STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

In the Matter of the Application of

PROTECT THE ADIRONDACKS! INC.,

Plaintiff-Petitioner,

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

-against-

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

Defendants-Respondents.

ANSWERING AFFIDAVIT OF JOHN W. CAFFRY

INDEX NO. 2137-13

RJI NO.01-13-ST-4541

HON. GERALD W. CONNOLLY, ASSIGNED JUSTICE

STATE OF NEW YORK)
)SS.:
COUNTY OF WARREN)

John W. Caffry, being duly sworn, deposes and says that:

1. I am an attorney licensed to practice law in the State of New York, and am a member of Caffry & Flower, the attorneys for the Plaintiff-Petitioner Protect the Adirondacks! Inc. (hereinafter "Plaintiff" or "PROTECT").

2. I make this affidavit in opposition to the Defendants' motion of the New York State Department of Environmental Conservation ("DEC") and the Adirondack Park Agency ("APA") (collectively "Defendants")for summary judgment on the first cause of action in this matter, and in support of Plaintiff's motion for summary judgment.

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INTRODUCTION

3. On August 31, 2016 Plaintiff made a motion for summary judgment on the first cause of action in this action, which motion demonstrated that there were "no material triable issues of fact", Red Zone, LLC v. Cadwalader, Wickersham & Taft, 27 N.Y.3d 1048, 1049 (2016), on the question of whether the construction of the Class II Community Connector snowmobile trails at issue herein will result in the destruction of a material or substantial amount of trees in the Forest Preserve, in violation of Article 14, § 1 of the New York State Constitution. On that same date, Defendants moved for summary judgment on that same issue.

4. The undisputed facts establish that the construction of said trails will result in the destruction of a material or substantial amount of trees in the Forest Preserve, in violation of Article 14, § 1. The only disputed issues are issues of law. Plaintiff's motion should be granted, Defendants' motion should be denied, and Plaintiff should be granted judgment on its first cause of action.

5. Defendants also moved for summary judgment on the question, which was also pled in the first cause of action, of whether said trails will create a man-made setting and interfere with the wild forest nature of large parts of the Forest Preserve. See Complaint[1] pp. 24-28. Plaintiff did not make such

[1] Plaintiff's verified Combined Complaint and Petition dated April 12, 2013 (hereinafter "Complaint"), a copy of which has

a motion on this question. See Corrected Affidavit of John W. Caffry, sworn to on September 19, 2016 ("Caffry Aff."), ¶7. As shown below, and by the affidavits being submitted simultaneously herewith, there are numerous "material triable questions of fact", id., on this question, and Defendants' motion on this aspect of the first cause of action should be denied.

UPDATED PROCEDURAL HISTORY

6. Since the filing of the parties' motions for summary judgment, a four justice panel of the Appellate Division granted Plaintiff's motion for a preliminary injunction pending appeal pursuant to CPLR § 5518. A copy of that Decision and Order on Motion is annexed hereto as Exhibit A. The decision bars the Defendants from destroying any trees in the Adirondack Forest Preserve for the construction of any Class II Community Connector snowmobile trails and also prohibits clearing the land on the Minerva-Newcomb-North Hudson trail.[2] Id.

7. Although the decision did not discuss the reasoning behind it, it is implicit in that decision that:

> the defendant threatens or is about to do ... an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a

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previously been filed with the Court.

[2] With Plaintiff's consent, the injunction allows work to go forward on a very short section of road that will double as the access route to the Palmer Pond Dam, which is alleged to be in need of safety-related repairs.

> judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. CPLR § 6301.

It is also implicit in this decision that Plaintiff has demonstrated a probability of success on the merits. See Green Harbour Homeowners' Ass'n v. Ermiger, 67 A.D.3d 1116, 1117 (3d Dept. 2009).[3]

8. With this most recent decision, five different justices of the Appellate Division have now voted in favor of granting a preliminary injunction in this case. See Exhibit A hereto and Caffry Aff. Exhibit H. Some of these justices have now done so twice. Id.

9. The Appellate Division did not require the posting of an undertaking, despite the fact that the Defendants argued for the Court to require that one be posted. Defendants' Memorandum of Law to the Appellate Division, August 26, 2016, pp. 16-17.

10. Plaintiff has now perfected its appeal on the preliminary injunction issue. The Appellate Division has not yet set a date for the filing of answering and reply briefs, or a date for oral argument. In the meantime, the preliminary injunction pending appeal remains in effect.

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[3] Of course, "[t]he granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits". Digitronics Inventioneering Corp. v. Jameson, 11 A.D.3d 783, 784 (3d Dept. 2004).

THERE ARE NO MATERIAL TRIABLE ISSUES OF FACT ON THE QUESTION OF WHETHER THE CONSTRUCTION OF THE TRAILS WILL RESULT IN THE DESTRUCTION OF A SUBSTANTIAL AMOUNT OF TREES IN THE FOREST PRESERVE, AND PLAINTIFF SHOULD BE GRANTED SUMMARY JUDGMENT

11. Both sides have moved for summary judgment on the question of whether the number of trees cut for the construction of Class II Community Connector snowmobile trails is substantial, and therefore in violation of Article 14, § 1. The material issues of fact on that question are undisputed. The disputed issues are all issues of law. Therefore, summary judgment is appropriate, and should be granted to the Plaintiff.

12. In the Ass'n for the Protection of the Adirondacks decisions the courts held that cutting an estimated 2,500 to 2,600 trees of 3" DBH (diameter at breast height) or more on the Forest Preserve for the construction of a bobsleigh run and its return road for the 1932 Winter Olympics was "substantial" and "material" and was unconstitutional. Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 238-242 (1930); Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73 (3d Dept. 1930).

13. At the opposite end of the spectrum, in Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dept. 1993), it was found that the cutting of about a dozen trees of 3" DBH or more, and a total of 350 trees of one or more inch in diameter at stump height, for the construction of a hiking trail was not substantial and was not prohibited by Article 14, § 1. See Caffry Aff. ¶¶ 40-43.

14. Thus, the courts have interpreted Article 14, § 1 to proscribe the cutting of 2,500 to 2,600 trees on the Forest Preserve, but have allowed the cutting of a mere dozen or so. In the present case, the total number of trees destroyed and designated for destruction vastly exceeds either number. Even if each Class II Community Connector snowmobile trail is looked at in isolation, rather than collectively, the number of trees cut vastly exceeds the number permitted to be cut by the Balsam Lake decision, and, for most of the trails, is much closer to the number that was proscribed in Ass'n for the Protection of the Adirondacks.

15. No matter how one counts the trees that have been or will be cut, under any scenario, the undisputed facts show that the Class II Community Connector trails violate Article 14, § 1.

The Trails Are Unconstitutional,
Counting Only Trees Over 3" DBH Cut to Date

16. So far, over 5,200 trees of 3" DBH or more have been cut for the system of Class II Community Connector trails:

Trees Over 3" DBH Already Cut

Trail Name	Defendants' Tree Count (Wolkenhauer Aff. Exhibit A)[4]	Plaintiff's Tree Count (Signell Aff. Exhibit D)[5]

[4] Affidavit of Maxwell A. Wolkenhauer, sworn to August 19, 2016 ("Wolkenhauer Aff.")

[5] Affidavit of Steven Signell, sworn to August 25, 2016 ("Signell Aff.").

Seventh Lake Mountain Trail	2,083	2,083*
Newcomb to Minerva to North Hudson Trail	2,213	2,654*
Gilmantown Trail	127	104
Wilmington (Cooperkiln) Trail	615[6]	565
Old Powerline Trail	22	22*
Lewey Lake Trail	3	3*
Steam Sleigh Trail	43	43*
North Crossover Trail	43	43*
Mt. Tom East Trail	124	124*
TOTAL	**5,273**	**5,641**

*Incorporates DEC's count for trail segment(s) in which Plaintiff did not have its own independent count.

17. Thus, to date, somewhere between 5,273 and 5,641 trees of at least 3" DBH have been cut for the construction of the system of Class II Community Connector snowmobile trails. This is twice the amount of trees of that size that was planned to be cut for the bobsleigh run at issue in Ass'n for the Protection of the Adirondacks, supra.

18. Construction of two of these trails has required cutting over 2,000 trees each, well within the range that was proscribed in Ass'n for the Protection of the Adirondacks, supra.

[6] In the August 22, 2013 decision (p. 14) in this action, the Court found that 722 trees were to be cut for the construction of the Wilmington Trail. The Court based its finding on DEC's own submissions, which showed that it would be cutting a total of 722 trees, not 615 trees.

Three others greatly exceeded the amount of tree cutting that was found to be permissible in Balsam Lake Anglers Club, supra.

19. Whether the entire Class II Community Connector trail system is considered as a whole (¶¶ 52-54, infra), or trails are considered individually, these trails were constructed in violation of Article 14, § 1, and summary judgment should be granted to the Plaintiff on its first cause of action as a matter of law.

The Trails Are Unconstitutional, Counting
Only Trees over 3" DBH Cut and Planned to Be Cut

20. In addition to the thousands of trees of 3" DBH or more that have been cut so far, many more trees of that size will be cut for trails that have already been approved by DEC and APA:

Trees Over 3" DBH Planned to Be Cut

Trail Name	**Defendants' Tree Count (Wolkenhauer Aff. Exhibit A)**	**Plaintiff's Tree Count (Signell Aff. Exhibit D)**
Newcomb to Minerva to North Hudson Trail	1,253	1,653
Polaris Trail	DEC count not released	2,078
TOTAL	**1,253**	**3,731**
Total trees cut, to date, and planned	**6,526**	**9,372**

21. Thus, somewhere between 6,526 and 9,372 trees of at least 3" DBH have been cut, or are planned to be cut, for the

construction of the system of Class II Community Connector snowmobile trails. This is well more than twice the amount of trees of that size that was planned to be cut for the bobsleigh run at issue in Ass'n for the Protection of the Adirondacks, supra.

22. Construction of two of these trails (Seventh Lake Mountain and Polaris) has or will require cutting over 2,000 trees each, and the Newcomb to Minerva to North Hudson Trail will be over 4,000 trees when it is complete. These three trails are well within, or over, the range that was proscribed in Ass'n for the Protection of the Adirondacks, supra.

23. Three other trails (Wilmington, Gilmantown and Mount Tom) greatly exceeded the amount of tree cutting that was found to be permissible in Balsam Lake Anglers Club, supra.

24. Whether the entire Class II Community Connector trail system is considered as a whole (¶¶ 52-54, infra), or trails are considered individually, these trails were constructed in violation of Article 14, § 1, and summary judgment should be granted to the Plaintiff on its first cause of action as a matter of law.

The Trails Are Unconstitutional,
Counting Trees of All Sizes Cut to Date

25. In addition to the thousands of trees of 3" DBH or more that have been cut, or will be cut, many more thousands of trees under 3" DBH have been cut so far:

Trees Under 3" DBH Already Cut

Trail Name	**Defendants' Tree Count (Wolkenhauer Aff. Exhibit A)**	**Plaintiff's Tree Count (Signell Aff. Exhibit D)**
Seventh Lake Mountain Trail	Not counted	5,587
Newcomb to Minerva to North Hudson Trail	Not counted	6,869
Gilmantown Trail	Not counted	283
Wilmington (Cooperkiln) Trail	Not counted	1,634
Old Powerline Trail	Not counted	n/a
Lewey Lake Trail	Not counted	n/a
Steam Sleigh Trail	Not counted	n/a
North Crossover Trail	Not counted	n/a
Mt. Tom East Trail	Not counted	n/a
TOTAL	**Not counted**	**??**
Total trees over and under 3" DBH cut to date	**Not counted**	**20,014**

26. Defendants argue that trees under 3" DBH should not be counted. As shown below (¶¶ 42-48), as a matter of law, trees of all sizes should be counted.

27. Thus, over 20,000 trees of all sizes have been cut to date for the construction of the system of Class II Community Connector snowmobile trails. This is eight times the amount of trees of that size that was planned to be cut for the bobsleigh

run at issue in Ass'n for the Protection of the Adirondacks, supra.

28. Construction of two of these trails (Seventh Lake Mountain and Newcomb to Minerva to North Hudson) will each require cutting several thousand trees of all sizes. These trails are well over the range that was proscribed in Ass'n for the Protection of the Adirondacks, supra.

29. Three other trails (Wilmington, Gilmantown and Mount Tom) greatly exceeded the amount of tree cutting that was found to be permissible in Balsam Lake Anglers Club, supra.

30. Whether the entire Class II Community Connector trail system is considered as a whole (¶¶ 52-54, infra), or trails are considered individually, these trails were constructed in violation of Article 14, § 1, and summary judgment should be granted to the Plaintiff on its first cause of action as a matter of law.

The Trails Are Unconstitutional, Counting Trees of All Sizes Cut and Planned to Be Cut

31. In addition to the thousands of trees of all sizes that have been cut so far, many more trees under 3" DBH will be cut:

Trees Under 3" DBH Planned to Be Cut

Trail Name	**Defendants' Tree Count (Wolkenhauer Aff. Exhibit A)**	**Plaintiff's Tree Count (Signell Aff. Exhibit D)**
Newcomb to Minerva to North Hudson Trail	Not counted	4,248
Polaris Trail	Not counted	5,044

TOTAL	Not counted	9,292
Grand Total	N/A	29,306

32. Thus, over 29,000 trees of all sizes have been cut, or are planned to be cut, for the construction of the system of Class II Community Connector snowmobile trails. This is more than eleven times the amount of trees that was planned to be cut for the bobsleigh run at issue in Ass'n for the Protection of the Adirondacks, supra.

33. Construction of three of these trails (Seventh Lake Mountain, Newcomb to Minerva to North Hudson, and Polaris) will require cutting several thousand trees each. These three trails are well over the range that was proscribed in Ass'n for the Protection of the Adirondacks, supra.

34. Three other trails (Wilmington, Gilmantown and Mount Tom) greatly exceeded the amount of tree cutting that was found to be permissible in Balsam Lake Anglers Club, supra.

35. Whether the entire Class II Community Connector trail system is considered as a whole (¶¶ 52-54, infra), or trails are considered individually, these trails were constructed in violation of Article 14, § 1, and summary judgment should be granted to the Plaintiff on its first cause of action as a matter of law.

Defendants Have Misstated the Law

36. Defendants argue that the decision of the Court of Appeals in the Ass'n for the Protection of the Adirondacks case did not endorse the language of the Third Department's decision regarding the preservation of the wild forest nature of the Forest Preserve. Defendants' Memorandum of Law dated August 31, 2016 ("Def.Mem.Law") p. 18. This argument is false. Article 14, § 1 specifically states that "[t]he 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." The Court of Appeals repeatedly referred to this mandate of Article 14, § 1 as a separate provision from the prohibition on the cutting of trees:

- "the advantages ... of having the wild forest lands preserved in their natural state," Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 239-240.
- "The forests were to be preserved as wild forest lands, and the trees were not to be sold or removed or destroyed." Id. at 240.
- "this purpose of preserving them as wild forest lands." Id. at 241.
- "The framers of the Constitution ... intended to stop the willful destruction of trees upon the forest lands, and to preserve these in the wild state now existing; they adopted a measure forbidding the cutting down of

these trees to any substantial extent for any purpose." Id. at 242.

37. The Def.Mem.Law (p. 18) is correct that the Court of Appeals did not specifically refer to a "man-made setting" as the Appellate Division did. However, it also did not reject that language, and this issue is entirely consistent with the decision of the Court of Appeals. Id. at 238-242.

38. The Def.Mem.Law (p. 18) is also incorrect when it argues that the test for consistency with Article 14, § 1 is whether the proposed use is reasonably necessary for public use of the park. The proposed use must be "compatible with the use of forest preserve land". Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 854. The proposed bobsleigh run in Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 241-242, was found to be unconstitutional for this reason.

39. Finally, Defendants falsely claim that the Court has already found for them on the question of tree cutting to a substantial extent or a material degree. Def.Mem.Law p. 17. However, "[t]he granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits". Digitronics Inventioneering Corp. v. Jameson, 11 A.D.3d at 784.

40. Also, this Court specifically held in the September 4, 2015 Decision and Order that the Defendants rely upon that "the Court is not constrained by this decision with respect to any future issues raised concerning the cutting down of trees in the

[Forest] Preserve and notes both the Court's prior decision in the instant litigation in which concern was expressed as to mass tree cutting activities in the Preserve by the defendants ... ". Caffry Aff. Exhibit G, p. 10.

41. The Court should reject Defendant's improper formulations of the applicable law.

The Constitution Prohibits the Destruction of All Trees in the Forest Preserve, Regardless of Their Size

42. The Defendants' motion is largely based on the premise that Article 14 protects only trees of 3" DBH or more, because the Constitution prohibits the destruction of "timber". E.g. Def.Mem.Law pp. 3-6, 21-22. As shown above at ¶¶ 16-24, even if Defendants' assertion is correct, and only trees of 3" DBH or more in size are counted, the Class II Community Connector Snowmobile trails still violate Article 14, § 1. However, as demonstrated by Plaintiff's Memorandum of Law dated August 31, 2016 ("Pltf.Mem.Law"), page 17 and Caffry Aff. ¶¶ 31-45, as a matter of law, the Constitution does indeed protect trees of all sizes in the Forest Preserve from destruction, and trees smaller than 3" DBH should be counted by the Court.

43. The Court of Appeals decision in Ass'n for the Protection of the Adirondacks v. MacDonald left no question that all trees are protected by the Constitution, not just those of

timber size.[7] It used the words "tree" and "timber" interchangeably and equated the meanings of those two words:

- "Taking the words of section 7 in their ordinary meaning, we have the command that the timber, that is, the trees, shall not be sold, removed or destroyed." Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 238.
- In 1894 "it was thought necessary to close all gaps and openings in the law, and to prohibit any cutting or any removal of the trees and timber to a substantial extent." Id.
- "the necessity for restricting the appropriation of trees and timber". Id. at 239-240.
- "and the trees were not to be sold or removed or destroyed." Id. at 240.
- "Trees could not be cut or the timber destroyed." Id.
- The "toboggan slide ... requires the cutting of 2,500 trees". Id. at 241.
- "The framers of the Constitution ... intended to stop the willful destruction of trees upon the forest lands, and to preserve these in the wild state now existing; they adopted a measure forbidding the cutting down of

[7] As shown at Caffry Exhibit Q, the stipulation of facts submitted by the parties to the Court only listed trees of 3"DBH or more, so the evidence before it was limited to such trees. However, the Court never found that smaller trees were not protected.

these trees to any substantial extent for any purpose." Id. at 242.

- "[T]he destruction of the trees is unconstitutional". Id.

44. Defendants argue that the record of the 1915 constitutional convention supports their position that trees and timber were considered to be separate types of vegetation. Def.Mem.Law pp. 3-6, 21-22. As set forth in the Answering Affidavit of Plaintiff's expert Adirondack historian, Philip G. Terrie, Ph.D., sworn to September 23, 2016 ("Terrie Ans. Aff."), this argument misconstrues the debates at the constitutional conventions of 1894 and 1915. With the exception of the representatives of a large Adirondack timber company that sought to open up the Forest Preserve to logging in 1915, the delegates at both conventions were focused on preserving the forests, and made no exceptions for the type or size of the trees involved. Id.

45. Among Defendants' arguments is that because some delegates sought to add the words "trees and" before "timber" in the phrase "nor shall the timber thereon be sold, removed or destroyed" in then-Article 7, § 7, this implies that smaller trees were not intended to be covered by the Forever Wild provision when it was adopted in 1894. Curiously, Defendants rely upon the debates of the 1915 convention, which did not result in the final adoption of any amendments by the voters,

rather than the debates of the 1894 convention, at which Article 7, § 7 was adopted. Def.Mem.Law pp. 3-4.

46. As shown by the Revised Record of the Constitutional Convention of the State of New York of 1915, Volume II (Terrie Ans. Aff. Exhibit A), the "trees and" amendment was offered in response to the decisions in some lawsuits regarding forest fires and salvage rights, was only intended to clarify the Constitution, was considered to be consistent with the intent of the framers in 1894, and was not intended to be a change in its meaning. "Trees" and "timber" were used interchangeably in the debate. Terrie Ans. Aff. Exhibit A, pp. 1327, 1333-1334, 1340-1341, 1448, 1468, 1479, 1489-1491, 1497, 1509, 1517, 1526-1529.

47. Therefore, despite the speculation in the Def.Mem.Law, the debate about possible amendments to Article 7, § 7, some 21 years after its approval, did not evince an intent to change its meaning. If anything, it reinforces Plaintiff's point that all trees in the Forest Preserve, including those under 3" DBH, are protected by Article 14, § 1.

48. This is purely a question of statutory interpretation, that lies in the province of the Court, and the disagreement between the parties herein on this question does not create an issue of fact. See Pltf.Mem.Law pp. 3-4 & Point I.B. Because Plaintiff has carefully counted the number of trees 3" DBH or less (¶¶ 25-35, supra; Signell Aff. pp. 14-41, Exhibits D & E), and Defendants have provided no evidence as to the number of such

trees that they have destroyed, there is no issue of fact as to the level of this destruction.

It Is Not Relevant That Defendants Are Purportedly Minimizing the Number of Trees That They Destroy

49. Defendants repeatedly claim that because they are attempting to minimize the number of trees that they destroy on the Forest Preserve, their work complies with Article 14, § 1. E.g. Affidavit of Tate Connor, sworn to on August 17, 2016 ("Connor Aff.") ¶18, Affidavit of Peter Frank, sworn to on August 24, 2016 ("Frank Aff."), ¶6; Affidavit of Timothy G. Howard, Ph.D., sworn to on August 24, 2016 ("Howard Aff.") ¶4, Def.Mem.Law pp. 18-19, 22-24. However, this is not the legal standard to be applied under Article 14.[8]

50. In Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. at 74-75, the Appellate Division listed the extensive measures that the state planned to take to minimize both the number of trees to be cut and the impacts on the adjoining Forest Preserve from the clearing of the land for the proposed bobsleigh run. Nevertheless, it found the proposal to be unconstitutional (id. at 82), and that finding was affirmed by the Court of Appeals. Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 242.

[8] To the extent that this argument applies to impacts to the wild forest nature of the Forest Preserve, rather than to the number of trees being cut, as set forth below, there are many material issues of fact.

51. Taken to its logical conclusion, Defendants' argument would mean that the state could destroy 20,000 trees and clear hundreds of acres of the Forest Preserve, so long as it minimized the damage from whatever it was constructing. This is obviously not permitted under the Ass'n for the Protection of the Adirondacks decisions, and this argument should be disregarded.

The Court Should Consider the Entire System of Class II Trails as a Whole, and Not Piecemeal

52. Defendants' construction of the Class II Community Connector snowmobile trails is a comprehensive system of trails, and not a series of disconnected actions. Complaint, pp. 14-20. Paragraph 65 of the Complaint alleged that:

> The Final Snowmobile Plan (pp. 45-46, 49-50, 52) includes a system of hundreds of miles of Community Connector trails, which would be at least 9 feet wide or more (pp. 52-53) and have a "prepared surface" (p. 50).

In their Answer[9] (¶65), Defendants admitted this allegation. They also admitted the allegation of Complaint ¶63 that the 2006 Adirondack Snowmobile Plan included "recommendations for a system of snowmobile trail connections..." (Answer ¶63), and many of the other allegations of the Complaint that show that this is unified system of trails.

53. Defendants' witnesses have also admitted that this is a single system of trails. See Linck Trans. pp. 34-35 (Exhibit

[9] A copy of the Defendants' Answer dated September 24, 2013 (hereinafter "Answer") has previously been submitted to the Court by the Plaintiff.

B);[10] Frank Trans. pp. 50, 68-69, 71 (Exhibit C); Martin Trans. pp. 13-14 (Exhibit E); Connor Aff. pp. 18-19 (Exhibit G).[11]

54. Therefore, the Court should consider the number of trees destroyed to date, and planned to be destroyed in the future, as a single action, and not consider each individual trail, or segment thereof, in a piecemeal fashion.

Defendants Failed to Count the Trees That Have Died, and Will Continue to Die, After the Completion of Trail Construction

55. Defendants concede (¶¶ 16-17, supra) that they have cut down at least 5,200 trees during the construction of the Class II Community Connector snowmobile trails to date. These numbers do not include the additional trees that have died as the result of being damaged during the construction process or those that are likely to die from the same cause or from future damage caused by the use of enormous mechanical grooming machines on the trails.

56. During his 2016 site visits to some of the trails at issue herein, Plaintiff's expert Ronald W. Sutherland, Ph.D., observed that trees along the new trails had died post-

[10] Copies of the pertinent pages of the deposition transcript of APA witness Walter W. Linck ("Linck Trans.") are annexed hereto as Exhibit B.

[11] Annexed hereto as exhibits are copies of the pertinent pages of the deposition transcripts of DEC's Bureau Chief of the Bureau of Forest Preserve Management Peter Frank ("Frank Trans.")(Exhibit C), Region 6 Natural Resources Supervisor Fred Munk ("Munk Trans.")(Exhibit D), Region 5 Natural Resources Supervisor Thomas Martin ("Martin Trans.")(Exhibit E), Region 5 Regional Forester Kristopher Alberga ("Alberga Trans.")(Exhibit F), and Forester I Tate Connor ("Connor Trans.")(Exhibit G).

construction due to motor vehicles using the new trails. Affidavit of Ronald W. Sutherland, Ph.D., sworn to on September 27, 2016 ("Sutherland Aff."), ¶¶ 14-15, 17, 33. Plaintiff's expert William Amadon observed that the construction process for the Class II trails causes "a high incidence of damage to trailside trees". Affidavit of William Amadon, sworn to on September 27, 2016 ("Amadon Aff.") ¶19. Plaintiff's Executive Director Peter Bauer observed that, due to having their root masses destroyed during construction of the trails, some trees have toppled over since the completion of construction. Answering Affidavit of Peter Bauer, sworn to on November 1, 2016 ("Bauer Ans. Aff."), ¶20.

57. Therefore, if anything, DEC has undercounted the timber that it has "destroyed", in violation of Article 14, § 1. However, establishing the precise number of trees destroyed in this manner would not create an issue of fact because the undisputed numbers (¶¶ 16-17, supra) are sufficient for the Court to find in Plaintiff's favor as a matter of law.

It Is Irrelevant Whether or Not the Affected Acreage Is a *De Minimus* Part of the Forest Preserve

58. Defendants argue that the amount of damage that they have inflicted on the Forest Preserve is not substantial or material because it only affects about 47 acres, a purportedly *de minimus* percentage of the total 2.6 million acres of the Adirondack Forest Preserve. Def.Mem.Law p. 23; Frank Aff. ¶¶ 6,

22. Even if this claim is factually true, it is irrelevant as a matter of law.

59. In Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 236, the Court of Appeals observed that the construction of the Olympic bobsleigh run would remove about 2,500 trees on about four and one-half acres, and that the "Forest Preserve within the Adirondacks consists of 1,941,403 acres. The taking of four acres out of this vast acreage for this international sports' [sic] meet seems a very slight inroad upon the preserve for a matter of such public interest and benefit...". Id. Nevertheless, the Court found the proposal to be unconstitutional. Id. at 242. See also Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. at 76 (also analyzing the affected percentage of the board feet of potential lumber in the Forest Preserve, but ultimately finding the action to be unconstitutional).

60. The question before this Court is not what percentage of the timber in the Forest Preserve is being destroyed, or what percentage of its acreage is being cleared, by the Defendants. The question is whether or not the destruction is "material" or "substantial". Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 238-242. As shown above, the level of destruction is material and substantial, and Plaintiff should be granted summary judgment.

It Is Irrelevant Whether or Not the Defendants Have Complied with Their Internal Policies

61. Defendants argue at great length that because they believe that they have complied with their own policies and procedures, their actions conform to the Constitution. Def.Mem.Law pp. 6-13. This argument is incorrect as a matter of law.[12] Moreover, the courts have already decided that in this case these policies are not relevant. The "physical destruction of the Forest Preserve which has occurred in the past and which will occur in the future, in connection with construction and maintenance of Class II Community Connector Snowmobile Trails" is relevant. The Defendants' 2006 and 2009 snowmobile trail policies were held to be "collateral" to the main issues in this case. Caffry Aff. Exhibit C, page 8; see also Pltf.Mem.Law pp. 16-17.

62. Even if this question had not already been decided, the Court should not consider these internal policies and procedures. For example, Defendants claim that the alleged conformity of the Class II Community Connector snowmobile trails with the Adirondack Park State Land Master Plan ("APSLMP"), and its progeny, the unit management plans ("UMPs"),[13] somehow

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[12] This argument is also factually incorrect (Bauer Ans. Aff., *passim*) but because it is legally incorrect, it can not create a triable issue of fact.

[13] UMPs for the various units of the Forest Preserve must "conform to the guidelines and criteria set forth in the master plan". APSLMP, Record Exhibit 1, page 9. See also Executive Law § 816(1).

establishes that the trails are consistent with Article 14, § 1. However, by its own terms, the APSLMP is neutral on the constitutionality of state agency actions in the Forest Preserve. Affirmation of Robert C. Glennon, sworn to on September 23, 2016, ¶¶ 8-9 ("Glennon Aff."). This was affirmed by APA's witness Walter W. Linck. Linck Trans. p. 27 (Exhibit B).

63. In fact, the APSLMP states that such determinations "are properly a matter for the Attorney General and ultimately the courts." Glennon Aff. ¶8. Notably, that authority does not reside with either of the Defendants. Id. Therefore, conformity with the APSLMP and the applicable UMPs is not an indication of "the constitutional appropriateness or inappropriateness" of the system of Class II Community Connector trails, or any individual trail. Id.

64. Likewise, Defendants also rely heavily upon the DEC/APA 2009 Snowmobile Trail Management Guidance (Record Exhibit 8), the 2006 Adirondack Park Snowmobile Plan (Record Exhibit 3) and DEC's tree-cutting policy, No. LF-91-2.[14] However, none of these documents supercede the Constitution, nor is there any evidence that they actually comply with Article 14, § 1.

65. When the Defendants' witnesses were deposed, none of them could point to any time when any of these internal policies and procedures had been determined to be in conformity with Article 14, § 1. For instance, Karyn Richards, the highest-

[14] A copy of this policy, whcih was marked as deposition Exhibit "Pltf's. 4" is annexed hereto as Exhibit H.

ranking DEC official who was deposed, could not do so. Richards Trans. pp. 20-48, 67-73, 122-128.[15] Ms. Richards did claim that the DEC counsel's office would make such determinations, but there is no evidence thereof, and Plaintiff's request to depose DEC's Forest Preserve attorney was denied. Caffry Aff. Exhibit D, pp. 2-3. See also Frank Trans. pp. 19-26, 70-71, 115-117 (Bureau Chief of DEC's Bureau of Forest Preserve Management admitted that no actual determinations of conformity to the Constitution were made)(Exhibit C); Martin Trans. pp. 12-13 (Exhibit E); Connor Trans. pp. 15-17 (Exhibit G). This testimony was corroborated by APA's witness Mr. Linck. Linck Trans. pp. 27, 32-33 (Exhibit B).

66. Likewise, none of these witnesses could identify how or when any individual UMP or work plan for a snowmobile trail that involved the cutting of trees had actually been determined by anybody be in conformity with Article 14, § 1. Richards Trans. pp. 42-49, 63; Frank Trans. pp. 35-40, 91-92 (Exhibit C); Martin Trans. pp. 69-70 (Exhibit E); Connor Trans. pp. 22-23 (Exhibit G); Alberga Trans. pp. 22-28 (Exhibit F). Again, this testimony was corroborated by APA's witness Mr. Linck, who stated that in APA's review of DEC's snowmobile trail work plans, it was "largely guesswork" as to whether or not the plans contained a

[15] A copy of Ms. Richards' entire deposition transcript is being provided to the Court simultaneously herewith ("Richards Trans.").

"constitutional mistake". Linck Trans. p. 27; see also pp. 32-33 (Exhibit B).

67. Therefore, these internal policies and procedures are not relevant, and they do not create a material issue of fact.

The Differences Between Class I and Class II Snowmobile Trails Are Irrelevant

68. Defendants argue that because this action only challenges the construction of Class II Community Connector snowmobile trails, and not Class I trails, it is somehow defective. Def.Mem.Law pp. 20-21.[16] This question is not relevant to the issue of whether or not the number of trees on the Forest Preserve that are being cut for the Class II trails is "material" or "substantial". Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 238-242.

69. Whether or not other trails violate the Constitution has no bearing on the question of whether or not the Class II trails do so. Plaintiff is under no obligation to right all of the Defendants' wrongs in a single lawsuit. As a practical matter, at the time that this action was commenced, DEC had begun construction of the Seventh Lake Mountain Class II trail, and was moving ahead with more such Class II trails, pursuant to its plan to create an entire system of them. Complaint ¶¶ 71-75; ¶¶ 52-

[16] The action also seeks to restrain "any other trails having similar characteristics or requiring like amounts of tree cutting", and is not strictly limited to trails that have been formally designated as Class II trails. Complaint ¶117; see also Complaint ¶82 & page 39.

54, supra. Accordingly, Plaintiff sought to restrain this imminent violation of Article 14, § 1 of the Constitution pursuant to Article 14, § 5. Caffry Aff. ¶9, Exhibit A.

70. On the other hand, upon information and belief, at that time, DEC was not building or planning to build any new Class I trails. Therefore, there was no imminent threat to the Forest Preserve from such trails, and nothing to be "restrained" pursuant to Article 14, § 5. If a Class I trail is proposed to be built on the Forest Preserve which would destroy a "material" or "substantial" number of trees (Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 238-242), Plaintiff could seek to restrain that violation of Article 14 by filing a separate suit or seeking to amend its pleadings in this suit.

71. It is also worth noting that the Def.Mem.Law greatly understates the differences between Class I trails and Class II trails under the DEC/APA 2009 Snowmobile Trail Management Guidance (Record Exhibit 8). Class I trails are strictly limited to an eight foot width, tree root masses may not be removed by grinding, trails may not be graded flat, and rock removal, bench cutting of side slopes, and the use of motorized landscaping equipment such as backhoes are limited. Record Exhibit 8, pp. 8-13. However, the Class II trails at issue herein may be as wide as twelve feet wide, grinding root masses is permitted, trails may be graded flat, rock removal is encouraged, much greater bench cutting is permitted, and much greater use of motorized

landscaping equipment such as backhoes is allowed limited. Record Exhibit 8, pp. 8-13.

This Action Is Not Limited to Trails
Under Construction As of October 2014

72. Contrary to Defendants' assertion at Def.Mem.Law p. 13, to the extent that the Court has previously limited discovery in this action to particular time frames, those decisions did not limit the scope of evidence that Plaintiff could present with respect to DEC's past, current, and future destruction of the Forest Preserve to construct Class II Community Connector snowmobile trails.

73. While the prior decisions in this case limit document discovery, they do not limit the trails and time periods that can be addressed at trial, or in this dispositive motion. Although limiting the scope of document discovery due to the relative burdens on each party, the Court (Ceresia, J.) noted, in its Decision/Order dated October 15, 2014 (p. 8), that the issues in controversy involve the "physical destruction of the Forest Preserve which has occurred in the past, and **which will occur in the future**, in connection with construction and maintenance of Class II Community Connector Trails". Caffry Aff. Exhibit C.

74. The Court held that "[w]ith regard to those Class II Community Connector Trails for which construction has either been completed or is currently under way, the Court will limit document discovery to final plans, approvals, and policies in

effect as of January 1, 2012 **and going forward, together with those records and reports which document actual construction and/or maintenance of the trails."** Caffry Aff. Exhibit C, p. 8.

75. The State has conceded, and the Court has confirmed, that the Minerva-Newcomb-North Hudson Class II CC Trail, existed or was under construction prior to the Court's discovery deadline, and thus this trail is part of the action, and DEC was under a continuing obligation to provide any new documents, including the newly finalized work plans, that document actual construction. See CPLR § 3101(h).[17] DEC had not provided the work plans, or provided Plaintiff with actual notice that construction, and tree cutting, was taking place on Segments 9 and 11.

76. Contrary to DEC's claim that this action addresses only "Sixteen Class II trails" (Def.Mem.Law p. 13), the Complaint in this action sought to enjoin "the construction of numerous Class II Community Connector snowmobile trails in Wild Forest Areas of the Forest Preserve" (Complaint ¶67). Plaintiff's action is not limited to the sixteen trails presently identified by DEC.

Conclusion

77. There are no material issues of fact regarding the number of trees cut, and to be cut, by the Defendants for the many Class II Community Connector snowmobile trails that have

[17] See J. Connolly decision dated August 10, 2016, p. 6 (Caffry Aff. Exhibit I).

been built, or approved to be built, to date, as part of Defendants' planned system of such trails. The only disputed issues are issues of law. Plaintiff should be granted summary judgment on its first cause of action.

THERE ARE NUMEROUS MATERIAL TRIABLE ISSUES OF FACT ON THE QUESTION OF WHETHER THE CONSTRUCTION OF THE TRAILS WILL CREATE A MAN-MADE SETTING AND INTERFERE WITH THE WILD FOREST NATURE OF THE FOREST PRESERVE, AND DEFENDANTS' MOTION SHOULD BE DENIED

78. On Defendants' motion for summary judgment on the question of whether the Class II Community Connector snowmobile trails will create a man-made setting and interfere with the wild forest nature of dozens of acres of the Forest Preserve, the Court must "view[] the evidence in the light most favorable to [Plaintiff] as the non-movant." Red Zone, LLC v. Cadwalader, Wickersham & Taft, 27 N.Y.3d at 1049. "The initial burden of proof on a motion for summary judgment... rests with the moving party" and the non-moving party must be granted "every favorable inference that might be drawn from the record." Baker v. International Paper Company, 226 A.D.2d 1007, 1007-1008 (3d Dept. 1996). See also Allegro v. Youells, 67 A.D.3d 1081, 1082 (3d Dept. 2009).

79. Article 14, § 1 prohibits any use of the Forest Preserve which is not consistent with its wild forest nature. Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 241-242 (1930); Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73, 82 (3d Dept. 1930).

Consistent with that prohibition, it also prohibits any construction which would result in the creation of a man-made setting in the Forest Preserve. Ass'n for the Protection of the Adirondacks, 228 A.D. at 82 ("[s]ports which require a setting that is man-made are unmistakably inconsistent with the preservation of these forest lands in the wild and natural state in which Providence has developed them"). See also Ass'n for the Protection of the Adirondacks, 253 N.Y. at 241-242.

80. There are numerous material triable issues of fact on this question, and Defendants' papers also misstate the applicable law. They argue that the Class II Community Connector snowmobile trails are consistent with the wild forest nature of the Forest Preserve because they will reduce fragmentation of the forest habitat, will not create open tree canopy, will not create habitat edge effects, will not cause erosion, do not require clearcutting, and have the character of a foot trail. There are material triable issues of fact on each of these arguments. Some of these are also irrelevant, but if they are found to be relevant, they also create material issues of fact. Defendants' motion should be denied.

There Are Material Questions of
Fact Regarding Forest Fragmentation

81. Dr. Timothy Howard, a DEC employee or contractor,[18] argues that DEC has minimized the effects of the new trail system

[18] The offices of the New York Natural Heritage Program are in the DEC building in downtown Albany. Howard Aff. ¶1.

on the wild forest nature of the Forest Preserve, in part, by reconfiguring the Adirondack Forest Preserve snowmobile trail network, including closing older trails. Howard Aff., pp. 2-3. He recognizes that such trails can cause forest fragmentation, which has detrimental effects on the plants and animals that make up its ecosystem. Howard Aff. ¶¶ 6-10.

82. Dr. Howard argues that by striving to meet the goals in the DEC/APA 2009 Snowmobile Trail Management Guidance (Record Exhibit 8) by closing older trails as the new Class II Community Connector trails are built, DEC may be reducing forest fragmentation and improving the wild forest nature of the Forest Preserve. Howard Aff. ¶¶ 5-6, 23, 30. However, as shown above at ¶¶ 61-67, these internal APA and DEC policies are not relevant herein.

83. In support of his argument, Dr. Howard undertook a statistical analysis of the level of forest fragmentation following the completion of three of the Class II Community Connector trails that have been constructed so far. Howard Aff. ¶¶ 11-23. In his admittedly "abbreviated assessment", he purported to find that "it appears that trail reconfiguration was mostly improving the fragmentation state of these forests, suggesting that the wild forest state is improving." Howard Aff. ¶23. His use of the ambiguous words "appears", "mostly" and "suggesting" shows that he did not have much confidence in his results. Indeed, for two of the three trails that he studied, the results were decidedly mixed. Howard Aff. ¶¶ 17, 19, 21, 22.

84. Likewise, the concluding statement in Dr. Howard's affidavit states only that "I support the notion that trail re-arrangement has the potential to improve the wild nature of the Wild Forest...". His use of "notion" and "potential" are anything but a rousing endorsement of this concept, and his conclusion hardly rises to the level of being a "substantive indication of reasonable reliability". Matott v. Ward, 48 N.Y.2d 455, 463 (1979)(discussing level of certainty required by expert giving an expert opinion).

85. Dr. Howard's analysis of the trails at issue herein is also incomplete. He studied just three of the seventeen Class II Community Connector trails that DEC has constructed so far. Def.Mem.Law p. 13. The extent to which he cherry-picked the data can only be determined at trial.

86. Also, during supplemental discovery in this matter, on or about October 7, 2016, the Defendants produced a DVD which contained, among other things, a file folder identified as "2016 Timothy Howard Photos". The folder contained ten photographs and a document labeled as "Photoinformation". Six of the photographs were taken of, or near, bridges 10, 11, 12 and 13 on the Seventh Lake Mountain Trail. Copies of these six photographs and of the "Photoinformation" spreadsheet that identifies their dates and locations are annexed hereto as Exhibit I.[19] On the 12+/- mile

[19] The remaining four photographs are labeled as having been taken on the "Old Powerline trail" near Mason Lake in the southern Adirondacks. This trail is not a Class II Community Connector trail, and it and Mason Lake are not near any of the trails that are at issue in this matter. These four photographs

long Seventh Lake Mountain Trail, bridges 10, 11, 12 and 13 are located within close proximity to each other.

87. Thus, Dr. Howard's affidavit appears to have been based almost entirely on desktop reviews and to have only been minimally field-checked to verify the results.

88. Plaintiff's expert Steven Signell[20] reviewed the Howard Aff.'s analysis of forest fragmentation. He also reviewed the data that the Defendants provided to the Plaintiff in their October 7, 2016 supplemental discovery response that was produced by Dr. Howard, and which apparently formed the basis for Dr. Howard's analysis. Mr. Signell has walked all, or almost all, of the trails that have been constructed or approved for construction at this time. Signell Aff. pp. 11-41; Answering Affidavit of Steve Signell, sworn to on October 26, 2016 ("Signell Ans. Aff."), ¶¶ 3-4.

89. Mr. Signell concurred with Dr. Howard's conclusion that roads and trails can fragment the forest ecosystem and can have detrimental impacts. Signell Ans. Aff. ¶24. Other than that, he found Dr. Howard's analysis to be severely flawed and incomplete. Signell Ans. Aff. ¶¶ 25-31.

90. Plaintiff's expert Ronald Sutherland, Ph.D. also reviewed Dr. Howard's affidavit. Sutherland Aff. ¶27. Like Mr. Signell, he agreed with Dr. Howard that fragmentation is harmful

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were excluded from Exhibit I hereto.

[20] Mr. Signell's qualifications are set forth at ¶2 of his August 25, 2016 affidavit and Exhibit A thereto.

to forest ecosystems. Id. However, he did not agree with Dr. Howard that there would be a net benefit to the Forest Preserve from the closure of older trails, and instead found that the impacts of the new trails would be additive. Id.

The Alleged Closure of Old Snowmobile Trails Does Not Offset the Adverse Effects of the New Trails

91. After reviewing the Howard Aff., Mr. Signell visited the Moose River Plains Wild Forest Area (Signell Ans. Aff. ¶¶ 26-31), where Dr. Howard had purportedly analyzed the benefits of closing old snowmobile trails in the interior as an offset to the construction of the Seventh Lake Mountain Trail. Howard Aff. ¶¶ 18-19.

92. Mr. Signell's "ground-truthing" of Dr. Howard's analysis showed that areas characterized by Howard as roadless were in fact not actually roadless and were fragmented by numerous roads and driveways, some of which are paved and some of which are dirt or gravel roads, as well as numerous trails and a power line. Signell Ans. Aff. ¶27. Dr. Sutherland concurred in this analysis. Sutherland Aff. ¶28.

93. Mr. Signell also discovered that most of the trails that Dr. Howard touted as having been closed, and thereby purportedly offsetting the impacts of the Seventh Lake Mountain Trail, were either abandoned long ago, or are still used and maintained for other uses, so that closing them to use by snowmobiles had no practical effect on their habitat fragmentation effects. Signell Ans. Aff. ¶28. Again, Dr.

Sutherland concurred with Mr. Signell's analysis (Sutherland Aff. ¶27). He also pointed out several methodological errors in Dr. Howard's analysis. Sutherland Aff. ¶¶ 27-37.

94. Mr. Signell found that allowing, at most, 2.6 miles of snowmobile trails to revert to their natural state, while constructing more than ten miles of new trail, did not reduce fragmentation, and instead increased it. Signell Ans. Aff. ¶29. He concluded that, in general, the closure of old trails in the interior would have "only a paper benefit" and that the construction of the new Class II trails would have "negative long-term impacts." Signell Ans. Aff. ¶30. Dr. Sutherland concurred with Mr. Signell's findings, concluding that the Seventh Lake Mountain Trial "is additive for the impacts of fragmentation and not a net benefit", and that Howard should not have included the trails that had been previously abandoned. Sutherland Aff. ¶¶ 28, 31, 34, 36. In some cases "the impact of the new trails was purely negative" in terms of fragmentation. Sutherland Aff. ¶36.

95. Dr. Sutherland also pointed out that Dr. Howard's fragmentation analysis should have taken into account the differences between the old growth habitat that was destroyed by the construction of the Seventh Lake Mountain Trail and the new growth that may occur on the closed trails. Sutherland Aff. ¶¶ 31, 34, 36. Mr. Signell expressed a similar concern regarding replacing old growth habitat with road-like trails and associated

non-forest vegetation. Signell Ans. Aff. ¶31. Dr. Howard failed to take this factor into account.

The New Trails Have Created Large
Areas of Non-forest Vegetation

96. Mr. Signell and Dr. Sutherland both also found that Dr. Howard's fragmentation analysis was flawed because he failed to properly assess changes in the vegetation on the new trails. Signell Ans. Aff. ¶¶ 17-23, 31; Sutherland Aff. ¶31.

97. Mr. Signell found that long stretches of the trails, up to one-quarter mile long or more, are dominated by non-forest grasses. Signell Ans. Aff. ¶¶ 17-23. Such grasses are an indicator of human activity, which contrast with the vegetation in the surrounding forest. Signell Ans. Aff. ¶¶ 17-18. This is particularly so in an old-growth forest, such as is traversed by parts of the Seventh Lake Mountain Trail. Signell Ans. Aff. ¶31.

98. Unlike Dr. Howard, who performed only a perfunctory inspection of part of the Seventh Lake Mountain Trail, Mr. Signell analyzed the entire trail, at one-tenth mile intervals, based on photographic evidence, and then applied statistical analysis to quantify his results. Signell Ans. Aff. ¶¶ 19-22. He found that "fully 56% of the survey points (66 out of 117) exhibited the unwanted pattern of grasses thriving along a trail in sharp contrast to the surrounding forest where grasses are absent" and that this showed that "there are real, measurable differences between the plant community on the trail vs. off the trail." Signell Ans. Aff. ¶21. This "significantly altered the

larger forest ecosystem". Signell Ans. Aff. ¶22. This effect of the construction of the trails has adversely affected the wild forest nature of the lands through which they pass. Signell Ans. Aff. ¶17; see also Amadon Aff. ¶17.

99. DEC Forester Tate Connor alleges at Connor Aff. ¶18, that the Seventh Lake Mountain Trail is "consistent with the wild forest nature of the adjoining lands". He goes on to allege that the trail has revegetated. Connor Aff. ¶19. However, his attached pictures (Exhibit B) show that much of the vegetation is grass and that the remaining areas are mostly bare. His pictures do not show any vegetation that looks like the natural forest floor.

100. It should come as no surprise that grasses dominate the vegetation on the Class II Community Connector trails, because DEC has planted them with a "conservation mix", but DEC's witness Tate Connor could not identify the species that are used in this mix. Connor Trans. p. 46 (Exhibit G). However, APA's witness Walter Linck stated that the revegetated areas are often seeded with grass, although he did not know what the species are, and he did admit that they may not be native to the Adirondacks. Linck Trans. pp. 43, 96-98 (Exhibit B). The use of such seed mixes also has the potential to introduce invasive species, and the grasses themselves are often non-native species. See Sutherland Aff. ¶16; Amadon Aff. ¶17, Exhibit H.

101. Thus, there is a material question of fact as to whether or not the new trails are damaging the wild forest nature

of the Forest Preserve due to the fragmentation of the forest habitat, including by the changing of the vegetation on the forest floor.

There Are Material Questions of Fact
Regarding the Introduction of Invasive Species

102. Defendants' witness Dr. Howard (¶9) concedes that snowmobile trails can contribute to the spread of invasive species into the interior of the forest, which is a "potential threat" to it. Plaintiff's expert witness Dr. Sutherland confirmed that, due to soil disturbance during their construction, the new trails "created ideal conditions for the spread of invasive plant species". Sutherland Aff. ¶16. Likewise, Mr. Signell found that the areas disturbed by the trails are already being invaded by grasses and other non-forest species, and opined that these lands are now also susceptible to colonization by non-native and invasive plants. Signell Ans. Aff. ¶¶ 17, 31.

103. In fact, Plaintiff's Executive Director Peter Bauer has discovered that at least one of the new trails has already been colonized by ragweed and Japanese knotweed, both of which are invasive, non-native species in the Adirondacks. Bauer Ans. Aff. ¶¶ 29-31.

104. Dr. Howard did not make any determination as to whether or not the old trails that have been closed are contributing to this problem, whether their closure will change

that, or whether the new trails are creating more of a problem than the old trails.

105. Thus, there is a material question of fact as to whether the new Class II Community Connector trails are damaging the wild forest nature of the Forest Preserve by contributing to the introduction of invasive species, or are reducing this problem by the closing of older trails as new ones are built.

The State's Witness Timothy Howard Failed to Consider All of the Potential Implications of the New Trails for Forest Fragmentation

106. Plaintiff's expert Dr. Ronald Sutherland, having reviewed Dr. Howard's affidavit, also found that Howard's fragmentation analysis should have, but failed to, take into account numerous other impacts from the new trails such as noise and air pollution, the speed of the snowmobiles, increased hunting and trapping of wildlife, and the cumulative impacts of the trails. Sutherland Aff. ¶¶ 8-12, 18-22.

There Is a Material Question of Fact Regarding the Trails' Effects on the Forest Canopy and Edge Effects

107. The cutting of trees in the Forest Preserve for the Class II Community Connector trails has had the effect of opening up the overhead canopy. Sutherland Aff. ¶¶ 7, 13-17; Signell Aff. ¶ 33. This has had considerable impacts on the forest vegetation, including the creation of open sunny areas where non-forest plants like ferns and grasses thrive, instead of the typical forest vegetation that is found under the tree canopy.

Sutherland Aff. ¶7. As a result, the trails are "unlike a natural wild forest setting." Amadon Aff. ¶17.

108. Construction of the trails has also created areas of "edge effect" where the vegetation, or the lack thereof, on the trails differs greatly from that which is found in the adjacent forest. Sutherland Aff. ¶¶ 7, 13-17; Signell Aff. ¶ 33. Dr. Sutherland found there to be a "stark difference" on the Seventh Lake Mountain Trail due to this effect. Sutherland Aff. ¶14.

109. Defendants' witnesses Dr. Howard and Tate Connor argue that these canopy and edge effects are not occurring on the Class II Community Connector trails. Howard Aff. ¶¶ 27-30; Connor Aff. ¶¶ 18-19. However, as above, it appears that they only observed part of one of these trails.

110. Dr. Howard's claim (¶27) that "canopy closure is relatively high" is both vague, and incorrect. Dr. Sutherland found that "there were significant canopy openings at regular intervals that appeared to be the direct result of trail construction". Sutherland Aff. ¶7.

111. Based on his one limited outing on part of a single trail, Dr. Howard also claimed (¶¶ 27-28) that mostly "forest herbs" are found growing on the trails, and that there is no edge effect. His claim is contradicted by his own photographs of a short part of the Seventh Lake Mountain Trail, Exhibit I hereto. Contrary to his claim that "forest herbs" (Howard Aff. ¶¶ 27-28) are growing on the trails, these photos show that, with just one exception, where there is vegetation, it is grass, not "forest

herbs". Otherwise, the trails are either bare ground, or rocks and mud. See Exhibit I. Cf. Signell Ans. Aff. Exhibits D & E; Bauer Ans. Aff. Exhibits C to F; Amadon Aff. Exhibit G; Sutherland Aff. Exhibit B, photos ## 1, 17-19.

112. Notably, the one photograph of Dr. Howard's that does not show grass growing on the trail instead shows ferns. Exhibit I hereto, photo NYS0007440, which is described on Dr. Howard's spreadsheet as "photo number 36 ... Bridge 12 on the Seventh Lake Mountain Trail". Dr. Sutherland describes ferns as "sun-loving", as are grasses. Sutherland Aff. ¶14. Mr. Bauer states that "[a]reas of the trail that have become vast fern beds are evidence of a highly disturbed area." Bauer Ans. Aff. ¶16, Exhibit F. See also Amadon Aff. ¶17. Thus, ferns, like grasses, are not consistent with the wild forest nature of the areas through which these trails pass, and are a sign that, contrary to Dr. Howard's claims, the trail construction has opened up the forest canopy. Sutherland Aff. ¶14.

113. Similarly, these photographs contradict Dr. Howard's claim (¶¶ 27-28) that there is a "lack of abrupt differences in vegetation along the trail edges". In his own photographs (Exhibit I hereto), the trail surfaces look nothing like the surrounding forest.

114. Contrary to Dr. Howard's claims, Plaintiff's expert William Amadon found that the new "connector trails become thick fern fields ... [or] are stretches of open dirt, showing the failure of the trail to regenerate." His affidavit includes

pictures that show how the "connector trails become grassy or fern fields for long stretches, unlike most foot trails, and unlike a natural wild forest setting." Amadon Aff. ¶17.

115. Finally, Dr. Howard relies on one aerial photograph to support his argument that the forest canopy is closed over the Class II trails. There is no evidence that this is a representative sample. The extent to which he cherry-picked the available GIS photographic data can only be determined at trial. Regarding this photograph, Dr. Sutherland states that it is "inappropriate, as a leaf-off photo of hardwood forest makes it impossible to see the impact of a trail on the forest canopy". Sutherland Aff. ¶33. He then explains the technical reasons that support this position. Id.

116. As discussed above at, Mr. Signell's detailed statistical and field-checked analysis shows that the majority of the Seventh Lake Mountain Trail is dominated by grasses, and that three and one-half years after the trail was constructed, the plant community on the trail "contrasts strongly with that of the surrounding forest." Signell Ans. Aff. ¶17. He found this to be "an indicator that the canopy has in fact been disturbed and opened up significantly." Signell Ans. Aff. ¶¶ 18, 22. Plaintiff's expert Mr. Amadon also observed that canopy openings are extremely rare on foot trails, but "this is something that I frequently saw on the [Class II Community] connector trails that I visited. This is not natural." Amadon Aff. ¶24, Exhibit O.

117. Dr. Howard claims that, as the trees continue to grow over time, the canopy will become even more closed. Howard Aff. ¶27. This is contradicted by Mr. Signell's statement that once established, the non-forest grasses and invasive plants can persist for decades, "serving as a reminder of past human activity in the area." Signell Ans. Aff. ¶18. This claimed effect will also be negated by the "high levels of damage caused by snowmobiles to young trees". Sutherland Aff. ¶15.

118. Thus, there is a material question of fact as to whether the new Class II Community Connector trails are damaging the wild forest nature of the Forest Preserve by creating edge effect and open canopy areas, which are altering the ecology of the forest.

There Is a Material Question of Fact as to Whether the Trails Are Causing Erosion, Which Alters the Terrain Of the Forest and Contributes to Pollution of Streams

119. DEC Forester Tate Connor claims that he "did not observe any evidence of extensive erosion of the trail tread" on the Seventh Lake Mountain Trail.[21] Connor Aff. ¶18. He also claims that "the trail tread is stable". Connor Aff. ¶19. In direct contradiction of this claim, Dr. Sutherland, Mr. Signell and Mr. Bauer all attested that they observed and photographed areas on the Class II Community Connector trails where erosion

[21] It should be noted that he only "visited portions of Segments 1 and 2" of the trail. Connor Aff. ¶18. This trail is 11.9 miles long (Connor Aff. ¶10), so it appears that his claim is based on a relatively small sample of the trail.

was already occurring. Sutherland Aff. ¶¶ 20-22 ; Signell Aff. ¶¶ 23, 32, Exhibit F; Bauer Ans. Aff. ¶12, Exhibits C & D. Mr. Connor's observations were incomplete and he apparently failed to notice many of the problems that persist on the Seventh Lake Mountain Trail. See Bauer Ans. Aff. ¶¶ 8-11.

120. Dr. Sutherland stated that the poor design of the trails, including building trails up steep hills, making bench cuts into the sides of hills, and the design of the bridges, would lead to significant additional erosion. Sutherland Aff. ¶¶ 20-22, 32, Exhibit B, photos 10, 25-30. Mr. Signell stated that "changes in the actual shape of the land due to grading and erosion can last for millennia." Signell Aff. ¶23.

121. Thus, there is a material question of fact as to whether the new Class II Community Connector trails are damaging the wild forest nature of the Forest Preserve by contributing to soil erosion, such "that soil will end up in the creeks and rivers downhill." Sutherland Aff. ¶21.

Defendants' Claim That the Trails Have
the Character of Foot Trails Is Irrelevant

122. The Defendants argue that the Class II Community Connector snowmobile trails are consistent with the wild forest nature of the Forest Preserve because they are similar to foot trails and similar construction techniques are used to build both types of trail. E.g. Connor Aff. ¶20; Affidavit of Robert Ripp, sworn to on August 23, 2016 ("Ripp Aff.")), ¶5; Def.Mem.Law pp. 22-23. This argument is not relevant to the issue of the

constitutionality of these trails, for which the standard is whether or not the activity is consistent with the wild forest nature of the Forest Preserve. Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 241-242.

123. Even if the issue is relevant, Defendants' factual claims are incorrect. In the opinion of Plaintiff's expert Ronald Sutherland, these snowmobile trails resemble roads more than they do trails, due to their width and design. Sutherland Aff. ¶¶ 6-7.

124. Plaintiff's expert Steven Signell concurred with Dr. Sutherland's opinion. In addition, he found that the Class II Community Connector trails do not conform to any known definition of a foot trail. Signell Aff. ¶¶ 6-16. He found that although the DEC/APA 2009 Snowmobile Trail Management Guidance (Record Exhibit 8) states that all trails must have the characteristics of a foot trail, that term is not defined therein.[22] Signell Aff. ¶7.

125. As explained in his answering affidavit, Mr. Signell also found that the Class II Community Connector trails do not conform to DEC's own Policy on Foot Trails (¶¶ 8-9), the definition of "footpath" in several dictionaries (¶10), a U.S. Forest Service trail management manual (¶¶ 11-14), and the

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[22] The requirement that a snowmobile trail must have "essentially the same character as a foot trail" is derived the APSLMP. Record Exhibit 1, page 18, definition no. 31; DEC/APA 2009 Snowmobile Trail Management Guidance, Record Exhibit 8, page 8; Martin Trans. p. 46 (Exhibit E). However, as shown above at ¶¶ 61-67, the APSLMP has no legal bearing on the interpretation of Article 14, § 1.

National Park Service's National Trails System trail handbook (¶15).[23]

126. Mr. Signell's findings are consistent with the fact that DEC does not even have a settled definition of a "foot trail". In their depositions, DEC's witnesses could not give any such definition, or identify one in any of the Defendants' official policies and procedures. Richards Trans. pp. 106-109; Frank Trans. pp. 69-70, 116-119, 173-177 (Bureau Chief of DEC's Bureau of Forest Preserve Management admitted not knowing of any such definition)(Exhibit C); Martin Trans. p. 48 (Exhibit E); Connor Trans. pp. 26-28, 36-39, 84-85 (Exhibit G).

127. Plaintiff also retained as an expert witness William Amadon, a professional trails manager. In 2016 he visited three of the trails at issue in this case. As set forth in his affidavit, he observed that these trails differ from foot trails in numerous ways, including the types of materials used to build the bridges (¶11), the width of the bridges (¶12), the width of the trails (¶13), the flattened trail surfaces (¶14), the use of higher, longer and more frequent bench cuts (¶15), the presence of thousands of tree stumps (¶16), the prevalence of grass and ferns instead of natural forest floor vegetation (¶17), the use of heavy equipment instead of hand tools (¶18), which is one of the causes of damage to standing trees and their roots (¶19), the

[23] This handbook would apply to the National Park Service's North Country Scenic Trail, part of which is being planned by that agency and Defendant DEC to be built in the Adirondack Park. Signell Ans. Aff. ¶15.

removal of bedrock (¶20), the leaving of large amounts of debris along the trailsides (¶¶ 21-22), the amount of stormwater generated and the scale of the water control measures required (¶23), the creation of openings in the forest canopy (¶24), and the size and types of signage required on the trails (¶25).

128. Based on these observations, Mr. Amadon concluded that "these trails resemble roads far more than foot trails, create a man-made setting, and simply do not have 'the character of a foot trail'". Amadon Aff. ¶9. "Thus, Class II Community Connector snowmobile trails are far different from foot trails. Connector trails change the wild forest character of an area ... in such a way that it is not forever kept as wild forest lands." Amadon Aff. ¶27.

129. Mr. Bauer compared the standards for Class II Community Connector snowmobile trails to the trail classification system employed by DEC in the 2006 Shaker Mountain Wild Forest Unit Management Plan, and found that these snowmobile trails are not consistent with these DEC standards. Bauer Ans. Aff. ¶¶ 6-7.

130. APA's witness Mr. Linck agreed that at least one aspect of the Class II Community Connector trails "alters the wild forest character of the trail and the area around it." Linck Trans. p. 111 (Exhibit B).

131. Defendants' argument that the Class II snowmobile trails have the characteristics of foot trails is irrelevant. To the extent that it might be somehow relevant, there are material

questions of fact as to whether the new Class II Community Connector trails are damaging the wild forest nature of the Forest Preserve by constructing dozens of miles of trails that do not have the character of a foot trail.

Defendants' Argument about the
Word "Clearcutting" Is Irrelevant

132. The Complaint (¶¶ 71, 96) characterized the clearing of the Class II Community Connector trails as "clearcutting". Defendants have taken issue with this wording. See e.g. Howard Aff. ¶¶ 24-28; Frank Aff. ¶¶ 18-20; Ripp Aff. ¶¶ 12-14; Def.Mem.Law p. 21. Their argument is merely semantical and has no bearing on the question of whether or not these trails violate Article 14, § 1.

133. In the Ass'n for the Protection of the Adirondacks decisions, the courts found the proposed bobsleigh run to be unconstitutional because "land will have to be cleared" by "the removal of trees from about four and one-half acres of land". Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 236. See also Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. at 76 ("over four and one-half acres of land must be cleared"). In the present case, there is no dispute that the Class II Community Connector trails will be "cleared" of all trees. Whether or not this act meets some technical definition of a "clearcut" is not relevant.

134. Defendants' witness Dr. Howard addresses this semantical issue from an ecological perspective, arguing that a

clearcut has no tree canopy overhead, and no forest edges with abrupt changes in vegetation. Howard Aff. ¶¶ 24-28. However, as discussed above, these conditions are abundant on the Class II Community Connector trails.

135. Defendants' witnesses Mr. Frank and Mr. Ripp address the issue from a forestry perspective, arguing that the dimensions of the trails do not meet their profession's definitions of the term. Frank Aff. ¶¶ 18-20; Ripp Aff. ¶13. However, as discussed above, Article 14, § 1 prohibits the sale and destruction of the timber on the Forest Preserve. Thus, the technical standards of the forestry profession for the clearing and regrowth of timber stands (Frank Aff. ¶18) are simply irrelevant. See also Bauer Ans. Aff. ¶¶ 25-28.

136. Defendants' quibble over the definition of a clearcut is irrelevant. To the extent that this semantical defense might be somehow relevant, there is a material question of fact as to whether the new Class II Community Connector trails are damaging the wild forest nature of the Forest Preserve by clearing all of the trees from long linear areas of the Forest Preserve, thereby creating areas of open canopies and edge effects, among other impacts.

Conclusion

137. There are numerous disputed material issues of fact that require a trial on the question of whether trails the built, and to be built, as part of Defendants' planned system of Class

II Community Connector snowmobile trails, will create a man-made setting and interfere with the wild forest nature of the Adirondack Forest Preserve. Defendants' motion for summary judgment on this question should be denied.

WHEREFORE, it is respectfully requested that the Court grant the following relief:

A. Grant Plaintiff the relief requested in its August 31, 2016 motion for summary judgment;

B. Deny Defendants' motion for summary judgment; and

C. Grant such other and further relief as may seem just and proper to the Court.

John W. Caffry

Sworn to before me this 2nd day of November, 2016.

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