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.

REPLY AFFIDAVIT OF JOHN W. CAFFRY

INDEX NO. 2137-13

RJI NO.01-13-ST-4541

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 the "Plaintiff" or "PROTECT").

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

3. This affidavit is intended to reply to various issues raised in Defendant's answering papers that are not otherwise fully addressed in Plaintiff's Reply Memorandum of Law or the Reply Affidavits of Steven Signell and Peter Bauer. It also serves to put into the record various exhibits that are responsive to Defendants' answering papers.

4. Attached hereto as Exhibit A is a copy of the pertinent parts of DEC's August 6, 1993 Appellate Division brief in Balsam Lake Anglers Club v. DEC, which brief is discussed in Plaintiff's Reply Memorandum of Law, of even date herewith, at Point III. This document is located in my firm's file from the Balsam Lake Anglers Club v. DEC case which I maintain in my office. See Affidavit of John W. Caffry sworn to on August 31, 2016 ("Caffry Aff."), ¶40.

5. Copies of two affidavits signed by DEC personnel in the Balsam Lake Anglers Club v. DEC case, located in that same file, were attached as Exhibits R and S to the Caffry Aff. It turns out that my copy of Exhibit R, the Affidavit of Frederick J. Gerty, Jr. was missing its Exhibit A, a "tree tally sheet". Defendants have quite thoughtfully provided a copy of that missing exhibit, as Exhibit 6 to the October 26, 2016 affirmation of Loretta Simon.

6. However, this tree tally sheet has no impact on the import of these two affidavits, Exhibits R and S. It does show a total of 73 trees "over 3"", which might appear to contradict the

fact that only about a dozen trees of 3" DBH (diameter at breast height) or more were cut for that project. However, as shown on that tree tally sheet, and as discussed at ¶¶ 7-10 of the Gerty Affidavit (Caffry Aff. Exhibit R), these were trees of "stump size", and not trees measured at DBH. This occurred because these measurements were taken after the trees had already been cut, and it was no longer possible to measure their DBH. Gerty Affidavit (Caffry Aff. Exhibit R), ¶12. Trees measured at stump level may actually be smaller at DBH. Id. Therefore, this tree tally sheet has no apparent effect on the present case.

7. It is noteworthy that, even though DEC resorted to counting stumps in the Balsam Lake Anglers Club v. DEC case, it now attacks the work of Plaintiff's expert Steven Signell who had to do likewise in this case, for the same reason. See Reply Affidavit of Steven Signell, sworn to on November 18, 2016.

8. The definition of the word "timber", as used in Article 14, § 1, has been the subject of debate in this case. E.g. August 30, 2016 Affidavit of Phillip G. Terrie, Pd.D. ("Terrie Aff."), ¶¶ 37-45 (discussing historical definitions of "timber"). Defendants' Memorandum of Law in Opposition, dated November 1, 2016 ("Def.Opp.Mem.Law"), at pages 10-14, claims that not all trees are "timber". However, the dictionary (www.Merriam-Webster.com/dictionary) defines "timber" as "trees that are grown in order to produce wood" and "growing trees or their wood". Thus, trees do not have to be of any particular size or age in

order to be timber, and thus come under the protection of Article 14, they merely have to be in the process of growing.

9. Defendants also imply that it is only the Plaintiff who uses the terms "tree" and "timber" interchangeably when writing about Article 14. Def.Opp.Mem.Law p. 13. However, legal scholars do so as well. E.g. The 2005 Constitutional Violation of New York's Forest Preserve: *What Remedy?*, Rosemary Nichols and Nicholas A. Robinson, *The New York Environmental Lawyer*, NYSBA, Spring 2006, Vol. 26, No. 2, *passim*. Because the online version of this article is behind a paywall, a copy thereof is attached hereto for the convenience of the Court as Exhibit B.

10. Attached hereto as Exhibit C is a copy of DEC Program Policy ONR-DLF-3, which is discussed in Plaintiff's Reply Memorandum of Law at Point I.C.

11. Attached hereto as Exhibit D, for the sake of completeness, is a copy of the Report of the Committee on Forest Preserves from the Constitutional Convention of 1894, which formed the basis for the debates set forth in the Revised Record of the Constitutional Convention, a copy of which is Exhibit D to the Terrie Aff.

CONCLUSION

12. The planned system of Class II Community Connector snowmobile trails will destroy tens of thousands of trees on the Adirondack Forest Preserve, in violation of Article 14, § 1 of

the Constitution, and there are no material issues of fact on that question. Even if only trees of 3" DBH or more are counted, Defendants' admitted cutting of several thousand such trees is a violation of Article 14, § 1, as a matter of law.

13. However, there are material issues of fact regarding the questions of whether these trails are consistent with the wild forest nature of the Forest Preserve and create a man-made setting, in violation of Article 14, § 1, which are questions that Defendants have sought summary judgment on.

14. Plaintiff's motion for summary judgment should be granted, and Defendants' motion for summary judgment should be denied.

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

A. Enter judgment in favor of the Plaintiff on the first cause of action;

B. Declare that the system of Class II Community Connector snowmobile trails violates Article 14, § 1 of the New York State Constitution.

C. Enjoin Defendants from constructing, in the Forest Preserve, Class II Community Connector snowmobile trails, and other trails having similar characteristics or requiring like amounts of tree cutting;

D. Order Defendants to rehabilitate the damage done to the Forest Preserve so far by the construction of said trails, including, but not limited to, the replanting of trees on said trails;

E. Award Plaintiff the costs and disbursements of this action;

F. Award Plaintiff its legal fees and other expenses pursuant to the New York State Equal Access to Justice Act, CPLR Article 86; and

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

John W. Caffry

Sworn to before me this 18th day of November, 2016.

NOTARY PUBLIC

LOIS J. STARK
NOTARY PUBLIC, State of New York
Reg. No. 01ST6244871
Qualified in Washington County
Commission Expires July 11, 2019

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EXHIBIT "A"

To Be Argued By:
Lawrence A. Rappoport

Estimated time of argument:
15 Minutes

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : THIRD DEPARTMENT

In the Matter of the Application of
BALSAM LAKE ANGLERS CLUB,

Petitioner-Appellant-Cross-Respondent,

No. 67257

For a Declaratory Judgment under Article 78 of the Civil Practice Law and Rules in the Nature of a Writ of Prohibition or of Mandamus

-against-

the DEPARTMENT OF ENVIRONMENTAL CONSERVATION and the STATE OF NEW YORK,

Respondents-Respondents-Cross-Appellants.

BRIEF OF RESPONDENTS-RESPONDENTS-CROSS-APPELLANTS

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Preliminary Statement

Respondents-cross-appellants Department of Environmental Conservation and the State of New York (collectively, "DEC") seek to affirm in part, and reverse in part, the judgment of the Supreme Court, Ulster County (Cobb, J.), the "court below", entered February 19, 1992 upon its decision issued December 30, 1991 (R. 7-25).[1]

The portion of the judgment declaring that DEC's adoption of a "unit management plan" ("UMP") for the Balsam Lake Mountain Wild Forest Unit of the Catskill Forest Preserve and the cutting of vegetation on forest preserve land for trails and parking lots as proposed in the UMP did not violate the State Constitution, Article XIV, § 1, should be affirmed. There is no prohibition in Article XIV that bars DEC from planning its management of

[1]Citations are to the Record on Appeal unless noted otherwise.

forest preserve lands under its "care, custody and control" (Environmental Conservation Law ["ECL"] 3-0301[1][d] and 9-0105[1]). The court below correctly determined that only an immaterial amount of vegetation has been or will be cut for the construction of a trail proposed in the UMP, and that cutting is for a purpose that is consistent with the forest preserve and does not change the forest preserve's wild forest character.

That portion of the judgment holding that DEC did not violate the property rights of petitioner-appellant-cross-respondent Balsam Lake Anglers Club (the "Club") when DEC included a cross-country ski loop in the UMP should also be affirmed. The ski loop is to be located partially on Club owned land according to the terms of a State-owned easement over the Club land. The court below determined correctly that the ski loop is consistent with the terms of the easement allowing the use of existing public trails on Club land for purposes of ingress and egress to the adjoining forest preserve land.

However, the portion of the judgment which annulled DEC's adoption of the UMP on account of purported violations of the State Environmental Quality Review Act ("SEQRA"), ECL Article 8, should be reversed. The court below wrongly substituted its judgment for that of DEC by making its own assessment of the environmental effects of the UMP, without assessing whether any of the effects it cited were "significant", and concluded that DEC should have prepared an environmental impact statement ("EIS") for the UMP.

QUESTIONS PRESENTED

1. Does the Balsam Lake Mountain UMP, and the cutting of vegetation that has occurred or is planned to occur for trails and parking lots proposed in the UMP, violate the State Constitution, Article XIV, § 1?

2. Does the inclusion of a cross-country ski loop in the UMP, to be located partially on Club-owned lands under the terms of a State-owned easement over such lands, violate the Club's property rights?

The court below determined these questions in the negative.

3. Did DEC violate the requirements of SEQRA when it adopted the UMP without preparing an EIS?

The court below determined this question in the affirmative.

FACTS

a. The Balsam Lake Mountain Unit under the Catskill Park State Land Master Plan

The Balsam Lake Mountain Wild Forest Unit of the Catskill Forest Preserve consists of several parcels which the State has acquired since 1856 (Appendix L of the UMP, following R. 388). A portion of the Unit consists of land which the Club once owned but gave to the Catskill Center for Conservation and Development, Inc. in April, 1976 and December, 1978 (R. 587-653, 932-934). The State purchased this land from the Catskill Center in June, 1979 (R. 654-663, 934-935).

This unit, like all other forest preserve lands, is protected by the State Constitution, Article XIV, § 1, which

states in pertinent part that the lands "shall be forever kept as wild forest lands." In May, 1985, DEC adopted the "Catskill Park State Land Master Plan" to guide its management of the Catskill Forest Preserve in a manner consistent with Article XIV, § 1 (R. 72-185, 859-861). The need for the Master Plan arose because ECL 3-0301(1)(d) and 9-0105(1), which vest DEC with the "care, custody and control" of the forest preserve, do not direct how DEC should carry out this responsibility (R. 859).

The Catskill Park Master Plan is modelled on the Adirondack Park State Land Master Plan[2] to insure a basic consistency in the management of the forest preserve lands in both parks (R. 861). The Master Plan classifies each unit of the Catskill Forest Preserve as either "wilderness," "wild forest," "intensive use" or "administrative" and sets management and use guidelines for each classification (R. 859-861). The Master Plan also requires that each unit be managed by an individual plan, known as a "unit management plan" ("UMP"), in accordance with the management guidelines applicable to the unit's classification (R. 96-97).

The Catskill Park Master Plan classifies the Balsam Lake Mountain unit as "wild forest" since significant in-holdings (i.e., privately-owned land entirely surrounded by State-owned

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[2]The Adirondack Park State Land Master Plan was prepared by the Adirondack Park Agency for the management of forest preserve and other State-owned lands within the Adirondack Park. See, Adirondack Park Agency Act, Executive Law § 816, formerly § 807. The Adirondack Park State Land Master Plan was held to be constitutional in Mtr. of Helms v. Reid, 90 Misc 2d 583, 605-606 (Sup. Ct., Hamilton Co., 1977).

land), existing structures and non-conforming uses and the unit's close proximity to several roads prevent the unit from providing the sense of remoteness and solitude which characterize the areas classified by the Master Plan as "wilderness" (R. 146, 222-223). However, portions of the unit that are "wilderness" in character would be managed as such (R. 223, 878).

b. Adoption of the Balsam Lake Mountain Wild Forest UMP

After the adoption of the Catskill Park Master Plan, DEC's Region 3 Lands and Forest staff ("the staff")[3] gave a high priority to the preparation of a UMP for the Balsam Lake Mountain unit because acquisitions of land in the unit in 1979 and 1980 had increased the size of the unit (R. 879-881). Some areas of these acquisitions were already heavily used by the public, and their man-made features needed upgrading; other areas previously not available to public use were now open to such use.[4]

In January, 1986 the staff began to inventory the unit's natural resources and to assess the projects which would resolve

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[3]The Club's complaint (Br., p. 28) that DEC's answering affidavit (R. 875-9297) is hearsay since the staff members are not identified is unavailing. The UMP identifies the staff members (R. 191), and the reply affidavits by the staff members (R. 969-1037) respond to the Club's complaint.

[4]Briefly, the dam at Alder Lake, acquired in 1980, required immediate repair. Parking within the unit was insufficient, and staff found that parking was evolving along access roads without regard to safety or environmental concerns. Uncontrolled camping was occurring within 150 feet of trails and bodies of water; these campsites required closure or designation in specifically approved areas. Trails located across or in close proximity to private lands required relocation to reduce conflicts with the private landowners (R. 879-881).

the problems which the unit was experiencing and which would improve the unit's recreational potential in a manner consistent with its "wild forest" classification (R. 881). The staff solicited public comments for a draft UMP in a notice issued September 28, 1987 (R. 664, 881). Individuals and organizations, including the Club, responded (R. 665-707, 881).

On October 26, 1988, DEC issued a "negative declaration" pursuant to SEQRA that a UMP for the unit, a Type I action, would not have a significant effect on the environment, using an "environmental assessment form" ("EAF") to identify relevant areas of environmental concern and to evaluate potential adverse impacts that may result from the projects proposed in the UMP (R. 373-385, 882). In December, 1988, the staff notified the public that a draft UMP was completed and available for review, a public meeting on it would be held and that comments were to be submitted by March 3, 1989 (R. 390-586, 726-720, 882).

At the public meeting, held in January, 1989, the staff discussed the purpose and goals of the draft UMP and the projects proposed in it (R. 882-883). While no transcript or recording was made, DEC staff took notes of comments made in support of and in opposition to the draft UMP (R. 735-750, 883). Besides the comments made at the meeting, the staff received 33 additional comments from the public, including the Club (R. 758-843, 883).

In April, 1989, the staff responded to these comments in a document distributed to the public (R. 844-848) and revised the draft UMP in light of them (R. 883-884). On May 11, 1989,

Commissioner Thomas C. Jorling approved the revision as the final UMP (R. 189, 884). The staff then began to implement the UMP according to its schedule of projects (R. 305-307, 884).

c. The UMP

The public has the right to the "free use" of the forest preserve. ECL 9-0301(1). The purpose of the Balsam Lake Mountain UMP is to provide the goals and objectives by which DEC will manage this public use of the unit for a 5-year period commencing in June, 1989 (R. 190, 253-257, 878). These goals and objectives seek to control or reduce the impact of human intrusion of the unit's natural and physical resources in an environmentally sound manner consistent with DEC's statutory responsibilities and the unit's "wild forest" classification (R. 878).[5]

Section I of the UMP is an historical and natural resource overview of the unit (R. 196-204). Pages 10-29 of Section II and appendices B, C, D and O of the UMP inventory the unit's physical and natural resources (R. 205-224, 320-332); pages 30-41 of Section II and appendices E, J, K and N inventory the unit's man-made facilities and easements affecting public use of the unit (R. 225-236, 333-335, 386-388); and pages 41-49 (R. 236-244)

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[5]The management objectives of the Balsam Lake Mountain UMP of controlling the impacts of public use of the unit are similar to the objectives of the UMP proposed for the Neversink River Unique Area (which is located outside of the Catskill Park), which this Court recognized in Mtr. of Schultz v. Jorling, 164 AD2d 252, 257 (3d Dept., 1990), lv denied, 77 NY2d 810 (1991). In Schultz, this Court held that SEQRA did not require DEC to prepare a UMP for the Unique Area before the State acquires land in the area.

discuss the unit's cultural/historical impacts, economic impacts, public use impacts and the unit's ability to withstand use.

Pages 49-52 of Section III (R. 244-247) review the unit's past management policies, which have been directed towards fire prevention, fish and wildlife management and recreation; pages 52-58 (R. 247-253) discuss the legal and physical constraints and issues which pertain to the management of the unit; and pages 58-62 (R. 253-257) state the management goals and objectives which DEC hopes to achieve within the UMP's 5-year period.

Section IV (R. 258-296) lists the projects which the staff proposes to undertake within the five-year period in order to achieve the UMP's goals and objectives. Included in this section are the new or relocated hiking trails, the cross-country ski loop partially located on existing public trails crossing Club land, five new parking areas totalling less than 2 acres,[6] and the designation of two existing campsites along the Beaverkill as lawful campsites, which the Club contests in this appeal and which are discussed more fully infra.

Section V of the UMP is the schedule for undertaking the projects listed in Section IV over the 5-year period (R. 305-307). Year I of the UMP commenced in June, 1989 and virtually all of that Year's projects were completed, except that the completion of project no. 12, the contested relocation of the portion of the Hardenburg-Neversink trail presently located on

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[6]See R. 265-267, 282, 899-900. The Club wrongly describes (Br., p. ix) the 5 parking lots as one "two acre parking lot".

Club land to a new location on forest preserve land, and project no. 13, the marking of the cross-country ski loop, have been awaiting resolution of this appeal (R. 886).

In September, 1989, after the staff commenced the Year I projects, including the vegetative cutting for the relocation of the Hardenburg-Neversink Trail from Club land, the Club commenced this proceeding. The Club amended its petition twice (R. 26-39, 40-52). DEC answered the second amended petition (R. 53-71) and submitted answering affidavits (R. 858-938) and the return, consisting of the administrative record of the adoption of the UMP (R. 72-857). The court below rendered its decision on December, 30, 1991 (R. 7-22). The judgment effectuating the decision was entered on February 19, 1992 (R. 23-25), and the Club served the judgment with notice of entry on March 2, 1992. The Club appealed in part from those portions of the judgment upholding the constitutionality of the UMP and the immaterial cutting of vegetation and also the propriety of the ski loop (R. 3-4); DEC cross-appealed from the portion of the judgment annulling the UMP for violations of SEQRA (R. 5-6).

DECISION OF THE COURT BELOW (now reported at 153 Misc 2d 606)

The court below first upheld the constitutionality of the UMP and the cutting of any amount of vegetation for the projects proposed in it under Article XIV, § 1 of the State Constitution (R. 8-14). The court noted that in Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 230 (1930),

the Court of Appeals rejected an absolutist interpretation of Article XIV, § 1 that bars the cutting of any timber on forest preserve land and held that an insubstantial and immaterial cutting of timber sized trees was constitutionally authorized in order to facilitate public use of the forest preserve so long as such use is consistent with wild forest lands (R. 9-11).

The court below then held that the amount of vegetation already cut and proposed to be cut for the relocation of the portion of the Hardenburg-Neversink Trail from Club land to State land, including saplings, seedlings and timber sized trees, is insubstantial and not constitutionally prohibited (R.11-12). The court also stated that it was premature to review the cutting for the proposed "Mill Brook Ridge Trail" since no specific route for the trail has yet been determined (R. 12-13).

The court below rejected the Club's argument that Article XIV, § 1 prohibits DEC from constructing any new trails on forest preserve land. The court held, following the Court of Appeals' MacDonald decision, that there is no intent under Article XIV, § 1 to prevent public hiking, camping and other recreational uses of the forest preserve or to maintain the forest preserve in an absolutely wild state (R. 13-14). The court then declared the UMP to be constitutional (R. 14).

The court below next reviewed DEC's compliance with SEQRA (R.14-19), holding that DEC's negative declaration did not address the impacts of likely increased use of the unit or the aesthetics of new trails in totally wild areas or camping along

the Beaverkill (R. 17-18). It noted that the declaration's reference to mitigation measures to be undertaken "implicitly concedes" that the construction of new trails will have an environmental impact (R. 18). It also noted that certain responses in DEC's EAF form were incorrect (R. 18).

The court below concluded that DEC failed to take a hard look at the impacts of the UMP or make a reasoned elaboration of the basis for the negative declaration (R. 18-19). Further, the court below found upon the submissions to it "that the UMP may (emphasis in the original) have an adverse impact on the environment requiring preparation of an [EIS]" (R. 19).

Next, the court below upheld the proposed cross-country ski loop using existing public trails on Club land under the terms of an easement which the State acquired (R. 19-20). The court stated that cross-country skiing would not have as much impact as other uses such as hunting or logging allowed under the easement (R. 19). The court also stated that the easement refers to existing public trails and "implicitly" allows the continuation of their use (R. 20).

The court recognized that the public trails to be used for the ski loop have long been used for hiking and horseback riding as shown on the trail maps issued by DEC (R. 20). The court then held that the "UMP does not violate any of the [Club's] property rights in and to the proposed cross-country ski trails" (R. 20).

ARGUMENT

POINT I

THE CUTTING OF INSUBSTANTIAL AMOUNTS OF TIMBER FOR PROJECTS PROPOSED IN THE UMP TO FACILITATE PUBLIC USE OF THE FOREST PRESERVE DOES NOT VIOLATE ARTICLE XIV, § 1 OF THE STATE CONSTITUTION.

The declaration by the court below that DEC's adoption of the UMP did not violate the State Constitution, Article XIV, § 1 should be affirmed. The court properly followed the Court of Appeals' decision in MacDonald in holding that the construction of trails and other facilities as proposed in the UMP that are consistent with the nature of the forest preserve and involve only a minimal amount of timber cutting are constitutional, though the facilities encourage increased public use of the preserve (R. 13-14).

In seeking to reverse this declaration, the Club misconstrues the Court of Appeals' decision in MacDonald and claims that Article XIV, § 1 bars the cutting of any vegetation on forest preserve land for any new trail, parking lot or for any other project proposed in the UMP. According to the Club, the provision of Article XIV, § 1 that forest preserve land "shall be forever kept as wild forest lands" even bars DEC from preparing a UMP that would facilitate increased public use of forest preserve land. The Club's absolutist arguments are erroneous and must be rejected.

In its decision in MacDonald affirming this Court's invalidation of legislation authorizing the construction of a

bobsled run on forest preserve land, the Court of Appeals rejected this Court's view that Article XIV, § 1 (formerly Article VII, § 7) bars any timber cutting on forest preserve lands. The Court of Appeals looked to the purpose and objective of Article XIV, § 1 and recognized that the Constitution, like a statute, must be interpreted reasonably. 253 N.Y. 238. The Court noted that the Forest Preserve and the Adirondack Park are "for the reasonable use and benefit of the public", that "all things necessary were permitted . . . which did not call for the removal of timber to any material degree," and that "[a] very considerable use may be made by campers and others without in any way interfering with this purpose of preserving them as wild forest lands". 253 N.Y. 238, 241. The Court reiterated at 253 N.Y. 242 that:

> The framers of the Constitution, as before stated, 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 <u>to any substantial extent</u> for any purpose. (emphasis added).

In its analysis, the Court also recognized:

> ... the question still remains whether the construction of a toboggan slide, which requires the cutting of 2,500 trees is such a reasonable use, or is forbidden by the Constitution. 253 N.Y. 241.

Thus, by rejecting an absolute view of Article XIV, § 1 that barred any cutting of timber for any purpose, the Court of Appeals framed the issue as being whether the bobsled run (i.e.,

the toboggan slide) was a reasonable use permitted under Article XIV, § 1. The Court concluded at 253 N.Y. 241-242 that the construction of the bobsled run, involving the clear-cutting of 2600 to 2700 trees 3 inches or more in diameter in a swath 1-1/4 miles long and 16 to 20 feet wide and a returnway about a mile long and 6 to 8 feet wide was an unreasonable use of the forest preserve and forbidden by Article XIV § 1.

The Club wrongly contends (Br., pp. 10, 13) that the analytical language of the Court of Appeals' decision in MacDonald recited above is "unnecessary dicta" which the court below wrongly followed and which this Court may ignore. The Club's argument overlooks the obvious. In invalidating the bobsled run legislation, the Court of Appeals did not hold that all cutting regardless of the purpose is prohibited. Rather, based upon its discussion at 253 N.Y. 238-239 and 240-241, the Court of Appeals held conversely at 253 N.Y. 242 that an insubstantial amount for some purposes which are consistent with the wild forest nature of the forest preserve would not be forbidden. The Court's actual holding was that the bobsled run did not come within these bounds. Hence, the analytical language in MacDonald which the Club argues may be ignored was in reality central to the Court's resolution of the constitutional issue before it.

Clearly, therefore, under the analytical language of the Court of Appeals decision in MacDonald, a use or activity which is consistent with the purpose of the forest preserve, which

would not change the wild forest nature of the preserve and would not involve tree cutting to a material degree would not be unconstitutional. Contrary to the Club's arguments (Br., pp. 14-16), the court in Helms v. Reid, 90 Misc 2d 595-598, 605-606, correctly applied the Court of Appeals' MacDonald analysis in upholding the Adirondack Park Agency's preparation of the Adirondack Park State Land Master Plan. See, also, Flacke v. Town of Fine, 113 Misc. 2d 56, 58 (Sup. Ct., St. Lawrence Co., 1982), which also applied the MacDonald analysis in upholding DEC's requirements that a town must apply for permit before cutting any timber in the repair of a town road crossing forest preserve land. As the Helms court stated at 90 Misc 2d 598, it is unreasonable to interpret Article XIV, § 1:

> as requiring a constitutional amendment anytime any timber whatsoever is to be cut in the preserve no matter what the purpose.

Consequently, the Club's argument that Article XIV, §1 bars any cutting of vegetation on forest preserve land for any project proposed in the UMP is meritless and must be rejected.

The Club also contends (Br., pp. vii-ix and Point I) that the relocation of a portion of the Hardenburg-Neversink Trail, the construction of the Mill Brook Ridge Trail and five new parking areas as proposed in the UMP are improper uses of the forest preserve that have or will result in a material and thus unconstitutional amount of vegetative cutting that will clear approximately 8-9 acres of forest preserve. The Club is wrong.

According to the staff's tally, the trail relocation resulted in the cutting of a total of 300 "trees" one-inch or more in diameter cut over a distance of 1.9 miles (R. 907, 925,[7] 975-976). (In response to the Club's allegations that this tally did not include vegetation less than one inch in diameter [R. 945], the staff also counted an additional 232 stumps of vegetation less than one inch in diameter cut over this distance [R. 976-977, 1025, 1027]). Completion of the trail relocation, including DEC's accommodation of the Club's request to re-route the trail further from its property, will result in the cutting of 50 more live trees one inch or more in diameter over a distance of .4 miles (R. 907-910, 974-978). This is a total of 350 trees of one inch or more in diameter that have been or will be cut for the trail relocation (R. 907, 977, 1025, 1028).[8]

This amount of cutting is not substantial. The 300 trees one inch or more in diameter cut over the 1.9 miles (or 10,032 feet) represents an average of one tree cut every 33.4 feet (R. 977). Taking into account the additional growth less than one inch in diameter that was cut over that distance, there has been one cut every 18.9 feet. The 50 trees one inch or more in diameter over a distance of .4 miles (or 2,112 feet) for the

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[7]Contrary to the Club's contention (Br., p. 29), the November 7, 1987 date written on the tally at R. 925 was inadvertent. The correct date of the tally is November 7, 1989 (R. 1025, 1028).

[8]The tally given above belies the Club's claim (Br., p. ix) that DEC staff did not include "trees" less than 3 inches in diameter at breast height ("DBH"), approximately 4½ feet from the ground.

Club's requested re-routing of the trail represents the cutting of an average of one tree every 42.2 feet (R. 977).

This cutting is more insignificant from the fact that only 33 stumps of the 300 trees cut over the 1.9 mile distance were more than 3 inches in diameter (R. 977). Only 5 of the 50 trees to be cut over the .4 mile re-route will be more than 3 inches DBH (R. 977-978, 1014-1015). The rest of the cutting, 312 trees, has been or will be 3 inches or less in diameter.[9]

These figures contrast starkly with the 2600 to 2700 trees 3 inches or more DBH proposed (according to the agreed statement of facts noted at 228 App. Div. 75-76) to be cut for the bobsled run in MacDonald over a distance of 1-1/4 miles in a swath 16 to 20 feet wide. The MacDonald cutting would have averaged one tree every 2.7 or 2.8 feet, which was found to be a material amount of cutting that would destroy the wild forest nature of the forest preserve and therefore determined to be forbidden.

Accordingly, the determination of the court below that the amount of cutting for the trail relocation is immaterial and not constitutionally prohibited should be upheld. Since the total amount of cutting for the trail relocation comes within the permissible ambit of Article XIV, § 1, there was no need for the

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[9]DEC does not consider vegetative growth less than 3 inches in diameter DBH to be "trees" (R. 975-976, 990-992, 1015). Growth less than one inch in diameter is a "seedling," "brush" or "shrub"; growth between one to 3 inches or as much as 5.5 inches DBH is a "sapling" (R. 975-976, 990-992, 1015). The Commissioner's Organization and Delegation Memorandum No. 84-06 (R. 721-724) requires the DEC staff to obtain approval for the cutting of trees only 3 inches or more in diameter (R. 1015).

court below to resolve the issue whether any vegetation less than 3 inches in diameter is "timber" under Article XIV, § 1.

The court below also correctly declined to review the anticipated cutting for the proposed 7.5 mile Mill Brook Ridge trail, since no route has yet been determined. Though the Club speculates (Br., pp. 5-6) that over 1000 trees would be cut for this trail, it cannot base its constitutional challenge on speculation that DEC will violate Article XIV, § 1 in the future. As the court below noted (R. 12), DEC staff must comply with its trail construction design and construction techniques and obtain approval for the route it selects from the Director of the Division of Lands and Forests pursuant to the Commissioner's Organization and Delegation Memorandum No. 84-06 (R. 721-724, 893-899, 905). If the Director determines that a material amount of cutting would be necessary, the trail construction will not be approved (R. 895, 914).[10] While the court below did not address the cutting for the proposed five scattered parking areas, the same Commissioner's Memorandum No. 84-06 would limit the amount of cutting for these acres to an immaterial amount to insure that

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[10]DEC staff anticipated that the cutting for the Mill Brook Trail would be minimized because a portion of the trail is proposed to follow an old logging road (R. 1017). The trail will then go through a mature forest where only some understory need be cut (R. 1017-1018).

Also, even if the Club's speculation that 1000 trees would be cut for the trail were considered, that is not a material amount when considered over the entire 7.5 mile (or 39, 600 foot) length of the trail. Such cutting amounts to an average of one tree for every 39.6 feet.

EXHIBIT "B"

The 2005 Constitutional Violation of New York's Forest Preserve: *What Remedy?*

By Rosemary Nichols and Nicholas A. Robinson

In September 2005, Dan Plumley photographed many of the more than 5,000 trees felled on both sides of eleven miles along New York Route 3 west of Saranac Lake in the New York State Forest Preserve. Emblematic of all this tree cutting is one photo. It shows both the stump of a mature, healthy white fir tree and its severed majestic trunk (with mangled limbs), still boldly emblazoned with a large bright yellow sign, which features the green and blue logo of the Department of Environmental Conservation and the words: "FOREST PRESERVE."[1] The tree once graced the edge of the wild forest, along a State highway that had won national awards for its beauty and sensitive routing through the Forest Preserve.

During last summer crews from the NYS Department of Transportation (DOT) and its contractors clear-cut trees back 50-75 +/- feet from the pavement on Route 3. When it is necessary to trim tree limbs, or remove old and diseased trees or limbs that may threaten highway use and safety, New York provides that the target trees may be marked and selectively removed as part of highway maintenance, after receipt of a permit from the NYS Department of Environmental Conservation (DEC).[2] DEC indicates that it informally authorized removal of up to 1,000 trees along Route 3. DOT or its agents cut upwards of 4,000 more trees and left the exposed roadsides open to erosion.[3] DEC's Forest Rangers, DEC's Lands & Forest staff and its Environmental Conservation Officers all took no action in the face of this clear-cutting. The Adirondack Park Agency (APA), which has authority over land use planning in association with the transportation corridors within the Adirondack Park's "Blue Line" borders, questioned DOT about the cutting but took no action. By September, the State DOT had clear-cut 22 miles of forest on both sides of Route 3 for eleven miles and done the damage while the State's watchdogs were slumbering.

What Plumley's camera documents is a *prima facie* violation of Article XIV of the New York State Constitution: "The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, *shall be forever kept as wild forest lands.* They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, *nor shall the timber thereon be sold, removed or destroyed.*"[4] The cutting of trees within the Forest Preserve has been unlawful since 1894, when Article XIV was adopted at a Constitutional Convention.[5] By amendment of the Constitution, the people of New York have allowed a circumscribed authority for tree cutting to permit maintenance of highways to access and cross the Forest Preserve.[6]

Stewardship of the "forever wild" Forest Preserve is entrusted to the Department of Environmental Conservation.[7] Before New York's Department of Transportation (for the 1,200 miles of State highways), or any town highway department (for the 3,000 miles of county and town roads), can trim trees along roadways in the Forest Preserve, the highway maintenance project requires a temporary, revocable permit from the DEC.

"No explanation has been provided to journalists or the public for why this vast, apparently premeditated clear-cutting along Route 3 was undertaken. Requests for explanations have not been answered."

DOT crews never marked any of the presumably "dangerous" target trees along Route 3 in order to single them out for selective cutting. DEC has not produced any evidence that it issued any formal permit for the cutting. A DOT Purchase Order, dated July 28, 2005, provided for "felling dead trees along Route 3," and contemplated use of the Feller Buncher, a machine that can reach deep into the forest from its edge. Once work began, DOT quickly moved from selective cutting with a bucket truck to the more intrusive Feller Buncher methods, apparently with a verbal approval by DEC. Cutting now penetrated deep into the adjacent woods of the Forest Preserve. In August, citizen complaints about the clear-cutting of trees immediately emerged, and by early September, DOT ceased its cutting. The legendary wilderness guide, Clarence Petty (born 1901), was among the first to protest.[8]

No explanation has been provided to journalists or the public for why this vast, apparently premeditated clear-cutting along Route 3 was undertaken. Requests for explanations have not been answered.

Municipal workers or private citizens cutting trees in the Forest Preserve have been subject to criminal and civil liability for more than a century.[9] The prohibition on cutting has been consistently enforced. Indeed, recent legislative amendments in 2003[10] to the Environ-

mental Conservation Law have increased the penalty sanctions for unlawful tree cutting to $250 per tree, or the stumpage value, with provisions for treble damages of that value.[11] Were the State to sanction DOT's contractors for this violation of the Forest Preserve,[12] the fines for 5,000 trees cut would total $750,000 (at $250.00 per tree cut), or a stumpage value of perhaps $1,500,000 +/-. With treble damages, the fine might reach $4.5 million. The costs for the restoration of the forest area may also be assessed in addition to the fines.[13]

Even if the State were to levy the full fine authorized by law, when a State agency violates State law it may be doubted that any fine is a wholly inadequate remedy. DEC has the authority to enforce the law against DOT.[14] However, for DEC to collect a fine to be paid from the DOT budget (whose funds are allocated from the general fund of the State) only then to be paid into the general fund of the State, is essentially a symbolic act, providing neither effective compensation nor deterrence. Moreover, just as the tourism season for the fall foliage was underway, with tour buses traveling along what was once the scenic Route 3, the DOT began to clean up the unsightly debris and cut trees, tidying up after itself,[15] even to the extent of securing penal laborers from the Department of Corrections to help with the work. DOT has proffered no authority to justify its clean-up activities, received no permit from DEC for this further work in the Forest Preserve, and held no public consultations with local towns or the public, and seems to have done none of the scientific studies that would be expected.[16]

However well intended this DOT effort at clean-up may have been, "two wrongs do not make a right." DOT's further acts in the Forest Preserve and its unremediated clear-cut are a continuing violation of Article XIV. Competent silvacultural and ecological analysis is needed to provide an environmentally sound restoration. The recently exposed interior forest trees along the edge of the clear-cut are vulnerable to sunburn and wind shear. Neither DEC nor DOT have evaluated how to curb further forest dieback because of the cutting.

Article XIV authorizes citizens to sue to enforce its provisions, as the Association for the Protection of the Adirondacks has done in the past.[17] The Association's Trustees, at their 504th Meeting,[18] authorized giving notice of the Association's intent to sue and suing, should the DEC and DOT fail to embrace suitable remedies for this Constitutional violation. Public debate and scrutiny are needed with respect to the question: What remedies should be sought?

A citizen plaintiff, or the Attorney General,[19] could seek an injunction obliging the DOT to consult the public, give public notice of its decision-making, design an ecological restoration plan, and replant trees to restore the Forest Preserve along both sides of Route 3. A citizen plaintiff could also seek to restrain on-going and future DOT violations of Article XIV by ordering internal agency reforms to prevent a recurrence of this sort of Constitutional violation. A citizen suit against the DEC could seek a mandamus to compel its enforcement of its Forest Preserve stewardship duties. It would be appropriate for DEC to secure a settlement of DOT's violations by requiring environmental public benefit projects, such as restoring Forest Preserve areas along other stretches of State highways in addition to Route 3.[20]

These sorts of remedies for this Route 3 clear-cut may not be enough. When DOT violated Article XIV in the past, past Commissioners of Transportation acted to avert a recurrence of such behavior by establishing the Adirondack Highway Council in 1974,[21] and by 1986 DOT, in cooperation with DEC, had issued its "Guidelines for the Adirondack Park," known as the green book. The DOT has since allowed the Highway Council to lapse, and seems to take little guidance from the green book. Evidently advisory councils and well-conceived manuals are not sufficient to ensure that DOT understands its Constitutional duties for the Forest Preserve under Article XIV. If all else fails, new legislation may be required to establish a permanent highway council for the Forest Preserve, and make other provisions to ensure that DOT can respect the "forever wild" values of Forest Preserve. In addition, if a financial penalty is required from the DOT, legislation could establish it as a permanent fund to enhance the buffers between highways and the Forest Preserve.

The Executive Committee of the NYS Bar Association has tasked its Committee on the Adirondacks, Catskills, Forest Preserve and Natural Resources to study the DOT violations of Article XIV, and examine what remedies are appropriate for the effective enforcement of Article XIV.[22] Since Article XIV contains both affirmative and negative provisions, stewardship for the "forever wild" Forest Preserve requires more than superficial compliance with the mandate not to cut or destroy trees. Implicit in Article XIV's mandate that the Forest Preserve be *"forever kept as wild forest lands"* is a duty to *more* than minimally observe the prohibitions explicitly set forth in Article XIV. The spirit of "forever wild" has been construed by the N.Y.S. Court of Appeals to require safeguarding the Forest Preserve as a sanctuary of quiet and appreciation of nature, for hunting and fishing and recreation and beauty.[23]

The Forest Preserve exists not for today alone. Our generation carries forward the wisdom of our forebears in the 19th and 20th centuries. In addition to its historic, intrinsic wild forest values, today the Forest Preserve affords new benefits. As our population grows the com-

mercial value of eco-tourism mounts, and healthy and beautiful wild forests sustain much of the North Country's economy. Moreover, as a consequence of climate change, habitats and migration patterns of species, as well as weather patterns are altering. This evolution can and must be studied. The Adirondacks afford a vast laboratory where the changes can proceed naturally, and we can learn how to adapt and cope to the new circumstances. Moreover, since the Forest Preserve was established to safeguard the sources of water supplies for much of New York, because of the climactic changes forecast in rainfall patterns, there are new reasons why the Forest Preserve's vast hydrologic assets become ever more important.[24] Highway tree buffer zones preserve the quality and the quantity of the Forest Preserve's waters, and cannot be reduced merely to a highway amenity, merely an object of highway maintenance.

New York's Constitution literally creates and defines our State. New Yorkers are justifiably proud to have a government of laws, under the rule of law. There is no room for rogue behavior among individuals in any State agencies, especially when express Constitutional provisions govern and are ignored. Like all its other provisions, the State Constitution's safeguards in Article XIV are fundamental. They impose an *affirmative* duty on all authorities in New York to sustain the "forever wild" values in the Forest Preserve.

If DOT is to honor and work within its Constitutional mandate, DOT needs to embrace what scientists know about ecology. DOT's administrative systems should incorporate the constitutionally mandated methods of ecosystem management in DOT's work within the Forest Preserve. Roads and Forest Preserve must coexist, but the Constitution puts roads under the umbrella of the Forest Preserve, not the other way around. In like vein, the Adirondack Park Agency and the Department of Environmental Conservation need to affirmatively discharge their Constitutional and statutory duties to progressively strengthen "forever wild" values. There is no room in Article XIV for APA and DEC to sleep on their stewardship duties. These Constitutional violations along Route 3 should motivate DOT, DEC and APA each to rethink how best to govern with regard to their respective "forever wild" duties.

"Forever wild" entails and embraces what the eminent ecologist Dr. Aldo Leopold conceived as the "land ethic."[25] Because wilderness is a place where natural systems predominate over human constructs, any breach of the land ethic is particularly transparent. In addition to offending the letter of the Constitution, DOT's cutting of 5,000 trees assaults the most basic of our society's environmental norms: the integrity, stability and beauty of the biotic community. The breach of New York's Constitutional land ethic for the Forest Preserve occurred. What now will the remedy be?

Endnotes

1. This photograph has been published in the Annual Report 2005 of the Association for the Protection of the Adirondacks (December 2005), at page 5 (available from the Association for the Protection of the Adirondacks, 897 St. Davids Lane, Niskayuna, New York 12309, http://www.protectadks.org). Plumley is the Association's North Country Director of Park Protection. Judge Warren Higley, Lt. Governor Timothy L. Woodruff, and Col. William F. Fox and a group of businessmen, private property owners, and conservationists established the Association in 1901 "to protect and enhance the natural resources and the human values of the Adirondack Park and the New York State Forest Preserve of the Adirondacks and Catskills." See Edith Pilcher, *A Centennial History of the Association for the Protection of the Adirondacks, 1901-2003* (Schenectady, NY).
2. *See* Section 9-0105 of the Environmental Conservation Law, 17½ McKinney's Consol. Laws of N.Y. These procedures also are based on memoranda of understanding between the DEC and DOT. *See* Will Abruzzi, "Generic Response to Rt. 3 Tree Inquiry," *Adirondack Daily* Enterprise, October 24, 2005.
3. At the DEC's Forest Preserve Advisory Committee meeting on October 27, 2005, the Director of the DEC's Lands & Forests Division, Robert Davis, indicated that a count of the cut trees showed that 3,000 trees had been cut within the Forest Preserve located within the Route 3 right of way, and 2,000 deeper within the Forest Preserve beyond the right of way.
4. Constitution of the State of New York, Article XIV, Section 1.
5. Opinions of the Attorney General have reaffirmed the illegality of any tree cutting in the Forest Preserve, see, e.g. 1908 Op. Att. Gen 143, 1909 Op. Att. Gen. 663; 1915 Op. Att. Gen 190; 1933 Op. Att. Gen 395; 1948 Op. At. Gen 166; 1970 Op. Att. Gen. 327. The Court of Appeals has noted the prohibition in connection with highways in *Association for the Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234 (1930) at 240: "If it were deemed necessary to obtain a constitutional amendment for the construction of a state highway, the use of which the Forest Preserve might be put with Legislative sanction was greatly limited. Trees could not be cut or the timber destroyed, even for the building of a road."
6. Section 9-0303(1) of the Environmental Conservation Law is clear that, *inter alia*, "no person shall cut, remove, injure, destroy or cause to be cut, removed, injured or destroyed any trees or timber" in the State's forests in the Adirondacks. With respect to highways, Constitutional amendments to the original language of Article XIV made it possible to construct the Northway (voters approved provisions in 1959 to the effect that ". . . Nothing herein contained shall prevent the State from constructing, completing, and maintaining any highway heretofore specifically authorized by constitution amendment, nor from constructing and maintaining to federal standards federal aid interstate highway route five hundred and two . . . " Earlier, in order to provide DEC some authority over highways, the adjacent forests of which remain in the Preserve on Nov. 5, 1957, the State's voters amended the Constitution to allow the use of no more than 400 acres to relocate, reconstruct, or maintain highways; DOT has not claimed to be seeking to use this authorization for its work on Route 3.
7. NYS Environmental Conservation Law, Article 9, "Lands & Forests," 17 ½ McKinney's Consolidated Laws of New York.
8. *See* Christopher Angus, *The Extraordinary Adirondack Journey of Clarence Petty* (Syracuse University Press, 2002).
9. *See, e.g., People of the State of NY v. Fisher*, 190 NY 468, 83 NE 482; 1908 LEXIS 1200 (1908)
10. L. 2003, Ch. 202.

11. A violation of Section 9-0313(1) of the NYS Environmental Conservation Law, subjects any person to a civil fine of $250/tree or treble damages based on the stumpage value of the trees, or both. Section 71-0703(6)(a), ECL. Stumpage value is the fair market value of the timber as it stood before cutting. Section 71-0703(6)(a), ECL.

12. Section 9-0101 defines "person" to exclude the State, but a private contractor would be covered within "any person." This leads to a double standard in the law. The responsibilities of State agencies with respect to the Forest Preserve may need to be revised by future legislation.

13. Section 71-0703(7), Environmental Conservation Law.

14. NYS Environmental Conservation Law § 9-0303(1) and 6 N.Y.C.R.R. 190.8.

15. Andy Bates, "DOT To Remove, Chip Rt. 3 Trees," *Adirondack Daily Enterprise*, December 23, 2005.

16. See, e.g. the environmental impact assessment procedures required by the NY State Environmental Quality Review Act, Article 8, Environmental Conservation Law, 17 ½ McKinney's Consolidated Laws of NY.

17. Article XIV, Section 4, provides that "A violation of any of the provisions of this article may be restrained at the suit of the people, or, with the consent of the supreme court of the appellate division, on notice to the attorney-general, at the suit of any citizen." See also *Association for the Protection of the Adirondacks v. MacDonald*, 228 App. Div. 73, *aff'd*, 253 N.Y. 234 (1930).

18. November 11, 2005, meeting at the Adirondack Nature Conservancy, Keene Valley, N.Y.

19. It is a delicate question whether the Attorney General's duty lies first to the Constitution, and enforcement of Article XIV, or to the defense of his clients, the DOT, for its violations of Article XIV, and the DEC for not fulfilling its statutory duties. It was because this sort of situation may paralyze the executive branch that the people includes Section 4 in Article XIV, authorizing citizen suit to ensure that the courts could vindicate the Constitutional safeguards.

20. DEC has statutory authority to settle the violations against DOT on this basis. *See* Section 71-0523, Environmental Conservation Law.

21. The Adirondack Highway Council consisted of representatives of State and local governmental agencies and of the public, to promote free interchange of ideas between citizens and public agencies and the resultant coordinated actions to ensure the preservation and enhancement of the Park's special character. The Council was to advise DOT in providing an efficient transportation system compatible with the unique, natural character of the Adirondack Park.

22. NYSBA Section on Environmental Law, Executive Committee meeting of January 28, 2006, NY City. The Committee on Adirondacks, Catskills, Forest Preserve and Natural Resources is to report to the Executive Committee in April, 2006.

23. The oft-quoted language from *Association for the Protection of the Adirondacks v. MacDonald*, in the Appellate Division decision, construes "forever wild" thus: "Giving to the phrase 'forever kept as wild forest lands' the significance which the term 'wild forest' bears, we must conclude that the idea intended was a health resort and playground with the attributes of a wild forest park as distinguished from other parks so common to our civilization. We must preserve it in its wild nature, its trees, its rocks, its streams. It was to be a great resort for the use of all the people, but it was made a wild resort in which nature is given free rein. Its uses for health and pleasure must not be inconsistent with its preservation as forest lands in a wild state. It must always retain the character of wilderness. . . . It is essentially a quiet and healthful retreat from the turmoils and artificialities of a busy urban life. Breathing its pure air is invigorating to those sick. No artificial setting is required for any of these purposes." 228 App. Div. 73.

24. In 1899, the Court of Appeals of New York noted that "The primary object of the park, which was created as a forest preserve, was to save the trees for the threefold purpose of promoting the health and pleasure of the people, protecting the water supply as an aid to commerce and preserving timber for use in the future." *People v. Adirondack Railway Co.*, 60 N.Y. 228, at 248 (1899).

25. See Aldo Leopold, *A Sand County Almanac* (Oxford University Press, 1949), in the section on "Wilderness," pp. 188-200, and on "The Land Ethic," pp. 201-226. Leopold restates the land ethic at pp. 224-5, "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."

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EXHIBIT "C"

ONR-DLF-3 / Clearcutting on State Forests

New York State Department of Environmental Conservation

DEC Program Policy

Issuing Authority: **Christopher Amato, Asst. Commissioner for Natural Resources**	**Title: Clearcutting on State Forests**
Date Issued: 3/21/11	**Latest Date Revised: N/A**

I. **Summary:** This Policy provides the procedures for clearcutting or conducting other regeneration cuttings on State Forests, including Reforestation, Multiple Use, and Unique Areas.

II. **Policy:** It is the policy of the DEC Division of Lands and Forests (Division) to ensure all even-age regeneration methods on State Forests, including clearcutting, are undertaken in a sustainable and ecologically responsible manner with appropriate levels of agency oversight and public notice and in accordance with the Standards and Procedures of this policy.

III. **Purpose:** The purpose of this policy is to ensure that clearcutting and other regeneration cuts undertaken by the Division as a forest management tool are done in a manner that (i) promotes long-term sustainability of the forest and the temporary establishment of early successional forest habitat, (ii) maintains the presence of shade intolerant species, and (iii) enhances biological diversity. This policy also describes the procedures to minimize negative visual impacts to the surrounding landscape from clearcutting and other regeneration cuts. In addition, this policy establishes procedures to keep all levels of the Division and the public informed of and educated concerning management decisions when conducting clearcutting and other regeneration cuts. This policy supports the Division's goal to sustainably manage New York's State Forests and to maintain green certification under the most current and applicable standards set forth by the Sustainable Forestry Initiative (SFI) and Forest Stewardship Council (FSC).

IV. **Background:** Even-age silviculture, including clearcutting, is intended to generate many of the biological attributes consistent with natural events such as fire, violent weather, or the spread of insect or disease. However, clearcutting is a controversial forest management practice (Harlow, 1997). Controversy regarding clearcutting on public lands in the eastern United States began on National Forests in the mountains of West Virginia and North Carolina during the 1960's (Borrelli, 1972). Large cuts of 400 acres or more, some located on steep slopes and adjacent to highways, evoked instant criticism. The absence of merchantable trees after cutting, the presence of logging slash, and soil disturbance made clearcuts seem uglier than areas harvested by other cutting methods (Lang, 1975). Indeed, over the years, clearcutting's unsightly appearance caused a general lack of public acceptance (Marquis, 1972), and subsequent studies documenting

adverse impacts to water quality and biodiversity from poorly managed clearcuts further worsened the public's opinion of the practice.

Today we better understand how clearcuts, as with all silvicultural options, when applied correctly, may create a positive change to a dynamic forest. When planned and managed properly, clearcutting and other regeneration cuttings may provide environmental, social and economic benefits, including but not limited to establishing even-aged forest regeneration of shade intolerant species, establishing temporary early successional forest habitat, and satisfying local and regional forest product needs. When applied judiciously in forests where habitat would be improved by large forest openings and at times when visual impacts are minimized and conditions are dry and stable, regeneration cuts, including clearcuts, can have multiple benefits to wildlife, species composition and other ecological functions. Proper sale layout and design can minimize, if not eliminate any erosion potential through the use of best management practices. Additionally, long term forest health may be improved when clearcuts and other regeneration cuts occur in forest stands at risk.

This policy, in conjunction with the *DEC Division of Lands and Forests Management Rules for Establishment of Special Management Zones on State Forests* which imposes best management practices and other restrictions to protect riparian areas and water quality, will ensure that clearcuts and other regeneration cuttings are conducted in an ecologically sensitive and sustainable manner.

V. Responsibility:

The responsibility for interpretation and update of this policy and the overall management of State Forests shall reside with the Office of Natural Resources Division of Lands and Forests - Bureau of State Land Management, or its successor.

VI. Definitions:

Clearcut - A regeneration or harvest method that removes essentially all trees in a stand – *note* depending on management objectives, a clearcut may or may not have reserve trees left to attain goals other than regeneration. (Helms, 1998).

Early Successional Forest Habitat - Very young forest characterized by a dense growth of shrubs and saplings.

Even-aged – 1. Composed of a single age class in which the range of tree ages is usually ±20 percent of rotation, as in *even-aged stand* or *even-aged regeneration*. 2. Intended to result in vegetation that is composed of a single age class in which the range of tree ages is usually ±20 percent of rotation, as in *even-aged silviculture* or *even-aged regeneration harvest.*

Overstory Removal - The cutting of trees constituting an upper canopy layer to release adequate desirable advanced regeneration in the understory (Helms, 1998).

Regeneration Cut(ting) – In even-aged silvicultural systems, any removal of trees intended to assist regeneration already present or to make regeneration possible (ex. clearcut, seed tree, shelterwood, and overstory removal). (Helms, 1998).

Rotation – In even-aged silvicultural systems, the period between regeneration establishment and final cutting.

Seed Tree Method *(an even-aged silvicultural regeneration method)* – The cutting of

all trees except for a small number of widely dispersed trees retained for seed production and to produce a new age class in fully exposed microenvironment – *note* seed trees are usually removed after regeneration is established.

Shelterwood Method (*an even-aged silvicultural regeneration method*) – The cutting of most trees, leaving those needed to produce sufficient shade to produce a new age class in a moderated microenvironment – *note* the sequence of treatments can include three types of cuttings: (a) an optional preparatory cut to enhance conditions for seed production, (b) an establishment cut to prepare the seed bed and to create a new age class, and (c) a removal cut to release established regeneration from competition with the overwood; cutting may be done uniformly throughout the stand (uniform shelterwood), in groups or patches (group shelterwood), or in strips (strip shelterwood); in a strip shelterwood, regeneration cuttings may progress against the prevailing wind.

Silviculture – The art and science of controlling the establishment, growth, composition, health, and quality of forests and woodlands to meet the diverse needs and values of the landowner and society on a sustainable basis.

Stand (*as applied to silviculture*) - A contiguous group of trees sufficiently uniform in age-class distribution, composition, and structure, and growing on a site of sufficiently uniform quality, to be a distinguishable unit.

Treatment Area – A defined area where a specific and uniform modification of vegetation occurs as a discrete operation.

Viewshed – The landscape that can be directly seen from a viewpoint or along a transportation corridor. (Helms, 1998).

VII. Applicability:

1. This policy applies only to proposed regeneration cuts that meet criteria 1.1 through 1.4 below, or criteria 1.5 below:
   - 1.1. Contiguous treatment area is greater than two acres in size;
   - 1.2. Width of contiguous treatment area is greater than 200 feet;
   - 1.3. Contiguous treatment area either does not have adequate, desirable advanced regeneration or 75% or more of the adequate, desirable advanced regeneration is less than five feet tall.
   - 1.4. Average post-harvest basal area of trees greater than 5" diameter at breast height (DBH) throughout the entire treatment area is less than 30 square feet (including dispersed individual recruitment and reserve trees as defined in program policy ONR-DLF-2/Retention on State Forests, but not including patches or groups of recruitment or reserve trees).
   - 1.5. Proposed treatment area meets criteria 1.3 and 1.4 and adjoins a previously treated area in which more than 75% of the regeneration is less than five feet tall and the basal area is less than 30 square feet and the combined proposed treatment area and previously treated area meet criteria 1.1 and 1.2.

2. Special management zones and protection buffers along permanent and intermittent streams and wetlands and travel corridors (including but not limited to designated recreation trails, public forest access roads (PFARs), and municipal highways) within and bisecting the treatment area will not be considered part of the treatment acreage.

VIII. Standards:

1. Regeneration cuts subject to this policy should be conducted only when the DEC Regional Forester determines the stand meets one or more of the following:
   - The goals, objectives and actions as outlined in the Strategic Plan for State Forest Management and/or the Unit Management Plan will be met by applying the treatment as the best silvicultural option as determined by the forester administering the treatment and is ready to be regenerated or the existing regeneration is ready to be released;
   - More than 75% of the stands basal area (BA) exhibits declining health and vigor, caused by one or more biotic or abiotic factors;
   - More than 75% of the stand BA is susceptible to excessive wind and weather damage or insect and disease damage within the next five years;
   - More than 75% of the stand BA exhibits excessive wind and weather damage or insect and disease damage;
   - A combination of decline, susceptibility and damage affects more than 75% of the stand BA (ex. 25% showing signs of decline, 25% susceptible to wind throw, and 30% with broken tops);
   - Evidence of decline, susceptibility, or damage must be documented in the stand prescription with justification of why alternatives (ex. do nothing, thinning, herbicide, or other alternative option) are not appropriate. NOTE: While the fiber (economic) value of declining or storm damaged timber is an important factor when considering the management option to regenerate the area, fiber value should be weighed equally with environmental, habitat, aesthetic, and various other values before a final management decision to regenerate the area is approved.

2. **Visual Assessments:** When conducting a regeneration cut subject to this policy and greater than five (5) contiguous acres in size, a visual assessment must be completed and included with the stand prescription that describes how the forester plans to mitigate potential viewshed impacts. Mitigation practices may include, but are not limited to, buffers along public roads, use of retention; timing of harvest, irregularly shaped treatment areas, signage, public notice and/or other methods.

3. During silvicultural treatments, efforts should be made to protect existing, desirable, advanced regeneration and retention elements where possible by employing harvesting techniques such as directional felling or utilizing mechanical harvesting equipment and appropriate sale layout to minimize impacts and, when possible, by harvesting during winter months when snow levels are likely to be sufficient to provide protection from felled trees and harvesting equipment.

4. **Artificial regeneration:** Although it is the policy of the Division to manage State Forests in a way to gradually move towards a more natural stand progression (preferring natural regeneration of desirable species from surrounding stands or within the stand through repeated intermediate treatments), the Division recognizes that conditions may require artificial regeneration after a clearcut. Under these circumstances, justification as to why artificial regeneration is preferred over natural regeneration must be documented in the stand prescription including species planted, seedling count, spacing, and nursery where

seedlings will be obtained. (Examples of justification for artificial regeneration include but are not limited to the presence of undesirable vegetation in surrounding stands, the lack of a seed source for desirable species, evidence of repeated intermediate treatments that have not resulted in adequate desirable regeneration, failed regeneration from deer browse, or other unique conditions.)

4.1. When artificially regenerating a stand, foresters should consider establishing a mixture of species over a mono-type. Species types should be documented in the stand prescription and should demonstrate the justification for the decision made.

4.2. Artificial regeneration using approved non-native species (species not native to North America prior to European settlement) may be considered only if it is determined the non-native species does not have invasive properties (outcompetes native species in a natural state), has a New York invasive risk assessment of medium, low or none, is more suited for the site due to soil and other properties, is resistant to wildlife impacts, can outcompete undesirable vegetation, is most appropriate to reach desired ecological goals, and is available. Justification for the use of non-native species must be clearly defined within the stand prescription including the nursery where the seedlings will be procured. Following is a list of approved non-native species:

- Norway Spruce (*Picea abies*)
- Scotch Pine (*Pinus sylvestris*)
- Japanese larch (*Larix kaempferi*)
- European larch (*Larix deciduas*)
- Hybrid larch (*Larix x europlepis* Henry)

5. **Regeneration Assessments:** When conducting a regeneration cut subject to this policy, regeneration assessments will be conducted within one (1) year of harvest completion, three (3), and five (5) years after the harvest or until the forester determines adequate natural or artificial regeneration has been securely established. Documentation should be retained showing evidence of the success including inventory data and reference to appropriate silvicultural guides and the stand regeneration assessment data in the State Forest Inventory Database (SFID) should be updated.

5.1. If at any point following the harvest, the forester determines the desired regeneration is either unsuccessful and/or different from the original intended species but the outcome does not pose a negative impact on ecology, habitat, soils, water quality, aesthetics, or any combination of these or other forest values, the forester may consider the newly established stand a success. A memo indicating the successful change in stand development should be placed in the sale file and the stand regeneration assessment data in SFID should be updated.

5.2. If during the five (5) year regeneration assessment, the forester determines the desired regeneration is delayed, but the situation does not pose a negative impact on ecology, habitat, soils, water quality, aesthetics, or any combination of these or other forest values, the forester may defer making a decision about how to treat the stand. A memo indicating the decision is being deferred should be placed in the sale file and a regeneration assessment should be conducted in no more than two years.

5.3. If at any point within the five years following the harvest, the forester determines that the desired regeneration (either natural or artificial) is being outcompeted by undesirable vegetation (interfering vegetation) or is otherwise unsuccessful and has

the potential of negatively impacting the ecology, habitat, soils, water quality, aesthetics, or any combination of these or other forest values, appropriate action with a treatment schedule to establish/encourage adequate desirable regeneration must be conducted and documented. Treatment may include, but is not limited to: mechanical site preparation to encourage natural regeneration (manual removal of interfering vegetation and/or other accepted site prep technique), use of prescribed fire, herbicide (to remove interfering vegetation) and/or artificial regeneration of native species.

IX. Procedure:

1. Prior to any timber marking, the Regional Forester must notify, by memo (either hard copy or by e-mail), the Regional Director and Chief of the Bureau of State Land Management when proposing a regeneration cut subject to this policy and between five (5) and nineteen (19) contiguous acres in size. The memo should include at minimum the treatment area size in acres, State Forest where the treatment is proposed and reason for conducting the treatment. A copy of the memo should be kept on file at the regional DEC office.

2. A Request for Conceptual Approval must be submitted by the Regional Forester and approved by the Chief of the Bureau of State Land Management on all proposed regeneration cuts subject to this policy and twenty (20) contiguous acres and larger (regardless of whether the treatment is carried out through a local or revenue sale) before regional staff may begin sale layout and timber marking.
   2.1. Because of the potentially lengthy gap between conceptual approval and commencement of harvesting, the Regional Forester must notify, by memo (either hard copy or by e-mail), the Regional Director and the Chief of the Bureau of State Land Management at least one week prior to commencement of harvesting on regeneration cuts subject to this policy and twenty (20) contiguous acres or larger. The memo should include at minimum the treatment area size in acres, State Forest where the treatment is occurring and reason for conducting the treatment. A copy of the memo should be kept on file at the regional DEC office.

3. When proposing a regeneration cut subject to this policy and forty (40) contiguous acres or larger has received approval from the Chief of the Bureau of State Land Management, the Regional Forester must conduct project specific State Environmental Quality Review (SEQR).

4. The DEC Regional Forester will have final approval in the management, prescription and treatment subject to this policy and less than twenty (20) contiguous acres in size on State Forests within his or her Region, and may consult with other DEC staff when necessary. Proposed treatments twenty (20) contiguous acres in size and greater must receive approval from the Chief of the Bureau of State Land Management before proceeding with sale layout and timber marking.

5. The Chief of the Bureau of State Land Management may modify this policy or approve exceptions on a case-by-case basis, at any time, if such modifications or exceptions provide equal or greater tree and stand protection or address site specific, unique

circumstances (control of invasive species, spread of insects and disease, hazardous conditions or other forest health or public safety issues). Depending on site conditions, stand prescriptions may need to be more restrictive or more flexible. Requests for exceptions must be in writing and must be approved by the Regional Forester before being submitted to the Chief of the Bureau of State Land Management. A detail of and justification for modifications must be documented in the stand prescription, Unit Management Plan (UMP), Temporary Revocable Permit (TRP), Request for Conceptual Approval form, or Notice of Sale and should be kept on file in the Regional office.

6. If modifications are required after the operation begins, documentation showing detailed justification should be kept on file in the UMP, TRP or Sale folder kept at the regional DEC office.

X. Related References:

Table 1. Regeneration cut (meeting criteria 1.1, 1.2, 1.3 and 1.4 of this Policy) Size and Level of Oversight

Treatment Area (Acres)	Regional Forester Approval of Stand Prescription	Visual Assessment	Central Office Request for Conceptual Approval	SEQR	Regional Director and Central Office Memo
2 - 4	•				
5 -19	•	•			•
20 - 39	•	•	•		•*
40 +	•	•	•	•	•*

*The notification memo to Regional Director and Central Office must be sent prior to commencement of harvesting on treatments 20 acres or larger.

1. Strategic Plan for State Forest Management
2. Management Rules for Establishment of Special Management Zones on State Forests
3. Policy # ONR-DLF-1, Plantation Management on State Forests
4. Policy # ONR-DLF-2, Retention on State Forests
5. http://www.natureserve.org/explorer/
6. http://www.nyis.info/Resources/IS_Risk_Assessment.aspx

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Boyer, W. (1990). Longleaf Pine. In R. B. Burns, *Silvics of North America Vol. I Conifers* (pp. 405-412). Washington, DC: USDA Forest Service Agricultural Handbook 654.

Chambers, R. E. (1983). *Integrating Timber and Wildlife Management Handbook.* Syracuse: State University of New York College of Environmental Science and Forestry.

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Lang, L. (1975). Aesthic Consideration. Chapter 1. In S. o.--. Agriculture, *Clearcutting in Pennsylvania* (pp. 1-8). University Park, PA: The Pennsylvania University.

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EXHIBIT "D"

STATE OF NEW YORK.

IN CONVENTION

DOCUMENT

No. 63.

REPORT

OF COMMITTEE ON FOREST PRESERVES.

To the Constitutional Convention:

The Special Committee on State Forest Preservation, which was directed to consider and report what, if any, amendments to the Constitution should be adopted for the preservation of the State forests, respectfully report:

That your committee has had presented to it many valuable arguments and statements bearing upon the matter, and, after careful consideration, has unanimously reached the conclusion that it is necessary for the health, safety and general advantage of the people of the State that the forest lands now owned, and hereafter acquired by the State, and the timber on such lands, should be preserved intact as forest preserves, and not under any circumstances be sold.

Your committee is further of the opinion that, for the perfect protection and preservation of the State lands, other lands contiguous thereto should, as soon as possible, be purchased or otherwise acquired, but feel that any action to that end is more properly within the province of the Legislature than of this Convention.

Your committee recommends the adoption by this Convention of the following as an amendment to the Constitution, viz.:

"The lands of the State now owned, or hereafter acquired, constituting the forest preserves, shall be forever kept as wild forest lands. They shall not, nor shall the timber thereon, be sold."

Dated August 23, 1894.

DAVID McCLURE,
Chairman.