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.

INDEX NO. 2137-13

RJI NO.01-13-ST-4541

HON. GERALD W. CONNOLLY, ASSIGNED JUSTICE

PLAINTIFF'S REPLY MEMORANDUM OF LAW

Dated: November 18, 2016

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POINT I:

THE COURT SHOULD NOT DEFER TO DEFENDANTS' INTERPRETATION OF ARTICLE 14, § 1

Defendants New York State Department of Environmental Conservation ("DEC") and Adirondack Park Agency ("APA") (collectively "Defendants") claim that when deciding this case the Court should defer to the purported expertise of the Executive branch in various fields of study such as silviculture. Defendants' Memorandum of Law in Opposition, dated November 1, 2016 ("Def.Opp.Mem.Law"), pp. 15-16. It is self-evident from the proceedings of the Constitutional Convention of 1894, and the 1930 decisions in Ass'n for the Protection of the Adirondacks v. MacDonald, that the courts owe no deference to the Defendants' interpretation of Article 14, § 1 of the Constitution, the "Forever Wild" clause. See Plaintiff's Memorandum of Law dated August 31, 2016 ("Pltf.Mem.Law"), pp. 2-4; Corrected Affidavit of John W. Caffry, sworn to on September 19, 2016 ("Caffry Aff."), ¶¶ 56-58; Affirmation of Robert C. Glennon, sworn to on September 23, 2016, ¶¶ 4-8; Affidavits of Philip G. Terrie, Ph.D., sworn to on August 30, 2016 and September 23, 2016 ("Terrie Affidavits").

Over the last half-century, the Court of Appeals has confirmed the primacy of the Judicial branch of government in the interpretation of the State Constitution. This Court must decide the scope of the protection for the Forest Preserve that is mandated by Article 14, § 1 as a matter of law. In doing so, it should not defer to the Defendants' opinions.

A. Only the Courts Can Interpret the Constitution And Define the Rights of the People That it Protects

"[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them." Campaign for Fiscal Equity v. State of New York, 100 N.Y.2d 893, 925 (2003) (hereinafter "CFE 2")(interpreting Art. 11, § 1, "the Education Article"). It is "the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and executive fail to conform to the mandates of the Constitution[] which constrain the activities of all three branches." Bd. of Ed. of Levittown v. Nyquist, 57 N.Y.2d 27, 39 (1982).

In interpreting the Constitution, the Judicial branch may not "enshrine" the standards of a state agency charged with carrying out a constitutional requirement as the controlling definition of the right provided by the Constitution, as this "would be to cede to a state agency the power to define a constitutional right." CFE 2 at 907; cf. id. at 951-952, 953-954 (dissenting opinion); Hussein v. State of New York, 19 N.Y.3d 899, 901-904 (2012) (concurrence).

For the courts to abjure this role would not only "entrust the Legislature and Executive with the decidedly judicial task of interpreting the [Constitution] but cast them in the role of being their own constitutional watchdogs." Hussein v. State of New York, 19 N.Y.3d at 903 (concurrence). The "system of separation of powers does not contemplate or permit such self-

policing, nor does it allow [the courts] to abdicate our function as 'the ultimate arbiters of our State constitution'...". Id. quoting Campaign for Fiscal Equity v. State of New York, 8 N.Y.3d 14, 28 (2006) (hereinafter "CFE 3").

In CFE 2 the Court of Appeals rejected the State's argument that the "Regents Learning Standards" adopted by the Board of Regents should define the "sound basic education" that the Court had previously found in Campaign for Fiscal Equity v. State of New York, 86 N.Y.2d 307, 316 (1995) ("CFE 1") and Bd. of Ed. of Levittown v. Nyquist, 57 N.Y.2d at 48, to be guaranteed by the Education Article to all students in the state. CFE 2 at 907. Likewise, it rejected the State's argument that the federal "No Child Left Behind" law and the "Schools Under Registration Review" ("SURR") program and other state regulations satisfied the Constitution's requirement. CFE 2 at 926-928.

> Courts are ... well suited to interpret and safeguard constitutional rights and review challenged acts of our co-equal branches of government - not in order to make policy, but in order to assure the protection of constitutional rights. CFE 2 at 931.

Likewise, in Paynter v. State of New York, 290 A.D.2d 95, 99 (4th Dept. 2001), the court found that the purpose of the Education Article was to deprive the Legislature of discretion in the sphere of establishing and maintaining free public schools.

Thus, the state statutes, regulations, and policies that are administered by the Defendants herein can not supercede the Constitution, or usurp the role of the courts in interpreting and enforcing its Forever Wild clause. Instead, the courts should be

guided by the words and intentions of the framers of the constitutional provision at issue. See CFE 2 at 909, 935-936 (citing constitutional history of Constitutional Convention of 1894); Bd. of Ed. of Levittown v. Nyquist, 57 N.Y.2d at 48.[1]

B. The Roles of the Executive and Legislative Branches in Interpreting and Carrying out Article 14, § 1 Are Uniquely Circumscribed

Amongst all of the civil law provisions of the Constitution, Article 14, § 1 is unique in the degree to which it limits the role of the Executive and Legislative branches of government in interpreting and carrying out its mandates and adhering to its limitations, and gives those powers to the Judicial branch. Unlike most, if not all, other such provisions, the Forever Wild clause does not authorize State action. Instead, it is a prohibition on certain Executive and Legislative branch actions. It provides that:

> 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.

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[1] Perhaps not coincidentally, this is the same Convention which proposed the adoption of the Forever Wild clause. Like the Forever Wild clause, the Education Article "constitutionalized" an issue that had previously been governed only by a statute. CFE 2 at 935-936 (concurrence). It appears that in both cases, the Convention's delegates felt it necessary to make mandatory something that had previously been left up to the whims of the Legislature and the caprices of commissioners and bureaucrats. See Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 239-240; see also Caffry Aff., ¶¶ 56-58; Terrie Affidavits.

This language does not provide an authorization for action, or the exercise of discretion, by the Executive and Legislative branches. Instead, it severely limits their discretion in the management of the Forest Preserve.

Whatever flexibility does exist in this realm is solely a creation of the courts. See Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 239, 242 (1930)(holding that Article 14, § 1 must be given a reasonable interpretation, but annulling act of Legislature authorizing construction of bobsleigh run). Even that flexibility is strictly limited. Kenwell v. Lee, 261 N.Y. 113, 116-117 (1933), in interpreting Ass'n for the Protection of the Adirondacks v. MacDonald, held that "the courts have adhered to a strict and literal construction of the entire section" of the Constitution regarding the Forest Preserve.

Perhaps uniquely, Article 14, § 5 of the Constitution evinces the intent of its framers for the Judicial Branch, the People, and "any citizen" to exercise an unusual degree of control over the actions of the other two branches of government on the Forest Preserve:

> 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 in appellate division, on notice to the attorney-general at the suit of any citizen. Id.

This was not put in the Constitution by accident. The Forever Wild clause was specifically intended by the Constitutional Convention of 1894 to restrain the actions of the Legislature and

the Executive branch, after decades of abuses of the State's publicly owned forest lands in the Adirondacks by those branches of government. See Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 239-240; see also Caffry Aff., ¶¶ 56-58; Terrie Affidavit of August 30, 2016, at ¶35.

This strict limitation on the powers of the Legislative and the Executive branches may be contrasted with the somewhat more flexible provisions of other constitutional mandates on the Legislative and Executive branches:

> The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine. Article 17, § 1.
>
> The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state and by such of its subdivisions, and in such manner and by such means, as the legislature shall from time to time determine. Article 17, § 3.

Thus, in the social welfare sphere, the Constitution mandates that the State provide for the needy and for the public health, but, within limits, it leaves the manner and means of doing so up to the Legislature. See Khrapunskiy v. Doar, 12 N.Y.3d 478, 484, 486 (2009); cf. Aliessa v. Novello, 96 N.Y.2d 418, 428-429 (2001) (law that deprived certain persons identified as "needy" of all aid found to be unconstitutional). Also, in contrast to Article 14, Article 17 does not contain a citizen suit provision comparable to Article 14, § 5.

The Education Article of the Constitution provides even less discretion to the Legislative and Executive branches than Article 17 does:

> The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated. Article 11, § 1.

This constitutional language imposes a mandate upon those branches (CFE 2 at 909), with the courts only deferring to them on a limited scope of budgetary issues. CFE 2 at 920-921, 925; CFE 3 at 28-29. This deference does not extend to issues of the standards to be applied in interpreting the Constitution itself. CFE 2 at 920-921, 931.

In comparing the Education Article with Article 11 and other more discretionary responsibilities that the Constitution imposes on the Legislature, Judge Smith's concurrence in CFE 2 opined that the mandatory nature of the Education Article made it the State's most important responsibility, with a higher priority than the other mandated responsibilities. CFE 2 at 933. Likewise, the mandatory nature of Article 14, § 1 makes its enforcement one of the State's highest priorities, one which can not be entrusted solely to the Legislative and Executive branches.

As with Article 17, Article 11 does not contain a citizen suit provision comparable to Article 14, § 5. And, perhaps most importantly, like Article 17, the Education Article imposes a duty to act on the Legislative and the Executive branches, while

Article 14, § 1 is a strict limitation on their actions, which is coupled with the express provision for judicial scrutiny provided by Article 14, § 5. Therefore, Article 14 is an even more appropriate realm for the exercise of Judicial branch authority than either Article 11 or Article 17.

Even § 4 of Article 14 provides the Legislature with a degree of discretion that Article 14, § 1 does not. It requires the Legislature to adopt "adequate provision for the abatement of air and water pollution" and other such hazards, but it does not provide any specifics as to what is to be done. As with Articles 11 and 17, it creates a mandate for action, rather than being intended as a limit on the Legislative and the Executive branches like Article 14, § 1.

Like a free "sound basic education", the preservation of the Forest Preserve is a public right, guaranteed by the Constitution. See Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 238, 240-241. "The Forest Preserve is preserved for the public; its benefits are for the people of the State as a whole". Id. at 238. It is the proper role of the Judicial branch to ensure that the Legislative and Executive branches live up to their obligations in protecting these rights of the People of the State.

C. DEC's Expertise in "Silviculture" Is Irrelevant

Defendants attempt to circumvent the superior role of the Judicial branch in interpreting and applying the Constitution by arguing that the Court should instead defer to DEC's purported expertise in "silviculture" and related fields of study in the application of Article 14 to this case. Def.Opp.Mem.Law, pp. 15-16. This argument is inconsistent with CFE 2, in which the Court of Appeals expressly rejected reliance on the purported "knowledge and understanding" (Def.Opp.Mem.Law, p. 15) of the education agencies charged by the Constitution and Legislature with carrying out the mandates of Constitution Article 11, § 1. CFE 2, at 907, 926-928.

Moreover, silviculture is not permitted on the Forest Preserve, so any expertise that DEC may have in that field is inapplicable to the management of the Forest Preserve. DEC defines "silviculture" as:

> 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.[2]

"[C]ontrolling the establishment, growth, composition, health, and quality of forests" (id.) on the Forest Preserve is

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[2] DEC Program Policy ONR-DLF-3, p. 3. A copy of this policy is set forth in the Reply Affidavit of John W. Caffry, sworn to on November 18, 2016 ("Caffry Reply Aff."), at Exhibit C. See also *Dictionary.com* (www.dictionary.com), defining "silviculture" as "the cultivation of forest trees; forestry" and defining "forestry" as, *inter alia*, "the process of establishing and managing forests".

completely prohibited by the Forever Wild clause, Article 14, § 1. See Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73, 78-79 (3d Dept. 1930).

What is now called silviculture was expressly the type of activity that drove the Constitutional Convention of 1894 to recommend that the Forest Preserve be preserved. As Delegate McClure stated:

> **We should not sell a tree or branch of one.** Some people may think in the wisdom of **their scientific investigations that you can make the forests better** by thinning out and selling to lumbermen some of the trees, regardless of the devastation, the burnings and the stealings that follow in the lumberman's track. **But I say to you, gentlemen, no man has yet found it possible to improve upon the ways of nature.**

Revised Record of the Constitutional Convention of 1894, Volume IV, page 139 (Exhibit D to August 30, 2016 Affidavit of Philip G. Terrie)("Revised Record"). Therefore, DEC's policies have little or no role to play in this case (Point I.B, supra; Plaintiffs' November, 2016 answering papers; Caffry Aff. ¶¶ 56-59; Pltf.Mem.Law pp. 2-4, Point I.B), and its purported expertise in silviculture is of no use in interpreting or applying Article 14, § 1.

While DEC does have the general authority to manage the Forest Preserve (ECL § 9-0105(1)), its authority to conduct silviculture on State lands is limited to lands outside the Forest Preserve. ECL § 9-0107(2)(b); see also Constitution Article 14, § 3(1); ECL § 9-0105(2), (6); ECL § 9-0107(2)(a). Even if the Legislature did attempt to authorize DEC to carry out

silviculture on the Forest Preserve, such an action would be unconstitutional. See Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. at 78-79. "The Convention deliberately chose to perpetuate the Forest Preserve as just 'wild forest lands.' Not a door was permitted to be open which might convert the preserve into anything but a wilderness." Id. at 79.

Defendants cite several cases in support of their plea for deference from the Court. Def.Opp.Mem.Law, pp. 15-16. All of these cases involve statutory interpretation, not the Constitution, and they have no relevance to the question before this Court. Cf. CFE 2, supra. Even in the legislative realm, no deference is owed on a question of "pure statutory reading and analysis, dependent only on the accurate apprehension of legislative intent", and in such cases "there is little basis to rely on any special competence or expertise of the administrative agency". Kurcsics v. Merchants Mutual Ins. Co., 48 N.Y.2d 451, 459 (1980).

D. Point I Conclusion

It is the role of the courts to interpret Article 14 of the Constitution, and that role is uniquely strong with regard to Article 14, § 1. The Court herein may not defer to DEC's policies, practices, interpretations, and purported expertise. Instead, the Court must divine the intent of the framers of Article 14 and apply that and the case law to the facts at hand.

POINT II:

THE NUMBER OF FOREST PRESERVE TREES CUT, AND TO BE CUT, FOR THE CLASS II COMMUNITY CONNECTOR TRAILS IS MATERIAL AND SUBSTANTIAL

The parties are essentially in agreement that the standard to be applied to determine whether a proposed cutting of trees in the Forest Preserve is whether the number of trees is "substantial" or "material". See Pltf.Mem.Law Point I.A; Def.Opp.Mem.Law Point I. The question of law to be decided by this Court is what those terms mean, and whether the Class II Community Connector trails come within their ambit. Defendants argue in their Def.Opp.Mem.Law (pp. 1, 11, 15) that the trails do not do so. However, as shown below, if, assuming for the sake of this motion that the Plaintiff and the Court accept Defendants' tree counts as accurate, the Class II Community Connector Snowmobile trails in question are unconstitutional because the number of trees to be destroyed is substantial and material. If Plaintiff's undisputed counts of trees under 3" DBH, and Plaintiff's detailed count of trees to be cut on the planned and approved Polaris Bridge trail, are taken into account, as they should be, as a matter of law, then these trails are even more obviously unconstitutional.

A. The Undisputed Number of Trees to Be Cut Is Both Substantial and Material

The Court of Appeals in Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 234, did not define what it

meant by "substantial" or "material", nor has any subsequent court. However, a dictionary definition of "substantial" includes "large in amount, size, or number", "considerable in quantity", and "significantly great". "Material" is defined as "having real importance or great consequences" (www.merriam-webster.com/dictionary). Dictionary.com (www.dictionary.com) defines "substantial" as "of ample or considerable amount, quantity, size, etc.", and "material" as "of substantial import; of much consequence; important".

The Court of Appeals did find that the destruction of 2,500 trees was unconstitutional (id. at 242), but did not decide what the threshold for unconstitutionality was.[3] Because the parties to that case did not provide any estimates of trees less than 3" DBH to be cut (Caffry Aff. ¶¶ 38-39), the Court did not consider them. Nor, in light of the outcome, was it necessary for it to do so in that instance. Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 240. At the other end of the spectrum, in Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dept. 1993), the Appellate Division found that cutting a mere dozen or so trees of 3" DBH or more, or 350 trees of all sizes, was constitutional. See also Caffry Aff. ¶¶ 40-43; Caffry Reply Aff. ¶¶ 4-6.

[3] "What ... reasonable cutting or removal of timber may be necessitated in order to properly preserve the State Park [sic], we are not at this time called upon to determine. Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 240.

Thus, there is a range, between about a dozen trees to 2,500 trees, of 3" DBH or more, for which the appellate courts have not provided precise guidance to this Court. Likewise, there is a range, above 350 trees of all sizes, for which there is a lack of precise guidance.

It is undisputed (perhaps with minor quibbles) that so far DEC has cut, and has approved plans to cut, at least the following total numbers of trees over 3" DBH (diameter at breast height):

- Seventh Lake Mountain Trail: 2,083
- Newcomb to Minerva to North Hudson Trail: 3,466
- Wilmington (Cooper Kill) Trail: 615[4]
- Gilmantown Trail 127
- Total System of Class II Trails:[5] 6,526

See Answering Affidavit of John W. Caffry, November, 2016, pp. 8-14; Affidavit of Maxwell A. Wolkenhauer, sworn to August 19, 2016 ("Wolkenhauer Aff."), *passim*.

The total of 3,466 trees of 3" DBH or more for the Newcomb to Minerva to North Hudson Trail would greatly exceed the 2,500 trees of Ass'n for the Protection of the Adirondacks v. MacDonald. This trail is obviously unconstitutional, as a matter of law.

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[4] This may actually be 715 trees. Answering Affidavit of John W. Caffry, November 2016, ¶16, fn. 6.

[5] This total includes several other trails. See Answering Affidavit of John W. Caffry, November, 2016, pp. 8-14; Wolkenhauer Aff., *passim*.

The 2,083 such trees cut for the Seventh Lake Mountain Trail is 83% of 2,500, well within the range of the action proscribed by Ass'n for the Protection of the Adirondacks v. MacDonald as being "substantial" or "material", and is almost 175 times the dozen or so trees found to be permissible in Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 853-854. It too is unconstitutional, as a matter of law.

The 615 trees cut for the Wilmington (Cooper Kill) Trail is 25% of 2,500 and over 50 times a dozen. Standing alone, even without any comparison to the prior decisions of the courts, this number of trees is "large in amount, size, or number", "considerable in quantity", and "of ample or considerable amount, quantity, size, etc.", such that it is "substantial" See Merriam-Webster.com, supra, and Dictionary.com, supra. It too is unconstitutional, as a matter of law.

The system-wide total of 6,526 trees of 3" DBH or more is 260% of 2,500 and over 500 times a dozen. This greatly exceeds the 2,500 trees of Ass'n for the Protection of the Adirondacks v. MacDonald. The Court should consider the entire system of Class II trails as a whole, and not piecemeal. See Caffry Aff. ¶¶ 26-29, 51-55; Answering Affidavit of John W. Caffry, November, 2016 (documenting Defendants' numerous admissions that it is a single system). See also Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. at 76 (court considered total of all trees to be cut for both the bobsleigh run and the return road); Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 353-354 (court considered

total of all trees to be cut for all planned elements of the unit management plan for which locations had been chosen). Given these undisputed numbers, the Class II Community Connector snowmobile trail system, as a whole, is obviously unconstitutional, as a matter of law.

The planned and approved Polaris Trail would destroy 2,078 trees of 3" DBH or more. See Answering Affidavit of John W. Caffry, November, 2016, pp. 8-14. Because DEC has not yet counted these trees itself, there is no question of fact on this number. This number of trees is comparable to that of the Seventh Lake Mountain Trail, discussed above. The Polaris Bridge Trail is unconstitutional. When this trail is included, the total number rises to 8,604 trees of 3" DBH or more system-wide, further confirming the unconstitutionality of the system as a whole.

Defendants argue that the count of the trees to be cut on this planned trail by Plaintiff's expert is "speculation" (Def.Opp.Mem.Law, p. 2), but it is based on an actual count, on the ground, precisely following DEC's planned route for the trail. See Affidavits of Steven Signell, sworn to on August 25, 2016, ¶¶ 15, 65, 77-85, and on November 18, 2016, ¶8; Reply Affidavit of Peter Bauer, sworn to on November 18, 2016, ¶20. Even if the route changes somewhat before the trail is actually built, the number of trees is unlikely to change significantly. Id. This is far more reliable than the approach taken by the courts in Ass'n for the Protection of the Adirondacks v.

MacDonald, where the trees to be cut for the bobsleigh run itself had apparently been counted by the State, but the courts themselves undertook to estimate the additional number of trees to be cut for the return road. Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. at 76.

When trees under 3" DBH are included (see Point III, infra), the numbers for some of these trails, and for the system as a whole, grow substantially:

- Seventh Lake Mountain Trail: 7,760
- Newcomb to Minerva to North Hudson Trail: 11,117
- Wilmington (Cooper Kill) Trail: 2,249
- Polaris Trail 7,122
- Total System of Class II Trails:[6] 29,306

See Answering Affidavit of John W. Caffry, November, 2016, pp. 8-14; Wolkenhauer Aff., *passim*.

Because DEC has not yet counted the trees under 3" DBH itself, there is no question of fact on these numbers. Using the same legal analysis of the case law as above, and taking into account that Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 353-354, took into account the cutting of 350 trees of all sizes (Point III, infra), the Seventh Lake Mountain, Newcomb to Minerva to North Hudson, Wilmington, and Polaris trails, as well as the Class II Community Connector trail system as a whole, have, or

[6] Includes several other trails. See Answering Affidavit of John W. Caffry, November, 2016, pp. 8-14; Wolkenhauer Aff., *passim*.

will, destroy a material or substantial amount of trees, and are unconstitutional. See Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 241-242; Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 353-354.

B. Defendants' Other Merits Arguments Are Either Not on Point or Are Specious

Defendants set up a straw man version of Plaintiff's position so that they may try to knock it down more easily than if they had addressed Plaintiff's real arguments. They incorrectly claim that Plaintiff asserts an absolutist position that would prevent the cutting of any trees, even "the smallest sapling", on the Forest Preserve, for any purpose. Def.Opp.Mem.Law, p. 3. This accusation is not correct. Plaintiff's arguments herein recognize that the Balsam Lake Anglers Club case upheld the constitutionality of cutting about a dozen trees over 3" DBH and 350 trees of all sizes for a hiking trail and related facilities, and do not dispute that such strictly limited cutting is permissible. Nor does Plaintiff argue that no trails of any kind are permitted, as claimed by Defendants. Def.Opp.Mem.Law, pp. 9-10. In fact, Plaintiff's members are regular users of the Forest Preserve (Complaint ¶¶ 7, 9-10), and Plaintiff's Memorandum of Law (p. 9) recognized that the court in Ass'n for the Protection of the Adirondacks v. MacDonald accepted the need to potentially construct facilities for public use in the Forest Preserve.

Defendants raise various arguments about the allegedly low-impact nature of their work, their efforts to minimize the impacts that do occur, and the alleged offsets achieved by closing older snowmobile trails. Def.Opp.Mem.Law, pp. 1-3, 6-9. These arguments have all been shown to be not relevant to the issue of whether the number of trees to be cut is material or substantial, and/or have been rebutted in Plaintiff's November 2016 answering papers, as well as in the reply affidavits being filed simultaneously herewith.

Finally, while arguing on the one hand that this Court's decision during prior motion practice is not binding on them (Def.Opp.Mem.Law, p. 11, fn 32), Defendants somehow still find a way to argue, on the very same page of their memorandum of law, that the prior decisions of the Court that denied Plaintiff's applications for injunctive relief are binding on Plaintiff. Def.Opp.Mem.Law, p. 11. This is just plain false. "The 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); see also Gilberg v. Barbieri, 53 N.Y.2d 285 (1981).

Also, this Court specifically held in its September 4, 2015 Decision and Order (which 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.

C. Point II Conclusion

In all of their voluminous motion papers herein, the Defendants have never come to grips with the plain truth that certain of their trails will each destroy an undisputed 2,000-plus trees of 3" DBH or more; that the undisputed system-wide total so far is over 6,500 trees of 3" DBH or more; that when the Polaris Bridge Trail is included the undisputed total number of trees of 3" DBH or more rises to more than 8,600; and that when trees under 3" DBH are included, the undisputed total exceeds 29,300 trees.

In light of the holdings of the appellate courts in Ass'n for the Protection of the Adirondacks v. MacDonald and Balsam Lake Anglers Club v. DEC, no matter what other theories advanced by Defendants may be considered, these numbers vastly exceed any rational threshold for a substantial or material level of tree cutting on the Forest Preserve, summary judgment should be granted to the Plaintiff, and further destruction of the trees (a/k/a "timber") on the Forest Preserve for Class II Community Connector snowmobile trails should be enjoined.

POINT III:

DEC'S ADMINISTRATIVE POLICY DOES NOT OVERRIDE THE CONSTITUTION; TREES UNDER 3" DBH ARE PROTECTED BY ARTICLE 14, § 1

Defendants are asking the Court to "enshrine" (CFE 2 at 907) as part of Article 14, § 1 DEC's policy which purports to exclude trees under 3" DBH from the protection of the Constitution. Def.Opp.Mem.Law, pp. 11-14. Doing so "would be to cede to a state agency the power to define a constitutional right." CFE 2 at 907. This, the courts may not do. Id.; see also Point I.A, supra. As Plaintiff's previous papers herein have shown, Forest Preserve trees of all sizes are protected by the Constitution, including those under 3" DBH.

Defendants first rely upon DEC's policy of only counting trees of 3" DBH or more when undertaking projects on the Forest Preserve that require the cutting of trees. Def.Opp.Mem.Law, p. 11; Affirmation of Loretta Simon, sworn to on October 26, 2016, ¶4. However, Policy LF-91-2 (Record Exhibit 18), does not purport to determine the constitutionality of this practice, nor does it even distinguish between "trees" and "timber", as alleged by Defendants. It is merely a procedure for counting trees that does not include in that process a determination of constitutionality.

While Policy LF-91-2 does limit the counting process to trees of 3" DBH or more, with one limited exception (p. 9), it does not even use the word "timber", or attempt to define it. Record Exhibit 18. None of DEC's witnesses who testified in

depositions could point to any determination having actually been made within DEC that found that this policy was constitutional, to any point in its detailed process at which such a determination would be made with regard to any specific project, or when such a determination had been made on any specific project. See Transcript of Karyn Richards, Exhibit 1 to October 26, 2016 affirmation of Loretta Simon, pp. 43-49, 67-68, 72-75, 120-126; Transcript of Peter Frank, Exhibit 2 to October 26, 2016 affirmation of Loretta Simon, pp. 19-26, 33-37; Transcript of Thomas Martin, Exhibit 4 to October 26, 2016 affirmation of Loretta Simon, pp. 24-66-70. Thus, on its face, and in actual practice, Policy LF-91-2 has nothing to do with the interpretation of Article 14, § 1.

Defendants next offer an argument that cherry-picks the records of the debates of the Constitutional Conventions of 1894 and 1915, and lacks historical context. Def.Opp.Mem.Law, pp. 11-12. These generalizations and incorrect surmises are all thoroughly rebutted by the Affidavits of Philip G. Terrie, Ph.D., sworn to on August 30, 2016 (¶¶ 37-45) and September 23, 2016, and by Plaintiff's November, 2016 answering papers. In addition, the debates of the Constitution of 1915, coming 21 years after the approval of Article 14 (then Article 7), have no bearing on this question.

The non-Forest Preserve cases cited by Defendants at Def.Opp.Mem.Law, p. 13, actually support Plaintiff's position. In Dwight v. Elmira, C. & N. Railroad Co., 132 N.Y. 199 (1892),

decided two few years before the adoption of Article 7 (now Article 14), the Court of Appeals distinguished between fruit trees and timber trees, but not between large timber tees and smaller growing timber or young timber. This decision recognized the concept of "growing timber" that was "not yet fully developed" or "fully matured". Id. at 203. Quoting a New Hampshire case, the Court of Appeals said: "[t]he value of young timber, like the value of growing crops, may be but little when separated from the soil. The land, stripped of its trees, may be valueless. The trees, considered as timber, may from their youth be valueless...". Id.

Similarly, in Disbrow v. Westchester Hardwood Co., 164 N.Y. 415 (1900), decided just a few years after the adoption of Article 7, the Court of Appeals used "wood", "trees", and "timber" interchangeably, discussed "timber, whether it be young or mature or both", and described trees below six inches in diameter as "growing timber".

Thus, at the time that Article 7 was adopted, in the law, "timber" included trees of all ages and sizes, and not just large trees of a marketable size. The delegates to the Constitutional Convention of 1894, being, of necessity, both literate and well-versed in the law, were no doubt aware of such usage of the word timber at the time that they drafted and approved Article 7.

Defendants continue to argue that Ass'n for the Protection of the Adirondacks v. MacDonald somehow adopted DEC's latter-day distinction between young or growing timber under 3" DBH, and

older, more mature timber of 3" DBH or larger. Def.Opp.Mem.Law, p. 13. As set forth at Caffry Aff. ¶¶ 38-39, the reason that the courts in that case only discussed trees over 3" DBH was that this was the only evidence before them. Given that 2,500 trees of that size was more than enough for the bobsleigh run to be found to be unconstitutional, it did not need to inquire further. Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y.2d at 240. The language of that decision makes it clear that no such distinction between trees under 3" DBH and larger trees was intended. Id; see also Caffry Reply Aff. ¶¶ 8-9 & Exhibit B.

Finally, Defendants continue to misrepresent to the Court that Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 353-354, held that, because DEC allegedly cut 350 trees of 3" DBH or more, "timber" does not include trees under 3" DBH, and so such trees are not protected by the Constitution. Def.Opp.Mem.Law, pp. 13-14. This is incorrect. As shown by Caffry Aff. ¶¶ 40-43, Exhibits R and S thereto, and Caffry Reply Aff. ¶¶ 5-6, in that case, only about a dozen trees of 3" DBH or more were cut. It is mystifying that Defendants' answering papers completely failed to address this fact, and instead continued to try to mislead the Court by again falsely claiming that there were 350 trees over 3" DBH involved. Def.Opp.Mem.Law, pp. 13-14 ("DEC... cut 350 trees of three inches dbh [sic] or greater").

In Balsam Lake Anglers Club, DEC's brief to the Appellate Division (Caffry Reply Aff. ¶4, Exhibit A) stated that "a total of 300 'trees' one-inch or more in diameter" were cut; only 5 of

these were over 3" DBH; and an additional 232 pieces of vegetation under one inch were cut. Id. These numbers did not include the remaining trees to be cut for additional facilities in the area. See Caffry Aff. ¶¶ 40-43, and Exhibits R and S thereto.

DEC further argued in Balsam Lake Anglers Club that "there was no need for the court below to resolve the issue [of] whether any vegetation less than 3 inches in diameter is 'timber' under Article XIV, § 1." Caffry Reply Aff. ¶4, Exhibit A. Contrary to Defendants' argument in the present case, the Appellate Division did not reach that question either. However, consistent with DEC's argument in that case, it did fully consider all trees, including those under 3" DBH, in its decision. Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 353-354; Caffry Aff. ¶¶ 40-43.

The Constitution protects trees of all sizes on the Forest Preserve, and DEC's internal policy for counting trees can not override it. Point I.A., supra; Caffry Aff. ¶¶ 31-45.

POINT IV:

DEFENDANTS IMPROPERLY CONFLATE THE TWO TESTS FOR COMPLIANCE WITH ARTICLE 14, § 1

Perhaps recognizing that the undisputed raw tree counts for the six trails discussed above, and for the Class II Community Connector trail system as a whole, greatly exceed the constitutional limits of Article 14, § 1 (Point II.A, supra), Defendants argue that tree counts alone are not enough to show

that the amount of tree cutting is material or substantial, and that this analysis should also be subjective and dependent upon DEC's opinion on the impacts of the cutting on the surrounding forest. Def.Opp.Mem.Law, pp. 14-15. This argument, if adopted by the Court, would gut Article 14, § 1, by allowing unlimited tree cutting, so long as DEC opined that the impacts were acceptable. It is based on a misreading of the plain meaning of Article 14, § 1, its constitutional history, and the case law. There are actually two different tests for the constitutionality of a proposed action on the Forest Preserve: whether the amount of tree cutting is material or substantial, and whether the action is consistent with its Wild Forest nature.[7] An action will only be permitted if it meets both of these tests.

While it is often considered to be a singular Forever Wild "clause", Article 14, § 1 really contains three separate restraints[8] on the State's control over the Forest Preserve. With regard to "[t]he lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law," it first provides that they "shall be forever kept as wild forest lands."[9] As the third restraint, the second sentence of § 1

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[7] Consistent with this requirement, the creation of "a setting that is man-made" in the Forest Preserve is also proscribed. Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. at 82.

[8] See Point I.B, supra.

[9] The second restraint, which is not pertinent herein, provides that these lands "shall not be leased, sold or exchanged, or be taken by any corporation, public or private...".

concludes: "nor shall the timber thereon be sold, removed or destroyed." These two restraints are entirely separate. Reading them to be interdependent would be contrary to the plain meaning of the Constitution.

The Revised Record of the Constitutional Convention of 1894 shows that Delegate McClure presented the Convention with a series of remedies for the problem, which he had so eloquently identified, of protecting the Forest Preserve: (1) to "not permit the sale [or exchange] of one acre of land"; (2) to "not sell a tree or a branch of one"; (3) to preserve the forests in the same state in which nature had created them; and (4) to prevent the land from being condemned by corporations. Revised Record, pp. 139-140 (Exhibit D to August 30, 2016 Affidavit of Philip G. Terrie); see also Terrie Affidavit at pp. 6-11.

Notably, the prohibition on destroying timber was added later, as an amendment to the original proposal that had been advanced by Delegate McClure. Revised Record, pp. 141-142, 157. See also August 30, 2016 Terrie Affidavit at ¶34. Without this amendment, cutting trees would not have been expressly proscribed, by the words "sold or removed". Moreover, if the delegates had believed that the requirement that the land "shall be forever kept as wild forest lands" was adequate to prevent the destruction of the trees, they would not have approved this

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Article 14, § 1.

amendment.[10] Revised Record, pp. 141-142, 157. Therefore, the Convention addressed the prohibition on the destruction of trees separately from the mandate that the Forest Preserve "be forever kept as wild forest lands." Article 14, § 1.

In keeping with this constitutional history and intent, both Ass'n for the Protection of the Adirondacks v. MacDonald and Balsam Lake Anglers Club v. DEC examined both tests, but did not conflate them. Each one was addressed separately. See Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 240-241. "The forests were to be preserved as wild forest lands, and the trees were not to be sold or destroyed." Id. at 240 (emphasis added). "These proposed uses appear compatible with the use of forest preserve land, and the amount of cutting is not constitutionally prohibited." Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 854 (emphasis added).

Therefore, this argument provides no basis for the Court to deny summary judgment to the Plaintiff on the question of whether the amount of tree cutting is material or substantial, and therefore unconstitutional. However, if the Court does hold that tree counts alone are not enough to determine whether the amount of tree cutting is material or substantial, there are material issues of fact on the question of the trails' impacts on the wild

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[10] By contrast, when an amendment was proposed to more clearly define the meaning of the term "Forest Preserve", it was rejected because the delegates believed that this subject was already well taken care of in the original text. Revised Record, pp. 149-150, 157-158.

forest nature of the Forest Preserve, and Defendants are not entitled to summary judgment. See Plaintiff's November 2016 answering papers and the Reply Affidavits of Peter Bauer and Steven Signell, both sworn to on November 18, 2016.

CONCLUSION

Plaintiff has established, as a matter of law, that the amount of trees being cut, and to be cut, for both individual trails and the entire system of Class II Community Connector snowmobile trails, will destroy a substantial or material amount of timber on the Forest Preserve, and that these trails therefore violate Article 14, § 1 of the Constitution. Plaintiff should be granted summary judgment on its first cause of action. Defendants have failed to prove that these trails meet either of the tests for constitutionality, and their motion should be denied.

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