NEW YORK SUPREME COURT
SUPREME COURT : COUNTY OF ALBANY

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

Plaintiff-Petitioner,

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

-against-

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

Defendants-Respondents.

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

Hon. Gerald W. Connolly

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF/PETITIONER'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The New York State Department of Environmental Conservation (DEC or the Department) and the Adirondack Park Agency (APA or the Agency) have together developed the concept of Class II Community Connector Trails, which are intended to preserve the wild character of the Forest Preserve by moving trails on which snowmobiles are permitted away from remote interior areas and toward roadways. Class II trails are 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, also known as the "forever wild" clause.

Although the parties agree that no issues of fact are in dispute, there is no consensus as to which facts are material to plaintiff's constitutional claim. *See* Plaintiff's Memorandum of Law (Pl.'s MOL) at 2. The Department's submissions, based on personal knowledge and actual tallies, establish each trail's width and mileage; number, size and species of trees cut; number of bridges constructed; and details of any erosion control features used. These facts were established through sworn testimony of the individuals who directed and carried out the work. By contrast the "facts" alleged by plaintiff Protect the Adirondacks! Inc. vary wildly in their own documents, and are based, in large part, on extrapolation and conjecture. Moreover, the plaintiff has unilaterally redefined "timber" to include every stage of a tree. Accordingly, its tree counts are grossly inflated.

The credible evidence establishes that no trail required substantial cutting, and that DEC staff carefully sited and designed each trail to preserve the forest lands in a wild state consistent with the constitutional standard, ensuring protection of natural resources, and maintaining the "character of a foot trail." *See Association for the Protection of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930). Because plaintiff has not demonstrated that Class II trails are unconstitutional,

and because, in fact, the Class II trail system improves upon the existing snowmobile trail system by making snowmobile trails more environmentally sustainable and removing such trails from remote interior areas of the Forest Preserve, plaintiff's remaining cause of action should be dismissed in its entirety.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Throughout this action, plaintiff has asserted wildly differing numbers of trees it claims were cut, or will be cut, on Forest Preserve land. *See* Petition/Complaint ¶ 88 (estimating 8,223 trees of 3 inches or greater diameter-at-breast-height [dbh]). Even following extensive discovery, however, plaintiff continues to rely on extrapolations, estimates, and conjecture. Aug. 25, 2016 Affidavit of Steve Signell ¶ 92, Ex. D (estimating 31,333 trees cut or to be cut); *see also* Pl.'s MOL at 6 (estimating that the State has "destroyed" or plans to destroy 31,000 trees in the Forest Preserve).[1]

The State's submissions, however, definitively establish the material facts as set forth in affidavits by individuals with firsthand knowledge. Fifteen Class II Community Connector trails, or trail segments, constructed or under construction, fall within the timeframe established by the Court's October 15, 2014, Order; an additional Class II trail was built in 2011. These trails are identified in the Aug. 19, 2016 Affidavit of DEC Natural Resource Planner Maxwell Wolckenhauer (Exhibit A – Tree Tally). 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; an additional 11 miles are scheduled to be closed.[2] Shifting trails

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[1] DEC and the APA refer to their Motion for Summary Judgment, specifically the Memorandum of Law and Statement of Material Facts, for a complete discussion of the statutory, factual, and procedural background and history of this case.

[2] *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 Exs. A, B and C (maps showing trail closures); Oct. 26, 2016 Clague Aff. ¶¶ 4-5.

from the forest interior to the forest edge reduces impacts to, and may actually enhance, the wild character of the forest.[3] 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.[4] Exact details of trees cut, bridges constructed, and terrain modification features used on each trail are set forth in the affidavits of DEC staff submitted with the State's motion for summary judgment, and exhibits thereto, as well as the Administrative Record submitted in 2013.[5] The State's submissions establish its entitlement to summary judgment.

ARGUMENT

Plaintiff asserts an absolutist interpretation of article XIV, § 1, arguing that, "[w]hile the Environmental Conservation Law authorizes DEC to manage and restrict the public's use of the Forest Preserve, it cannot, and does not authorize DEC to violate the Constitution by cutting trees in [the] Forest Preserve[.]" Mem. of Law in Support of Pl.'s Motion for Summary Judgment (Pl.'s MOL) at 15. Plaintiff's interpretation of article XIV, § 1, would render unconstitutional all construction or maintenance work in the Forest Preserve that required the cutting of even the smallest sapling. That is not the law. The State concedes that trail construction or terrain manipulation of any kind in the Forest Preserve will have an impact on the surrounding forest. However, DEC has considered a wide variety of context-specific factors in designing and constructing the Class II community connector trail system and has taken actions to minimize each trail's impacts on the forest around it. DEC uses the same construction design and erosion control techniques for Class II trails as for other trails in the Forest Preserve, the only difference being that these trails are one foot wider than other trails to limit the effects of

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[3] *See* Aug. 24, 2016 Affidavit of Timothy Howard, Ph.D., ¶¶ 6-23.
[4] *See* Oct. 26, 2016 Simon Aff. ¶¶ 4-5.
[5] *See* Aug. 24, 2016 Frank Aff. ¶ 14; *see also* Aug. 30, 2016 Affirmation of Loretta Simon, Ex. E (list of affidavits and exhibits).

snowmobiling on the surrounding environment, while ensuring that snowmobiles may pass each other safely. Plaintiff's argument, which effectively challenges all trails in the Forest Preserve, is extreme, not supported by the evidence in the record, and belied by both the legislative history of article XIV and the subsequent case law. Plaintiff's affidavits do not raise a genuine material issue of fact; in contrast, the State has presented ample evidence to support its request for summary judgment in its favor.

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).

As the Court has already determined, 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.[6] These affidavits also establish the exact number of trees cut, or authorized to be cut, for each trail.[7] Each affidavit and work plan sets

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[6] *See* Aug. 24, 2016 Frank Aff. ¶¶ 14-15.
[7] *See* Aug. 19, 2016 Wolckenhauer Aff., Ex. A.

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.

By way of example, the Department's record and affidavits establish the material facts about the Seventh Lake Mountain trail, constructed between January 1, 2012, and December 15, 2013. The evidence shows that the trail is 11.9 miles long, and required the cutting of fewer than 1,924 live trees[8] and 161 dead trees.[9] Likewise, credible evidence before the Court establishes the material facts regarding the Class II segment of the Wilmington trail,[10] the Gilmantown trail,[11] and both the constructed and proposed portions of the Newcomb to Minerva to North Hudson trail.[12] The relevant details of each of these trails, including numbers of trees cut, number of bridges constructed, and specific erosion control measures, are set forth in sworn affidavits, record exhibits, work plans, and other documents submitted by DEC and the APA. *See also* Memorandum of Law in Support of the State's Motion for Summary Judgment at 14-15.

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[8] Some trees marked for cutting were not actually cut. *See* Aug. 17, 2016 Connor Aff. ¶ 12.

[9] 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.

[10] R. Ex. 6 (UMP), 40 (map), 41-44 (work plans and permit), 45 (photos); *see also* Aug. 19, 2016 Affidavit of Steve Guglielmi.

[11] R. Ex. 46 (map), 47-49 (work plan and tree tallies), 50 (photos); *see also* Aug. 18, 2016 Affidavit of Benjamin Thomas ¶ 11.

[12] R. Ex. Aug. 23, 2016 Ripp Aff. ¶¶ 24-29.

Because all material facts regarding on-the-ground work are known, and clearly set forth in the State's supporting documents, the 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.

CLASS II COMMUNITY CONNECTOR TRAILS ARE CONSTITUTIONAL

A. DEC Constructs Trails to Provide Public Access and Prevent Destruction of the Forest Preserve.

The Department builds Class II trails on lands classified as "Wild Forest" and "Intensive Use," not those classified "Wilderness" or "Primitive."[13] Contrary to plaintiff's allegations, the State locates, designs, and constructs Class II community connector trails – and all trails in the Forest Preserve – in a manner that minimizes negative impacts on the forest. When DEC contemplates building trails in the Forest Preserve, it considers several factors, including the number of trees to be cut. The Department, together with the Agency, considers the length of the trail, the concentration of the cutting, how the area looks before and how it will look after cutting, whether the cutting will cause erosion or impacts on wetlands, what will be done with the cut trees, the purpose of the cutting, whether there will be any watershed impacts, whether there would be an increased wild fire danger, what species will be cut and the size of the trees to be cut, whether the canopy would be impacted, and in what type of forest the cutting would occur.[14] The Department does not merely count trees but analyzes in comprehensive detail the

[13] "Wild Forest" areas are those where the "resources permit a somewhat higher degree of human use than in wilderness, primitive or canoe areas, while retaining an essentially wild character." Adirondack Park State Land Master Plan, R. Ex. 1, at 31. If, at the time of classification, there is a snowmobile trail that cannot be closed in an area that would otherwise be classified as "Wilderness," an area may be classified as "Primitive," acknowledging the pre-existing snowmobile trail, while otherwise managing the lands as "Wilderness." Regardless of the pre-existing use, new snowmobile trails may not be built on "Wilderness" or "Primitive" lands.

[14] *See generally* 2011 Moose River Plains Wild Forest UMP, R. Ex. 5, 2005 Wilmington Wild Forest UMP, R. Ex. 6, 2010 Amendment to the Jessup River Wild Forest UMP, R. Ex. 7; *see also* affidavits of Maxwell Wolckenhauer, Tate Connor, Benjamin Thomas, Keith Rivers, Steven Guglielmi, Jonathan DeSantis, Daniel Levy, Robert Ripp, and Peter Frank, submitted on in

number and size of trees of each species to be cut, and the impact that will have on the character of the wild forest.

DEC foresters and APA planners carefully design each trail to avoid cutting larger trees, minimize erosion, and require minimal maintenance. The details for all of the individual Class II Community Connector trails involved in this case – including mileage, number of trees cut, and additional trail features – can be found in the accompanying affidavits to the State's motion for summary judgment as well as the State's Administrative Record.[15] Even after the trail route is mapped and trees are marked to be cut, DEC foresters often reassess the trail location to avoid cutting large trees; this is confirmed by "the significant undercount" of trees cut on the Seventh Lake Mountain trail, as alleged by Steve Signell.[16] DEC foresters will construct trails that cut through dense stands of small trees in favor of preserving larger trees because it preserves the canopy and the large, mature trees in the forest.[17] On the Seventh Lake Mountain trail, for example, 95% of the trees cut were 8" diameter at breast height (dbh) or smaller.[18]

Among the trail features they implement to preserve the forest, DEC trail construction crews preserve the tree canopy, which maintains the integrity of the forest ecology.[19] Because the canopy is maintained and the trails do not create a forest edge, they likewise do not constitute a "clearcut" within either the forestry or ecological definitions of the term.[20] Nor does DEC

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support of the State's Aug. 31, 2016, motion for summary judgment.

[15] *See, e.g.,* Aug. 24, 2016 Frank Aff. ¶ 17; Aug. 23, 2016 Ripp Aff. ¶ 5-15; Sept. 26, 2016 Connor Aff. ¶ 18; Sept. 23, 2013 Connor Aff. ¶ 15.

[16] Sept. 26, 2016 Connor Aff. ¶ 12; Sept. 23, 2013 Connor Aff. ¶¶ 27, 30-31; *contra* Aug. 25, 2016 Signell Aff. ¶ 68.

[17] Aug. 23, 2016 Ripp Aff. ¶¶ 31-35, 39; Sept. 26, 2016 Connor Aff. ¶¶ 8, 21; *contra* Aug. 25, 2016 Signell Aff. ¶ 31.

[18] Sept. 26, 2016 Connor Aff. ¶ 24; Sept. 26, 2016 Wolkenhauer Aff. ¶ 10.

[19] *See* Aug. 17, 2016 Affidavit of Tate Connor ¶ 11; Aug. 23, 2016 Affidavit of Robert Ripp ¶¶ 11-14; Aug. 24, 2016 Affidavit of Timothy Howard, Ph.D. ¶¶ 27-28.

[20] *See* Aug. 24, 2016 Frank Aff. ¶¶ 17-20; Aug. 24, 2016 Howard Aff. ¶¶ 27-28, Ex. C.

remove any trees from the Forest Preserve. The trees are cut and used on the trail or scattered in the surrounding forest, consistent with the constitutional directive that trees may not be removed from the Forest Preserve and must therefore remain as part of the ecosystem.[21]

The Department designs and constructs trails that will be environmentally sustainable and will preserve the forest's ecosystem. Contrary to plaintiff's assertions, saplings and seedlings do not serve the same role in the forest as large overstory trees.[22] Rather, large, mature trees absorb greater volumes of water and nutrients, provide greater erosion control and wider shade to the forest floor, and provide habitat and produce fruit for wildlife.[23] Thus, even if the Court accepts Signell's assertion that one Class II trail passes through old growth forest, the trail planning and construction features ensure that the Forest Preserve is not impacted to a substantial extent, and the record demonstrates that few large trees were cut.[24] DEC has considered these factors in its planning and construction of Class II trails, and has reasonably determined that these trails will have a minimal impact on the Forest Preserve. Moreover, by closing trails to snowmobiles in the interior of the forest and creating trails with fewer impacts on the forest edge, close to roads, the State reduces fragmentation and increases the forest's ability to withstand a changing environment.[25]

Even if the plaintiff had carried its burden of showing that the Department cut a material amount of timber in constructing the Class II connector trail system, which it has not, plaintiff is in fact complaining about a *one foot* difference in trail width. The real difference between Class II community connector trails and existing trails that plaintiff does not challenge is twelve

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[21] Aug. 23, 2016 Ripp Aff. ¶ 15; Sept. 26, 2016 Connor Aff. ¶ 25.
[22] Aug. 25, 2016 Signell Aff. ¶ 11; *compare* Oct. 26, 2016 Affidavit of Timothy Howard, Ph.D. ¶ 16.
[23] *See* Sept. 27, 2016 Howard Aff. ¶ 15; *see also* Aug. 23, 2016 Ripp Aff. ¶ 39.
[24] Sept. 26, 2016 Connor Aff. ¶¶ 26-27; Sept. 26, 2016 Wolkenhauer Aff. ¶ 10.
[25] *See* Aug. 24, 2016 Howard ¶¶ 7-9, 23; Aug. 24, 2016 Affidavit of Peter J. Frank ¶¶ 5-7.

inches.[26] Plaintiff does not challenge Class I snowmobile trails, which are eight feet wide, but does challenge Class II trails, which are nine feet wide. DEC uses the same trail construction and erosion control techniques in other parts of the Adirondack Forest Preserve, including in the High Peaks region, a Wilderness area that experiences extensive public use.[27] DEC also uses substantially similar gates and reflective signage on Class II trails as it does on other trails, as well as gravel to stabilize trails and prevent erosion.[28] There is no substantial difference between Class I and Class II trails: Class II trails are simply one foot wider.

Plaintiff's argument that Class II trails "are not 'necessary' to protect the Forest Preserve or to allow the public to 'use' the Forest Preserve," and should, therefore, be prohibited (Pl.'s MOL at 10) is a red herring: no recreational trail is strictly "necessary," including the extensive network of foot trails, horse trails, and Class I trails, all unchallenged by plaintiff. Rather, the question before the Court is whether the State removed timber to a "material degree" to provide reasonable access to the Forest Preserve. *See MacDonald*, 253 N.Y. at 238. The Court of Appeals in *MacDonald* placed a significantly greater emphasis on public access than plaintiff acknowledges:

> [t]he Forest Preserve is preserved for the public; its benefits are for the people of the State as a whole. Whatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for every one within the State and for the use of the people of the State. Unless prohibited by the constitutional provision, this use and preservation are subject to the reasonable regulations of the Legislature.

Id. at 238-239. Plaintiff's interpretation of article XIV, § 1, would effectively bar any further construction of trails in the Forest Preserve and therefore, unreasonably restrict access to the Forest Preserve. The text of the Constitution, its legislative history, and case law interpreting

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[26] R. Ex. 8 (2009 Guidance) at 8-9.
[27] Aug. 17, 2016 Connor Aff. ¶ 20; EBT Trans. of Tom Martin, 39:15-40:13, attached as Ex. 4 to Oct. 26, 2016 Affirmation of Loretta Simon.
[28] Martin EBT Trans., 55:9-57:15, 59:4-62:9.

article XIV each make clear that the public has a right to use the Forest Preserve. The Class II connector trail system facilitates reasonable public access within the meaning of the Constitution because it simultaneously protects the wild character of the Forest Preserve.

B. The State Constitution Distinguishes Between "Trees" and "Timber"

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" – not timber – by DEC in order to construct Class II trails violates article XIV, § 1. Complaint ¶ 82. Specifically, plaintiff alleges that the number of trees cut for the Seventh Lake Mountain, Gilmantown, and Wilmington trails is "substantial" within the meaning of a 1930 Court of Appeals decision, and thus violates the Constitution. Complaint ¶¶ 85-89. Plaintiff further alleges that Class II trails generally violate the "forever wild" clause because construction involves land clearing, trails that are nine feet wide (rather than eight feet), trail erosion control features such as bench cuts, bridges over waterways, rock removal and reduction, the removal of "understory vegetation," and the use of plastic reflectors. Complaint ¶¶ 98, 104, 106, 108, 109, 111. Finally, plaintiff alleges that these trail construction features, along with snow grooming, create a "man-made setting" in violation of article XIV, § 1, of the Constitution. Complaint ¶ 116.

Plaintiff has failed to produce sufficient legal or factual evidence to support these allegations. Rather, plaintiff has provided only estimates of trees cut, including extrapolations and projections based largely on speculation.[29] The Department, by contrast, has provided actual tree counts, set forth in sworn affidavits. The Department has demonstrated that, in designing and implementing the Class II trail system, it has appropriately balanced its statutory mandates to provide public access to the Forest Preserve and to ensure environmental protection by moving

[29] *See, e.g.*, Aug. 25, 2016 Signell Aff. ¶¶ 77-85; Pl.'s MOL at 13.

trails from remote interior areas closer to major travel corridors, closing 53 miles of existing trails, avoiding forest fragmentation, and preserving the forest canopy.[30] 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," the standards set forth in *Association for Protection of Adirondacks v. MacDonald*, 253 N.Y. 234, 238 (1930). *See, e.g.*, Sept. 4, 2015 Decision and Order at 6-10; Aug. 10, 2016 Decision and Order at 11-18.

To further its view of article XIV, § 1, which it claims precludes the cutting of *any* trees, plaintiff misinterprets legislative history and existing case law. Plaintiff also improperly treats "trees" as a synonym for "timber." As fully explained in defendants' own motion for summary judgment, DEC policy limits tree-cutting on the Forest Preserve, requiring, among other things, that work plans for any construction and maintenance of facilities in the Forest Preserve include a count by species of all "trees" to be cut, that is, trees that measure 3 inches or more dbh.[31] Plaintiff, however, argues that DEC violates article XIV, § 1, by cutting *any* "trees" on the Forest Preserve, regardless of their age, size, or likelihood of survival.[32]

The text of article XIV, § 1, is simply not as broad as plaintiff insists. The Constitution prohibits the sale, removal or destruction of "timber," not seedlings, saplings, or even small

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[30] *See* Aug. 24, 2016 Howard Aff. ¶¶ 7, 22-23; Aug. 19, 2016 Affidavit of Joshua D. Clague ¶ 5.
[31] *See* Mem. of Law in Support of State Defendants' Motion for Summary Judgment, 8-10; Sept. 25, 2013 Affidavit of Karyn Richards ¶¶ 19-31.
[32] *See* Aug. 25, 2016 Affidavit of Steve Signell ¶¶ 6, 9, 32; Aug. 31, 2016 Affidavit of John W. Caffry ¶ 31. Contrary to plaintiff's assertion (Aug. 31, 2016 Caffry Aff. ¶ 32; Pl.'s MOL at 17), this Court has not determined that the State's policies regarding tree-cutting are irrelevant. Rather, the portion of the Court's October 15, 2014 protective order to which plaintiff's counsel quotes sustained the State's objection to plaintiff's document demand no. 43, seeking documents dating from January 1, 1894, as being "overly broad, burdensome, vague, irrelevant and seeking legal conclusions and/or theory." Oct. 15, 2014 Order, 23-24. Thus, the Court's rejection of plaintiff's onerous discovery demands did not constitute a final decision after a full and fair opportunity to litigate whether the State's tree-cutting policies are applicable. *See Gilberg v. Barbieri*, 53 N.Y.2d 285, 291 (1981).

trees. The legislative history demonstrates that the framers intended to stop the wholesale clearing of the Adirondack forests, which caused mountainside erosion and silting up of commercial waterways such as Lake George, the Hudson River, and Lake Champlain, and threatened the drinking water supply to New York City. Rev. Rec. of Const. Conv. of 1894, Vol. IV at 132-133, 151-152, attached to Oct. 26, 2016 Simon Aff. as Ex. 7. They sought to prevent the Adirondacks from becoming "desolate and barren," not to prevent all access by the people to the Forest Preserve. *See id.* at 147.

Moreover, the 1915 Constitutional Convention explicitly *rejected* plaintiff's absolutist view of the Forever Wild clause, making clear that "timber" is not synonymous with "trees." The delegates debated and rejected a proposal to amend the "forever wild" clause to add "trees and" to the prohibition against selling, removing, or destroying timber "for the purpose of making more inclusive the scope of the provision." Rev. Rec. of the Const. Conv. of 1915, Vol. II at 1340, attached as Exhibit 8 to the Oct. 26, 2016 Affirmation of Loretta Simon. One delegate observed that

> "[t]he Court of Appeals has determined that a tree is any growing thing of a tree nature, which may be only six or eight inches high. It will be impossible, under this provision, for any one to cut a tent pole, a tent stick, or anything in the Adirondacks for the purpose of the construction of a tent, or for any other use whatever."

Id. at 1448.

Delegates feared that the addition of "*trees and* timber" to the forever wild clause would prevent public access to the Forest Preserve, "locking up our forests against access and use" by the people of New York. *Id.* at 1505. Indeed, the original proponent of article 14, § 1, David McClure, had stated that the "value" of the Forest Preserve was "as a great resort for the people of this State." Rev. Rec. of the Const. Conv. of 1894, Vol. IV at 131, Ex. 7 to Oct. 26, 2016 Simon Aff.; *see also* Aug. 30, 2016 Affidavit of Philip Terrie ¶ 32. Accordingly, the delegates

ultimately voted against the proposed amendment to article XIV. Plaintiff asks the Court to adopt this proposal, even though it was specifically rejected by a constitutional convention a century ago.

The courts have also rejected plaintiff's attempt to blur the distinction between trees and timber. In the few instances where the Court of Appeals has taken up this question, it has also recognized the difference between "timber" and "trees." The Court distinguished between "fruit instead of timber trees" and stating that "[w]here timber, forming part of a forest, is fully grown, the value of the trees taken or destroyed can be recovered." *Dwight v. Elmira, C. & N. R. Co.*, 132 N.Y. 199, 201, 202 (1892); *see also Disbrow v. Westchester Hardwood Co.*, 164 N.Y. 415 (1900). Likewise, although trees may have been historically harvested in the Adirondacks for the charcoal industry or for "rustic furniture" (*see* Aug. 31, 2016 Affidavit of Peter Bauer, ¶¶ 6-10), the Appellate Division, in *Association for the Protection of the Adirondacks v. MacDonald*, would have been well-aware of such industry and nonetheless noted, after considering the State's tree tally accounting for all trees 3 inches dbh or greater, that the 2,600 trees must "be regarded as of 'timber' size." 228 App. Div. 73, 82 (3d Dep't 1930).

More recently, the Third Department accepted DEC's 3 inch dbh cut-off in *Matter of Balsam Lake Anglers' Club v. Dep't of Environmental Conservation*, stating that DEC acted within constitutional bounds when it cut 350 trees of three inches dbh or greater, as well as saplings and "vegetative growth that DEC does not classify as trees" for a trail on Forest Preserve land, as well as an undetermined amount of cutting required for a new trail and five parking lots. 199 A.D.2d 852, 854 (3d Dep't 1993). In that case, the petitioners argued that article XIV, § 1, bars any cutting of vegetation on Forest Preserve land for any project.

In response to the *Balsam Lake* petitioners' argument that the 1.9-mile newly constructed portion of the cross-country ski trail involved cutting more than 300 trees, including vegetation less than 1 inch dbh, DEC foresters went back to the trail to tally the stumps on the ground, distinguishing between vegetative growth under 3 inches dbh and timber-sized trees 3 inches or greater dbh. *See* Apr. 18, 1991 Affidavit of Frederick J. Gerty, Jr., Ex. A, attached to the Oct. 26, 2016 Affirmation of Loretta Simon, Ex. 6.[33] DEC staff explained that it included in its tally growth 1 to 3 inches dbh "to show the relative insignificance of the cutting." Apr. 18, 1991 Gerty Aff. ¶ 9, attached to Aug. 31, 2016 Caffry Aff. as Ex. R. DEC foresters in *Balsam Lake* submitted affidavits stating that "it has been DEC's policy that vegetation less than 3 inches DBH is not a 'tree.' Instead, vegetation less than 1 inch in diameter is a "seedling,' 'brush,' or a 'shrub.' Vegetation 1 to 3 inches DBH is a 'sapling.'" Apr. 18, 1991 Affidavit of William J. Rudge ¶ 7, attached to the Aug. 31, 2016 Caffry Aff. as Ex. S; *see also* Apr. 18, 1991 Gerty Aff. ¶ 9. The Department's longstanding policy is consistent with industry standards and sound ecological science, and has been supported by New York courts.

Nor is the tree count the only criterion relevant to deciding whether an activity is consistent with article XIV. The courts in both *MacDonald* and *Balsam Lake* did not merely look at the number of trees over 3 inches dbh to be cut, but also looked to the specific context of each project to determine whether the State had adequately examined the project's impact on the surrounding forest. In *MacDonald*, the Court of Appeals determined that denuding a mountainside had a significant impact on the forest around it, and thus violated article 14, § 1. *MacDonald*, 253 N.Y. at 238. The Appellate Division in *Balsam Lake* also looked at the proposed cutting within the context of its wild forest unit and, after considering both the number

[33] Although plaintiff included the Gerty affidavit and one of its exhibits (Ex. B), plaintiff notably excluded Gerty's tree tally.

of trees over 3 inches dbh cut and other project features, determined that the number of trees cut did not rise to a "material degree." *Balsam Lake*, 199 A.D.2d at 853. Here, the Court should likewise examine each trail built or proposed to be built in the context of its surrounding wild forest, looking not only to the pure numbers of trees cut, but other trail features and considerations to determine whether DEC cut timber "to a substantial extent." *MacDonald*, 253 N.Y. at 238. Record documents and sworn affidavits establish that it did not.

Although plaintiff correctly states that courts need not defer to agency expertise *when interpreting the Constitution*, that is not what the Department is doing here. To the contrary, the Department is carrying out the Legislature's mandate that it manage the Forest Preserve. ECL § 9-0105(1)-(2). The Environmental Conservation Law recognizes the Department as the State's expert on silviculture – the science of forestry. ECL § 9-0107(2). To carry out its obligation to manage the Forest Preserve, DEC uses its expertise and specialized knowledge in silviculture, forest ecology, and management to provide public access to the Forest Preserve while also ensuring that these natural resources are protected.[34]

Where the "interpretation of a statute or *its application* involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for the administration of the statute." *Town of Lysander v. Hafner*, 96 N.Y.2d 558, 564-565 (2001) (emphasis in original), citing *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980). The court's role in such a case is limited to ascertaining whether the agency's construction or application of the statute is irrational or unreasonable. *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 79 (2008); *Matter of Chesterfield Assocs. v. N.Y. State Dept. of*

[34] *See* MOL in Support of Defendants/Respondents' Motion for Summary Judgment, at 8-10; *see also* "Divisional Directive LF-91-2," R. Ex. 18, at 2, 6.

Labor, 4 N.Y.3d 597, 604 (2005); *Kennedy v. Novello*, 299 A.D.2d 605 (3d Dep't 2002), *lv. denied* 99 N.Y.2d 507 (2003). Accordingly, the Court should defer to the Department's decisions regarding the best practices for sustainable use of the Forest Preserve, within the boundaries set forth in article XIV, § 1. *See Matter of Luther Forest Corp. v. McGuiness*, 131 A.D.2d 233, 237 (3d Dep't 1987) (DEC has expertise in forestry); *contra* Aug. 31, 2016 Caffry Aff. ¶¶ 32, 56; *contra* Pl.'s MOL at 17.

CONCLUSION

DEC's plan to construct multiple-use trails to provide public access and use of Forest Preserve land does not violate article XIV, §1. The amount of timber to be cut for these 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 Forest Preserve. For all the foregoing reasons, plaintiff is not entitled to summary judgment and the Court should instead grant the State's motion for summary judgment, dismissing plaintiff's remaining cause of action in its entirety.

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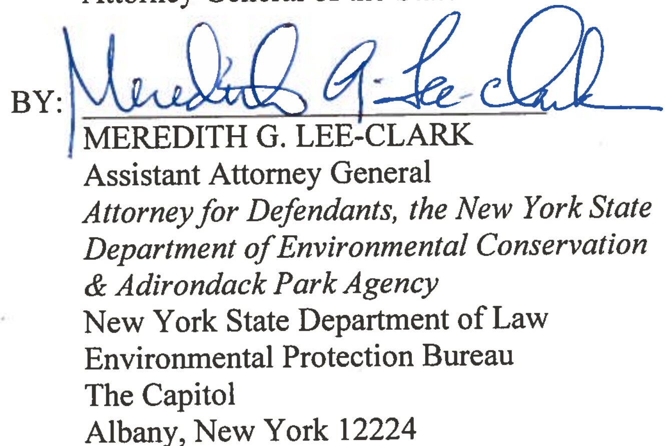

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