

NEW YORK SUPREME COURT  
SUPREME COURT : COUNTY OF ALBANY

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

Plaintiff-Petitioner,

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

-against-

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

Defendants-Respondents.

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AFFIRMATION OF  
LORETTA SIMON  
IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT

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

Hon. Gerald W. Connolly

**LORETTA SIMON**, an attorney duly admitted to practice in the State of New York,  
affirms under penalty of perjury pursuant to CPLR § 2106:

1. I am an Assistant Attorney General in the Office of Eric T. Schneiderman, New York State Office of the Attorney General, Environmental Protection Bureau, and am co-counsel to defendants/ respondents, the Department of Environmental Conservation (DEC or Department) and the Adirondack Park Agency (APA or Agency), together "defendants." I make this affirmation based on personal knowledge of the documents maintained in this litigation.

2. I submit this affirmation in opposition to the plaintiff's motion for summary judgment pursuant to CPLR § 3212.

3. In support of its motion for summary judgment, plaintiff's counsel John Caffry submitted an affidavit in which he alleges that "none of Defendants' witnesses could identify a legal or scientific basis for excluding trees under 3" DBH from the ambit of Article 14" (*see*,

August 31, 2016 Affidavit of John Caffry ¶ 35; *see also* September 19, 2016 Corrected Affidavit of John Caffry ¶ 35) and to which he attached select pages of deposition testimony of DEC employees Karyn Richards, Peter Frank, Tate Connor, Thomas D. Martin, and Fred Munk.

4. First, to the extent plaintiff's counsel sought a "legal" opinion from DEC fact witnesses, such a request is improper. Second, contrary to counsel's assertions, Department witnesses consistently explained that DEC's tree counts, which exclude brush, saplings, and other vegetation less than 3" in diameter at breast height, are done pursuant to DEC policy and guidance. *See* Record Exhibit (R. Ex.) 17 (Memorandum #84-06 at 2, ¶2 [removal of trees on forest preserve] and at 4 [1986 addendum]); R. Ex. 18 (1991 DEC policy LF-91-2 re: tree cutting at 2 [¶ 1] and 6 [1]); R. Ex. 19 (1986 Van Valkenberg Forest Preserve Policy Manual, Snowmobile Trails, page 11 of 14). The relevant portions of the DEC witnesses' testimony, are found at the following, separately bound, exhibits:

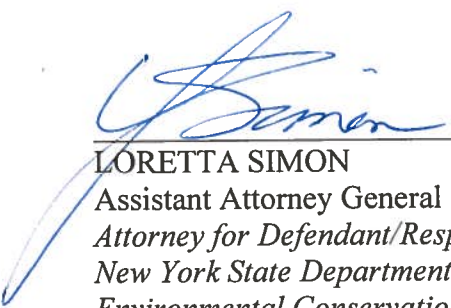
- Exhibit 1, January 7, 2015 Testimony of Karyn Richards, Special Assistant Forest Preserve Coordinator, 125:2-128:14 (citing DEC policy LF-91-2, court case and identifying DEC staff with knowledge of 3" dbh standard);
- Exhibit 2, January 8, 2015 Testimony of Peter Frank, Bureau Chief of DEC's Bureau of Forest Preserve Management, 172:10-173:16 (citing DEC policies LF-91-2 and 84-2);
- Exhibit 3, January 21, 2015 Testimony of Tate Connor, DEC Forester 1, 70:18-73:12 (citing DEC policy LF-91-2, forestry standards, and distinguishing trees 3" dbh from forest regeneration) and 77:1-8, 138:11-141:10 (explanation of 3" dbh in tree tally);
- Exhibit 4, January 28, 2015 Testimony of Thomas D. Martin, Natural Resource Supervisor for DEC Region 5; 22:20-22:22; and 126:14-127:8;
- Exhibit 5, February 25, 2015 Testimony of Fred Munk, Natural Resource Supervisor for DEC Region 6, 30:8-17.

5. Even if DEC's policy and practice were not enough, the Court of Appeals has implicitly adopted the 3" dbh standard. *See Association for the Protection of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930) (record includes a tree tally titled "Live Timber" tabulating trees starting at 3" dbh). *See* Aug. 30, 2016 Affirmation of Loretta Simon, Exhibit G at 12.

6. Plaintiff's counsel purports to attach to his affidavit true copies of affidavits from the record in *Matter of Balsam Lake Anglers Club v. Dep't of Envtl. Conservation*, 153 Misc. 2d 606 (Sup. Ct., Ulster County 1991); *aff'd* 199 A.D.2d 852 (3d Dep't 1993). Sept. 19, 2016 Corrected Caffry Aff. ¶ 40 (Ex. R). However, counsel has omitted the tree count (exhibit A) that was annexed to the April 18, 1991 affidavit of DEC Regional Forestry Manager Fredrick J. Gerty, Jr.. Attached hereto as exhibit 6 is the missing tree count from Mr. Gerty's affidavit.

7. Finally, I have attached as Exhibits 7 and 8, respectively, excerpts of the revised records of the May 8, 1894 to September 29, 1894 Constitutional Convention (observing that the "value" of the Forest Preserve was "as a great resort for the people of this State.") and the April 6, 1915 to September 10, 1915 Constitutional Convention (debate rejecting a proposal to amend the "forever wild" clause to add "trees and" to the prohibition against selling, removing, removing or destroying timber).

Dated: October 26, 2016  
Albany, New York



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