, 2016 Affidavit of Steve Guglielmi. Similarly, a total of 127 trees were cut over 2.66 miles on the Gilmantown trail. R. Ex. 46 (map), 47-49 (work plan and tree tallies), 50 (photos); *see also* Aug. 18, 2016 Affidavit of Benjamin Thomas ¶ 11. Work plans for each of the 16 trails also detail the number of bridges constructed, as well as specific erosion control measures used such as bench cuts and water bars.

Because all material facts regarding on-the-ground work are known, this Court can determine, as a matter of law, whether the construction of these 16 Class II trails violates the forever wild clause of the constitution. Where a movant has demonstrated its entitlement to summary judgment, the burden shifts to the non-movant to present sufficient evidence to raise a

[3] Some trees marked for cutting were not actually cut. *See* Aug. 17, 2016 Connor Aff. ¶ 12.
[4] Segments 1 and 2 of the Wilmington trail are not Class II trails. They were approved in 2008 and were constructed to an 8 foot trail tread width, not the 9 foot width of Class II trails. *See* Aug. 19, 2016 Affidavit of Steven Guglielmi ¶ 4.

triable issue of fact. *St. Lawrence County v. Town of Fowler*, 136 A.D.3d 1251, 1254 (3d Dep't 2016) citing *Alvarez*, 68 N.Y.2d at 324; *Flomenbaum v. New York University*, 14 N.Y.3d 901, 901 (2010) citing *Zuckerman*, 49 N.Y.2d at 560; *Wagner v. Modulars by Design, Inc.*, 163 A.D.2d 676, 677 (3d Dep't 1990). A non-movant's mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to establish existence of a triable issue of fact. *Zuckerman*, 49 N.Y.2d at 562-563; *Wagner*, 163 A.D.2d at 678; *Transamerica Commercial Fin. Corp. v. Roy A. Matthews Inc.*, 178 A.D.2d 691 (3d Dep't 1991) (burden of showing entitlement to judgment with evidentiary proof was not met by conclusory allegations).

THE TRAILS AT ISSUE ARE CONSISTENT WITH ARTICLE XIV, SEC. 1, OF THE CONSTITUTION BECAUSE THEY DO NOT INVOLVE CUTTING OF TIMBER TO A MATERIAL DEGREE, NOR DO THEY DESTROY THE WILD FOREST CHARACTER OF THE FOREST PRESERVE

The New York State Constitution, article XIV, § 1, provides that Forest Preserve lands "shall be forever kept as wild forest lands" and that the timber on such lands shall not be "sold, removed, or destroyed." Plaintiff alleges that the felling of trees by the DEC in order to construct Class II trails violates article XIV, § 1. Complaint ¶ 82. Plaintiff also alleges that the trails are inconsistent with the wild forest character of the Forest Preserve and constitute an impermissible "man-made" setting. Complaint ¶ 82. Specifically, plaintiff alleges that the number of trees cut for the Seventh Lake Mountain, Gilmantown, and Wilmington trails is "substantial," and violates the constitution. Complaint ¶¶ 85-89. Plaintiff further alleges that Class II trails generally are inconsistent with wild forest nature of the Preserve in violation of the "forever wild" clause because construction involves land clearing, nine foot trail widths (rather than a previous eight foot maximum width for snowmobile trails), trail erosion control features such as bench cuts, bridges over waterways, rock removal and reduction, use of plastic reflectors, and removal of "understory vegetation." Complaint ¶¶ 98, 104, 106, 108, 109, 111. Finally,

plaintiff alleges that all of these trail construction features, along with snow grooming, create a "man-made setting" in violation of article XIV, § 1, of the Constitution. Complaint ¶ 116.

Contrary to these allegations, in designing and implementing the Class II trail system, the Department has appropriately balanced public access and environmental protection by moving trails from remote interior areas closer to major travel corridors, closing 53 miles of trails, avoiding forest fragmentation, and preserving the forest canopy. *See* Aug. 24, 2016 Affidavit of Timothy G. Howard Ph.D. Further, as this Court has already found, the cutting of trees for these trails does not constitute destruction of the Forest Preserve to a substantial extent, or to a material degree. *See, e.g.,* Sept. 4, 2015 Decision and Order at 6-10; Aug. 10, 2016 Decision and Order at 11-18.

The landmark case and continuing controlling authority on article XIV, § 1, is *Association for the Protection of the Adirondacks v. MacDonald*, 228 A.D. 73 (3d Dep't 1930), *aff'd* 253 N.Y. 234 (1930). *MacDonald* concerned the construction of a bobsled run on Forest Preserve land in preparation for the 1932 Winter Olympics. The land selected for the bobsled run would have been completely cleared of trees. *MacDonald*, R. on App. at 10. For the one-and-a-quarter-mile run, an estimated 2,500 trees of 3 inches dbh or greater[5] would have been cut, including first growth trees, allowing for the construction of a road with a width of 16 to 20 feet, a return road with a width of 8 feet, the installation of a motor-powered pull line, and the blasting of 50 cubic yards of rock ledge. *MacDonald*, R. on App., at 10-11. The Third Department held that the "forever wild" clause requires the Forest Preserve to be kept "in its wild nature" and that

[5] The record on appeal includes Department of Conservation tree tallies, separately listing live and dead timber to be cut, measuring 3 inches dbh and greater. *MacDonald* R. on App. at 12 (attached as Exhibit G of Simon Affirmation herein). A separate inventory calculates in cords and board feet the quantity of timber to be cut, and estimates the stumpage value of the timber to be cut as approximately $628.90. *Id.* at 13.

"sports which require a setting that is man-made are unmistakably inconsistent." *MacDonald*, 228 A.D. at 81-82. Accordingly, the court determined that the State could not cut "2,600 trees which must unquestionably be regarded as of 'timber' size" for such a purpose as it would set a precedent for the construction of "automobile race tracks, toboggan slides, golf courses, baseball diamonds, tennis courts, and airplane landing fields" within the Forest Preserve. *Id.*

On appeal, the Court of Appeals further clarified the permissibility of timber-cutting under the "forever wild" clause while noting that words of the Constitution "must receive a reasonable interpretation, considering the purpose." *MacDonald*, 253 N.Y. at 238. Relying on the records of the Convention of 1894, the Court held that the "forever wild" clause prohibits "any cutting or any removal of the trees or timber to a *substantial extent*." *Id.* (emphasis added). However, the Court refused to read the clause as implying an absolute restriction. Instead, it held that article XIV, § 1, permits necessary measures to preserve the Adirondack Park that do "not call for the removal of the timber to any material degree." *Id.* Nor did the Court endorse the Third Department's "wild forest character" and "man-made setting" language. The questions for this Court, as articulated by the Court of Appeals are (1) is the proposed use reasonably necessary to provide for public use of the Park, and (2) will it require the cutting of "timber" to a material degree? 253 N.Y. at 238; *see also Matter of Balsam Lake Anglers Club v. Dep't of Environmental Conservation*, 153 Misc. 2d 606, (Sup. Ct., Ulster County 1991), *aff'd* 199 A.D.2d 852 (3d Dep't 1993); *Helms v. Reid*, 90 Misc. 2d 583 (Sup. Ct., Hamilton County 1977); *Flacke v. Fine*, 113 Misc. 2d 56 (Sup. Ct., St. Lawrence County 1982).

DEC's and the APA's policies and practices ensure that Class II trail-siting, construction, and maintenance comply with *MacDonald*'s two-prong test. By individually assessing and marking each tree to be cut, DEC ensures that the minimum amount of timber is cut during this

process, as it does with any other kind of trail in the Forest Preserve. *See, e.g.,* Aug. 23, 2016 Ripp Aff. ¶¶ 16-18; Aug. 17, 2016 Connor Aff. ¶ 11. Further, the record establishes that the Department preserves trees that have been approved for cutting when on-the-ground conditions allow. *See, e.g.,* Aug. 17, 2016 Connor Aff. ¶ 12. Here, DEC is carefully constructing environmentally sustainable multiple-use trails that allow access to the Adirondack Park, acting pursuant to its statutory authority to maintain and provide access to the Forest Preserve for the people of the State of New York (*see* ECL § 9-0105).

The Class II trail system also easily satisfies the test set forth by the Third Department in *Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conservation,*199 A.D.2d 852. In *Balsam Lake,* the petitioners challenged the Department's plan to relocate several existing trails, and construct a hiking trail, a cross-country ski loop, and five new parking lots. 199 A.D.2d 852. The trail relocation required 350 trees of 3 inches dbh or greater to be cut, as well as saplings and "vegetative growth that DEC does not classify as trees." 199 A.D.2d at 854. The number of trees to be cut for the new trails and parking lots had not yet been determined. *Id.* at 853. In reviewing the Department's plans, Supreme Court rejected an absolutist interpretation of the forever wild clause that would permit no cutting whatsoever and found "no indication of any intent to maintain the forest in an 'absolutely' wild state with no organized human alteration of intervention at all." 153 Misc. 2d at 610.

On appeal, the Third Department agreed that article XIV, § 1, did not prohibit all cutting of timber from the Forest Preserve and concluded that the "proposed uses appear compatible with the use of forest preserve land, and the amount of cutting necessary [was] not constitutionally prohibited." 199 A.D.2d at 853-854. As the Adirondack Mountain Club and Appalachian Mountain Club, NY-NJ Conference, argued in their amicus brief in *Balsam Lake,*

"[t]rail maintenance and construction in the Forest Preserve has been unquestionably sanctioned by the Legislature as a reasonable use of the Forest Preserve in conformity with the *MacDonald* decision" and the Legislature "authorizes DEC … *to develop and improve* these trail systems in order to make them suitable and available for public use." Brf. for amicus curiae, at 9 (emphasis in original).

Consistent with *Balsam Lake*, this Court should reject plaintiff's attempt to preclude trails that provide public access to the Forest Preserve on sustainable trails and to prevent the Department from implementing the Class II trail system, which will replace old poorly built trails in the interior remote areas of the Forest Preserve with properly constructed trails located near major transportation routes. Plaintiff does not challenge snowmobile use per se, nor does it challenge Class I snowmobile trails. Rather, plaintiff's counsel has stated that "[t]he First Cause of Action is directed solely at the construction of the so-called 'Class II Community Connector' trails, not at snowmobile trails in general." *See* Dec. 11, 2013 Affidavit of John W. Caffry ¶ 4 (in response to amicus curiae brief filed by the New York State Snowmobile Association).

The difference between Class I and Class II trails is one foot in width: trail tread for Class II trails is nine feet wide, compared to an eight foot width for Class I trails. R. Ex. at 9-10 (2009 Guidance). Class II trails are designed and constructed with the same features and characteristics as foot trails and Class I trails, but are one foot wider. R. Ex. 8 at 2; s*ee also* Aug. 17, 2016 Connor Aff. ¶ 20. Plaintiff refers to an eight-foot trail width in the complaint: "In contrast to normal 8 foot wide or less foot trails in the Forest Preserve, the Class II Community Connector snowmobile trails are 9 to 12 feet wide." Complaint ¶ 104. The additional one-foot width of these multi-use, multi-season Class II trails is designed, in part, to facilitate safe public

use of the Forest Preserve, including to safely accommodate two-way snowmobile travel. R. Ex. 3 at 52-53; Ex. 8 at 2, 5.

Plaintiff further alleges that Class II trails violate the "forever wild" clause because a substantial amount of timber will be cut and claims, moreover, that the trails will be "clear cut." Complaint ¶¶ 71, 82, 96, 112. First, the number of trees authorized to be cut on each trail segment, as set forth in the tree tally, is not substantial and is fewer than the 2,600 trees at issue in *MacDonald*. *See* Wolckenhauer Aff., Ex. A. Second, plaintiff is wrong when it claims that Class II trail construction constitutes "clearcutting." As defined by both the forest industry and ecologists, "clearcut" eliminates an entire stand of trees, including necessarily the canopy. *See* Aug. 24, 2016 Frank Aff., ¶¶ 18- 22; *see also* Aug. 23, 2016 Ripp Aff., ¶¶ 11- 13; Aug. 24, 2016 Howard Aff., ¶¶ 24-30 (definition of clear cut in ecological literature). The Department does not "clearcut" when constructing trails. The ecological effects of clearcuts have been studied for many years, and their characteristics include wide open spaces with no canopy overhead, and forest edges with abrupt change in vegetation. *See* Aug. 24, 2016 Howard Aff., ¶¶ 25-26. Class II trails do not have these characteristics and canopy closure is relatively high. *See* Aug. 24, 2016 Howard Aff. ¶¶ 27-29, and Ex. C (aerial imagery Wilmington trail); *see also* R. Ex. 45 (photos: Wilmington trail), 50 (photos: Gilmantown trail); Aug. 23, 2016 Ripp Aff., Ex. F (2016 photos: Newcomb to Minerva to North Hudson trail); Aug. 17, 2016 Connor Aff., Ex. B (2016 photos: Seventh Lake Mt. trail).

Likewise, there is simply no support for plaintiff's argument that the tree tallies do not reflect the full extent of tree cutting because they exclude saplings and trees under 3 inches dbh. Complaint ¶ 92. As explained above, article XIV, § 1, prohibits sale, removal or destruction of "timber," not seeds, saplings, or even trees. DEC policy and forestry standards do not consider

trees under 3 inches dbh to be timber, and the caselaw does not support plaintiff's position. The *MacDonald* case counted only trees 3 inches dbh or greater in determining whether the cutting of trees met the constitutional standard. *See* Aug. 30, 2016 Simon Aff., Ex. G (*MacDonald* R. on App., 12). The Court considered trees 3 inches dbh to be "timber size" pursuant to the Constitution's "forever wild" clause. 253 N.Y. at 242. Additionally, the Appellate Division in *Balsam Lake* only counted the 350 trees 3 inches dbh or greater, not saplings or other vegetative growth. 199 A.D.2d at 853-854; *see also* 153 Misc.2d 606, 608 (Supreme Court citing petitioner's contention regarding the cutting of as many as 2,000 "trees," most of which are less than 3 inches dbh). Indeed, New York courts have consistently classified trees with a dbh of 5 inches or less as saplings, not timber or trees. *See, e.g., Calli v. Sorci*, 203 A.D. 327, 330 (3d Dep't 1922) (classifying a tree 4 inches dbh as a sapling); *Save our Parks v. City of New York*, 2006 N.Y. Misc. LEXIS 2365 (Sup. Ct., N.Y. County 2006) (referring to trees of a "3.5. inch caliper" as saplings). The constitutionality of DEC's 3 inch dbh standard is further supported by the legislative history of the 1915 Constitutional Convention and long-standing forestry industry standards for timber. In summary, the tree count for the Class II trails built in the timeframe set by the Court is immaterial within the meaning of *MacDonald*'s second prong.

Likewise, there is no merit to plaintiff's argument that Class II trails violate the "forever wild" clause (Complaint ¶¶ 99, 111) because trail construction includes grading, leveling, and flattening of trails, trail tread widths of nine feet rather than eight feet (Complaint ¶¶ 103-104); rutting on trails during construction (Complaint ¶ 107); bridges (Complaint ¶ 108); and cutting of brush (Complaint ¶ 109). First, terrain modifications facts are clearly set forth in work plans for each trail. In addition to disclosing the number of trees 3 inches dbh or greater to be cut, work plans describe in detail all terrain work including, rock removal, construction of bridges, and

erosion control features such as bench cuts and water bars. Although current trail construction techniques may seem more invasive during the construction stage than the older trail-building methods used at the Forest Preserve's infancy, DEC foresters and trail crews design and construct trails – including Class II trails – in a manner that will minimize their environmental impact on the surrounding forest and reduce the maintenance required. R. Ex. 8 at 6-13; *see also* Aug. 23, 2016 Ripp Aff., ¶¶ 5-16; Sept. 23, 2013 Connor Aff., ¶¶ 5-17.

Finally, even if Class II trails are viewed in terms of acres of Forest Preserve impacted, the acreage of all Class II trails is a small, insignificant fraction of Forest Preserve acreage. The total acreage of Class II trails, constructed in the timeframe of this action, assuming a 9' to 12' width would range from 29.5 acres (at a 9' width) to 39.3 acres (at a 12' width). *See* Aug. 24, 2016 Frank Aff. ¶ 13. There are 2,551,699 acres of State Forest Preserve land in the Adirondack Park. *See* Aug. 17, 2016 Regan Aff. ¶ 20. Of these lands 1,161, 257 acres are classified as "Wilderness;" 17, 637 are classified as "Canoe;" and 38,984 acres are classified as "Primitive" pursuant to the Adirondack Park State Land Master Plan. *See* Aug. 17, 2016 Regan Aff. ¶ 20. Snowmobile trails are prohibited in each of these areas. Furthermore, though snowmobile trails are allowed in "Wild Forest" areas, a classification totaling 1,298, 209 acres, trails are limited to 848.88 miles in total,[6] of which only 780.13 exist. *See* Aug. 17, 2016 Regan Aff. ¶ 20; *see also* Aug. 24, 2016 Frank Aff. ¶ 12.

Since the 1971 recommendations from the Temporary Study Commission on the future of the Adirondacks established by Governor Rockefeller, as well as the provisions of the 1972 State Land Master Plan, the State has controlled and limited snowmobile trails in the Adirondack Park.

[6] If all 848.88 miles of trails were between 9' and 12' in width the acreage would be between 926 and 1235 acres of land. However, the mileage is below this maximum, and includes Class I, Class II trails, and snowmobile routes on woods roads. *See* Aug. 24, 2016 Frank Aff. ¶ 6.

R. Ex. 14 (excerpts of 1972 Master Plan); 13 (excerpts of Temporary Study Commission); 15 at 27 (1979 Master Plan); *see also* Aug. 24, 2016 Frank Aff. ¶ 7; Sept. 25, 2013 Richards Aff. ¶¶ 8-10, 16-18. The 2009 Guidance further refined trail construction, instituting criteria for construction of more sustainable trails that prevent erosion and withstand public use, and directing elimination of many trails that penetrate the remote areas of Wild Forest units.

DEC's plan to construct multiple-use trails, like its plan to construct trails in *Balsam Lake*, is consistent with the use of Forest Preserve land and does not violate article XIV, §1. As this Court has held in previous decisions in this matter, the number of trees to be cut for Class II trails does not constitute destruction of the Forest Preserve to a "substantial extent" and therefore the state should be awarded summary judgment in its favor. Accordingly, for all these reasons, the Court should reject plaintiff's allegations that Class II trails destroy the wild forest character of the Forest Preserve.

CONCLUSION

For all the forgoing reasons, defendants are entitled to summary judgment.

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