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 POST-TRIAL MEMORANDUM OF LAW

Dated: July 31, 2017

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POINT I:

THE DEFENDANTS HAVE VIOLATED THE CONSTITUTION BECAUSE THEY ARE DESTROYING A SUBSTANTIAL NUMBER OF TREES IN THE FOREST PRESERVE

The Defendants, the Department of Environmental Conservation ("DEC") and the Adirondack Park Agency, are destroying trees and clearing land on the Adirondack Forest Preserve[1] in violation of the NYS Constitution, for the construction of Class II community connector snowmobile trails. Therefore, the First Cause of Action in the Complaint should be granted, and Defendants should be permanently enjoined from all such activities.

A. Cutting a Substantial Number of Trees in the Forest Preserve Violates the Constitution

Article 14, § 5 of the Constitution provides in pertinent part that:

> [a] violation of any of the provisions of this article [14] 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. (emphasis added)

Article 14, § 1 of the Constitution provides in pertinent part that:

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[1] The Forest Preserve was, and is defined in pertinent part as: "the lands owned or hereafter acquired by the state within the county of Clinton, except the towns of Altona and Dannemora, and the counties of Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, Saint Lawrence, Warren, Washington, Greene, Ulster and Sullivan". ECL § 9-0101(6). There is no dispute that the lands in question herein are part of the Forest Preserve.

> 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. (emphasis added)

The First Cause of Action of the Complaint dated April 12, 2013 ("Complaint") seeks to restrain the Defendants from constructing certain new snowmobile trails in the Adirondack Forest Preserve, known as Class II community connector trails ("Class II trails"), and from the cutting of a substantial number of trees in furtherance thereof, because such destruction of timber and construction is a violation of Article 14, § 1.[2] Complaint pp. 1-2, 15-28, 39-40.

The actions taken by DEC so far have, or will if not permanently enjoined, destroy over 25,565 trees in the Forest Preserve and cleared 37.1 acres of land for the eight trails at issue herein. FOF 140.[3] DEC has admitted that it has already cut, or approved for cutting, 5,881 large trees. Court Exhibit 1, ¶14. The proof at trial show that another 715 large trees would be cut, and that at least 17,519 small trees have, or will be, cut. FOF 140. Defendants have admitted that DEC intends to

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[2] By a Decision and Order on Motion decided and entered on March 28, 2013, the Appellate Division, Third Department, granted Plaintiff's motion for consent to maintain this suit pursuant to Article 14, § 5, with regard to the First Cause of Action.

[3] References herein to the Plaintiff's Proposed Findings of Fact are abbreviated as "FOF".

construct an entire system or network of such Class II trails. FOF 72-85.

In the seminal case of Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234 (1930) the Court of Appeals held:

> Taking the words of section 7[4] in their ordinary meaning, we have the command that the timber, that is, the trees, shall not be sold, removed or destroyed. To cut down 2,500 trees for a toboggan slide, or perhaps for any other purpose, is prohibited. Id., at 238 (emphasis added).
>
> The purpose of the constitutional provision [Article 14, § 1], as indicated by the debates in the Convention of 1894, was to prevent the cutting or destruction of the timber or the sale thereof, as had theretofore been permitted by legislation, to the injury and ruin of the Forest Preserve. To accomplish the end in view, it was thought necessary to close all gaps and openings in the law, and to prohibit any cutting or any removal of the trees and timber to a substantial extent. The Adirondack Park was to be preserved, not destroyed. Therefore, all things necessary were permitted, such as measures to prevent forest fires, the repairs to roads and proper inspection, or the erection and maintenance of proper facilities for the use by the public which did not call for the removal of the timber to any material degree. Id., at 238 (emphasis added).
>
> If it were deemed necessary to obtain a constitutional amendment for the construction of a State highway, the use to 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. This seems to be a fair conclusion to be drawn from the adoption of these constitutional amendments after the Constitution of 1894. Id., at 240.

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[4] Now Article 14, § 1. T. 27:7-19, 29:4-10. References herein to the trial transcript are abbreviated as "T.".

> However tempting it may be to yield to the seductive influences of outdoor sports and international contests, we must not overlook the fact that constitutional provisions cannot always adjust themselves to the nice relationships of life. 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 to any substantial extent for any purpose. Id., at 241-242 (emphasis added).
>
> In other words, this plea in behalf of sport is a plea for an open door through which abuses as well as benefits may pass. The Constitution intends to take no more chances with abuses, and, therefore, says the door must be kept shut. The timber on the lands of the Adirondack Park in the Forest Preserve, or that on the western slope of the Sentinel range cannot be cut and removed to construct a toboggan slide simply and solely for the reason that section 7, article VII,[5] of the Constitution says that it cannot be done. Id., at 242 (emphasis added).

See also Ass'n for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73 (3d Dept. 1930); Balsam Lake Anglers Club v. DEC, 199 A.D.2d 852 (3d Dept. 1993).

The holding in the case states that the Constitution's "ordinary meaning" is that "trees, shall not be sold, removed or destroyed", and that therefore, cutting trees for "a toboggan slide . . . is prohibited". Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 238. Trees can not be cut in the Forest Preserve in response to "the seductive influences of outdoor sports", even for a project as beneficial as the

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[5] Now Article 14, § 1.

bobsleigh run project that was proposed to be built for the 1932 Lake Placid Winter Olympics. Id. at 241.

Therefore, cutting more than 25,265 small and large trees in the Forest Preserve to construct the Class II trails is not permissible "simply and solely for the reason that" Article 14, § 1 "says that it cannot be done". Id. at 242; see Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 852; Balsam Lake Anglers Club v. DEC, 153 M.2d 606 (Sup. Ct. Ulster Co. 1991).

The destruction of a limited amount of trees is permitted, for a permissible purpose, but only if it is not a material or substantial amount. Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 238; Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 853. In the present case, the Court has interpreted these precedents to require that this question be analyzed in conjunction with the question of whether the trails are an improper use of the Forest Preserve because they impair its wild forest lands to an unconstitutional degree, also taking into account the context of the project as well. See Decision and Order, January 25, 2017, pp. 11-12, 21-22 (Connolly, J.).

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

The Defendants' defense largely based on the premise that Article 14 protects only trees of 3" more in diameter at breast height ("DBH"), because the Constitution prohibits the

destruction of "timber". However, as a matter of law, the Constitution does indeed protect trees of all sizes in the Forest Preserve from destruction, and trees smaller than 3" DBH should be counted by the Court. FOF 30-71.

The Court of Appeals decision in Ass'n for the Protection of the Adirondacks v. MacDonald left no question that all trees are protected by the Constitution, not just those of so-called "timber size".[6] It used the words "tree" and "timber" interchangeably and equated the meanings of those two words:

- "Taking the words of section 7 in their ordinary meaning, we have the command that the timber, that is, the trees, shall not be sold, removed or destroyed." Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 238.
- In 1894 "it was thought necessary to close all gaps and openings in the law, and to prohibit any cutting or any removal of the trees and timber to a substantial extent." Id.
- "the necessity for restricting the appropriation of trees and timber". Id. at 239-240.

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[6] As shown by Plaintiff's Appendix Exhibit B, the stipulation of facts submitted by the parties to the Court of Appeals only listed trees of 3" DBH or more, so the evidence before it was limited to such trees. However, the Court never found that smaller trees were not protected.

- "and the trees were not to be sold or removed or destroyed." Id. at 240.
- "Trees could not be cut or the timber destroyed." Id.
- The "toboggan slide ... requires the cutting of 2,500 trees". Id. at 241.
- "The framers of the Constitution ... intended to stop the willful destruction of trees upon the forest lands, and to preserve these in the wild state now existing; they adopted a measure forbidding the cutting down of these trees to any substantial extent for any purpose." Id. at 242.
- "[T]he destruction of the trees is unconstitutional". Id.

Courts of the era in which Article 14 was adopted tended to interpret the word "timber" to include trees of all sizes. Tuscarora Nation of Indians v. Williams, 79 M. 445, 448, 450 (Co. Ct. Niagara Co. 1913)(finding that "timber" included second growth trees, and recognizing the impracticality of distinguishing between timber and shrubbery); see also U.S. v. Soto, 64 P. 419, 420 (Sup. Ct. Az. Terr. 1901)(interpreting timber, as used in federal statute, to apply "in its most general sense" and not be limited "to any particular class or kind of trees"); U.S. v. Stores, 14 F. 824, 825-826 (Cir. Ct. S.D. Fla. 1882)(finding that "timber" in federal statute applied

"regardless of the present size and character of the individual trees", so long as the trees had "value in any kind of manufacture). In the present case, the testimony showed that trees as small as one inch in diameter were being cut for pulpwood in the era when Article 14 was added to the Constitution. FOF 31-33.

The evidence introduced at trial further demonstrates that the Constitution protects trees of all sizes, not just those of 3" DBH or greater. FOF 30-71.

C. The Number of Trees Cut, or 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 provided such definitions. 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.[7] Because the parties to that case did not provide any estimates of trees less than 3" DBH to be cut, the Court had no reason to consider them. FOF 67-68. 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, the Appellate Division found that cutting 350 trees of all sizes, was constitutional. FOF 69-71. Thus, there is a range, between about 350 trees to 2,500 trees, for which the appellate courts have not provided precise guidance to this Court.

In the present case, the construction of the eight Class II trails which are at issue has, or will, result in the destruction of over 25,565 trees on the Forest Preserve. See Court Exhibit 1, Ex. 80;[8] FOF 140. This greatly exceeds the 2,500 trees of Ass'n for the Protection of the Adirondacks v. MacDonald, especially considering the fact that the total number of trees destroyed was undercounted (FOF 112-116).

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[7] "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.

[8] References herein to the trial exhibits are abbreviated as "Ex.".

The Court should consider the entire system of Class II trails as a whole, and not piecemeal. FOF 72-85. 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 trail system, as a whole, is obviously unconstitutional, as a matter of law.

Even if each Class II Community Connector snowmobile trail is looked at in isolation, rather than collectively, the number of trees cut vastly exceeds the number permitted to be cut by the Balsam Lake decision, and, for the longer trails, is greater than, or close to, the number that was proscribed in Ass'n for the Protection of the Adirondacks. Accordingly, the construction of the individual Class II Community Connector snowmobile trails is "forbidden by the Constitution". Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 241.

The total of 14,452 trees cut, or to be cut, for the Newcomb to Minerva Trail (Ex. 80) 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.

The 7,201 such trees cut for the Seventh Lake Mountain Trail (Ex. 80) is also well over the 2,500 trees proscribed by Ass'n for the Protection of the Adirondacks v. MacDonald as being "substantial" or "material". It too is unconstitutional, as a matter of law.

The 1,972 trees cut for the Wilmington (Cooper Kill) Trail (Ex. 80) is almost as many as were to be cut in Association for the Protection of the Adirondacks, and well more than five times as many as were cut, or to be cut, in Balsam Lake Anglers Club. 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.

Keeping in mind that it was not feasible to fully count the small trees, the 388 trees cut for the Gilmantown Trail, and the 303 cut for the very short additional trails listed in Court Exhibit 1 (FOF 117-128) are also substantial and material amounts of trees, and these trails are unconstitutional.

Collectively, and individually, the construction of the Class II Community Connector snowmobile trails is "forbidden by the Constitution". Ass'n for the Protection of the Adirondacks

v. MacDonald, 253 N.Y. at 241. Pursuant to Article 14, § 5, Defendants should be enjoined from further construction of Class II trails.

D. Construction of Class II Trails Has Impaired The Wild Forest Lands of the Forest Preserve To an Unconstitutional Degree

After Article 14, § 1 "was adopted and became part of the Constitution January 1, 1895", the "forests were to be preserved as wild forest lands" and the "building of roads through these lands" was no longer permitted. Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 240. While "[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", the "question still remains whether the construction of [Class II community connector trails], is such a reasonable use, or is forbidden by the Constitution". Id. at 241.

In Ass'n for the Protection of the Adirondacks, the State wanted to construct a bobsleigh run in the Forest Preserve for the purpose of hosting the 1932 Winter Olympics. Id. at 236. The project was described as follows:

> The bobsleigh run will be approximately one and one-quarter miles in length and six and one-half feet wide, with a return route or go-back road. As additional land will have to be cleared on either side of the run, the width in actual use will be approximately sixteen feet, and twenty feet where the course curves. It is estimated that the

> construction will necessitate the removal of trees from about four and one-half acres of land, or a total number of trees, large and small, estimated at 2,500. Id. at 236.

The Court of Appeals noted that the "Legislature, recognizing the benefits of an international gathering of this kind, has sought in the public interest . . . to provide appropriately and in the spirit of hospitality, the necessary equipment and facilities for these games, and contests, incident to winter sport, of which tobogganing is a large feature". Id. at 236-237. The Court of Appeals also recognized that there were "advantages . . . of having wild forest lands preserved in their natural state". Id. at 238-239.

After taking into consideration the benefits and "seductive influences of outdoor sports and international contests", the Court of Appeals held firm, and determined that the construction of the bobsleigh run was not permissible because 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". Id. at 242.

In Balsam Lake Anglers Club v. DEC, the defendant wanted to build a 2.3 mile cross-country ski trail, build five new parking areas, and relocate and construct certain other trails. The project in that case involved cutting approximately 350 trees as of the time of the lawsuit. Balsam Lake Anglers Club v. DEC, 199 A.D.2d at 853. The Third Department held that "[t]hese proposed

uses appear compatible with the use of forest preserve land, and the amount of cutting necessary is not constitutionally prohibited". Id. at 854.

The evidence before the Court in the present case demonstrates that the Defendants' construction of the Class II trails is an improper use of the Forest Preserve because it impairs the wild forest lands of the Forest Preserve to an unconstitutional degree. See Decision and Order, January 25, 2017, pp. 11-12. The construction of Class II trails has resulted in the cutting of thousands of trees, and the clearing of approximately 35 miles (or 37 acres) of trails. FOF 140. The construction of Class II trails leads to long-lasting negative impacts on the Forest Preserve by causing habitat fragmentation, habitat changes, and negative effects on the flora and fauna in the Forest Preserve. FOF 144-173.

The road-like characteristics of the Class II trails will continue to negatively impact the wild forest nature of the Forest Preserve. FOF 161-167. Even though DEC will no longer allow some older snowmobile trails and roads to be used for snowmobile use, those closures do not offset the Class II trails' negative impacts to the Forest Preserve. FOF 174-194. Moreover, the Constitution proscribes the destruction of the timber on the Forest Preserve. Nowhere does it say that some of it can be destroyed if new timber is allowed to grow up elsewhere.

Taking into account the context of the project at issue and its resultant damage to the Forest Preserve (see Decision and Order, January 25, 2017, pp. 21-22), the Class II snowmobile trails at issue herein are akin to the bobsleigh run that was at issue in Ass'n for the Protection of the Adirondacks. Both facilities involve sliding on snow in an open-topped mechanical vehicle with runners, at high speeds. The most significant difference between the two sports is only that one relies upon gravity to create that speed, while the other relies upon motors. Regardless of the means of achieving the desired speed, it necessitates a wide, flattened, track that has been cleared of all trees and other obstacles. FOF 161-167, 195-220.

On the other hand, the Class II trails are quite unlike the cross-country ski trail and ancillary facilities that were at issue in Balsam Lake Anglers Club. That ski/foot trail required only a narrow path for gliding over the snow at low speeds, with minimal disruption of the forest. The Class II trails are akin to roads, but not to such foot trails. Because foot trails meander through the forest, avoiding trees, roots, and rocks whenever possible, rather than removing them, the land is not cleared the way that it is for bobsleigh runs and Class II snowmobile trails. FOF 195-220.

Despite the purported benefits and "seductive influences of outdoor sports" such as snowmobiling (Ass'n for the Protection of

the Adirondacks v. MacDonald, 253 N.Y. at 242), the Class II trails "constitute[] an improper use of the forest preserve impairing such wild forest lands to an unconstitutional extent." Decision and Order, January 25, 2017, pp. 11-12 (Connolly, J.). Accordingly, the construction of the Class II trails is "forbidden by the Constitution". Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 241. Pursuant to Article 14, § 5, Defendants should be enjoined from further construction of Class II trails.[9]

E. There Is No *De Minimus* Acreage Exception to Article 14

Defendants presented testimony that the Adirondack Forest Preserve contains approximately 2.5 million acres of land. T. 1003:13-16. They are likely to argue that the 37.1 acres that have been, or will be, cleared for the Class II trails at issue are a *de minimus* amount of that vast acreage, and that therefore their actions are not unconstitutional.

However, in Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 236, the record showed that the proposed bobsleigh run would result in the clearing of four acres, a mere

[9] This is not to say that snowmobiling can not occur on the Forest Preserve, when it can be done on existing trails or forest roads, or in other ways that do not result in substantial destruction of trees, and impairment of the wild forest nature of the woods.

fraction of the 1,941,403 acres that were in the Forest Preserve at that time, yet the Court of Appeals still found that the project would violate the Constitution. Id. at 241. "[I]t is clear that the application of the principal of de minimus was not be applied in the forest preserve." Helms v. Reid, 90 M.2d 583, 593 (Sup. Ct., Hamilton Co. 1977). Here, the Class II trails will destroy 37.1 acres of the Forest Preserve (FOF 89), almost ten as much acreage as was at issue in the Association case. Therefore, any such argument by the Defendants herein should likewise be rejected by the Court.

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

POINT II:

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

It is self-evident from the proceedings of the Constitutional Convention of 1894 (FOF 15-29), 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". 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. The Standard of Review

To determine if an agency acted without, or in excess of, its jurisdiction, or contrary to the Constitution, the court must look to the relevant constitutional language. See Anderson v. Regan, 53 N.Y.2d 356, 359 (1981); Ass'n for the Protection of the Adirondacks[10] v. MacDonald, 253 N.Y. 234 (1930) (discussing the record of the Constitutional Convention); see also Lighthouse Pointe Property Associates LLC v. New York State Dept. of Environmental Conservation, 14 N.Y.3d 161, 176-177 (2010). If, after reviewing that language, and the "intent of the framers of the Constitution", the agency's actions are found to be contrary to the law, or in excess of its jurisdiction, then its actions,

[10] Plaintiff is the successor organization to The Association for the Protection of the Adirondacks, Inc. Complaint ¶4; T. 802:10-19.

no matter how "well-intended", must be found to "violate" the Constitution. Anderson v. Regan, 53 N.Y.2d at 363, 367-368.

In determining whether an action violates the Constitution, the court is free to conduct its own analysis when the question is one of "'pure legal interpretation' of clear and unambiguous statutory terms". Lewis Family Farm, Inc. v. Adirondack Park Agency, 64 A.D.3d 1009, 1013 (3d Dept. 2009). The court is not required to defer to an agency's interpretation of the language at issue when "there is little or no need to rely on any special expertise on the agency's part". Id.; see also Madison-Oneida Board of Cooperative Educational Services v. Mills, 4 N.Y.3d 51, 58-59 (2004); Kee v. Daines, 68 A.D.3d 1503, 1504 (3d Dept. 2009).

B. 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 light of the "intent of the framers of the Constitution in adopting the predecessor of" Article 14, Section 1, it should be interpreted strictly to ensure the goals of the framers of the Constitution were met, and to "maintain[] the delicate balance of powers that exists between

the legislative and executive branches of government". Anderson v. Regan, 53 N.Y.2d at 363-366.

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, guidances, plans, 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.[11] 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.[12]

C. 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

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[11] The parties have stipulated that these documents were admitted into evidence for a very limited purpose, and not on the question of the constitutionality of the Defendants' actions or of these documents themselves. FOF 247-248.

[12] 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; FOF 15-29.

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.

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. FOF 28. Indeed, the ultimate authority over the Forest Preserve resides with the People. Point IV, infra; FOF 28. See Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 239-240 (Legislature's power to authorize the building of roads in the Forest Preserve was taken away by the adoption of the Forever Wild Clause).

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 more than a decade of abuses of the State's publicly owned forest lands in the Adirondacks by those branches of government. FOF 15-29; see also Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 239-240; Helms v. Reid, 90 M.2d at 590-592.

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 Branch and the Executive branch live up to their obligations in protecting these rights of the People of the State.

POINT III:

DR. TERRIE'S TESTIMONY AS A HISTORIAN WAS RELEVANT AND WAS PROPERLY ALLOWED

Plaintiff's expert historian, Philip Terrie, Ph.D., was properly allowed to testify about the common meaning and usage of the word "timber" in the 1890s, the social and conservation concerns that led to the adoption of the Forever Wild Clause, the debates at the Constitutional Convention of 1894, and their outcome. He was also properly allowed to provide the foundation for the admission of historic documents into evidence. See FOF

15-29, 31-38, 40-41. Defendants did not question Dr. Terrie's credentials as a historian of Article 14. Instead, they argued that such testimony was not relevant. T. 44-50, 93, 102-103. In a proper case, such testimony is admissible, to lay a foundation for historical documents, and to assist the court in analyzing the meanings of constitutions and other laws.

The words of a statute are the best evidence of its intent, but even if the words are clear, extrinsic sources such as the legislative history should be consulted. Riley v. County of Broome, 95 N.Y.2d 455, 463 (2000). The history of the times and the circumstances surrounding a statute's passage are also pertinent. Id. at 464. When interpreting a constitution-level enactment such as the Articles of Confederation:

> [t]he surrounding circumstances, including custom, usage, and the factual context in which the words were used, may also be importance in resolving a facial ambiguity or inconsistency.

Oneida Indian Nation of New York v. State of New York, 691 F.2d 1070, 1085-1086 (2d Cir. 1982). In such cases, historical evidence is admissible. Id. at 1086. See also Oklahoma v. New Mexico, 501 U.S. 221, 235 (fn 5) (1991)(holding that it was appropriate to look at extrinsic evidence when necessary to interpret an ambiguous statute).

Thus, in an Indian land claims case in New York, the U.S. Court of Appeals found that:

> The men and women who gathered at the treaty fires some two centuries ago at the places mentioned, will not testify; their mouths are stop't with dust, as are those of their children's children. Accordingly, the hearing to be held by the district court will be unlike the traditional trial of an issue of fact. Instead, the trial court will consider issues of law and statutory construction, against the historical background of the events surrounding the treaties, and the adoption of the applicable portions of the Articles of Confederation relied on by plaintiffs. This factual background in turn will probably be derived from the expert testimony of historians and others, and consideration by the court of contemporaneous documents and oral traditions.

Oneida Indian Nation of Wisconsin v. State of New York, 732 F.2d 261, 265 (2d Cir. 1984).

The "district court had erred in considering only untested primary and secondary historical sources without expert testimony to lay a proper foundation for consideration of such evidence". 4 A.L.R. Art. 4 (2015) § 4. See also 130 *Am. Jur. Proof of Facts* 3d 89, § 22 (stating that "[h]istorians may provide invaluable assistance to attorneys and triers of fact as consultants, and . . ., as expert witnesses with respect to investigating and analyzing the meanings of the federal and state constitutions and statutes and local ordinances when originally adopted and as amended, interpreted, and applied thereafter").

The U.S. Supreme Court has also applied such an approach to the interpretation of a state constitution. For instance, in

Hunter v. Underwood, 471 U.S. 222, 228-229 (1985), the court relied upon the trial testimony of historians in interpreting the legislative intent of the Alabama Constitutional Convention of 1901, and in determining the "actual motivations" of the legislators.

The New York courts routinely allow historians to testify on a wide variety of issues. See Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 606 (1998) (history of the use of an Adirondack river for navigation); Miele v. American Tobacco Company, 2 A.D.3d 799, 802 (2d Dept. 2003) (state of knowledge of consumers in the 1940's to 1960's about the dangers of smoking cigarettes); Rose v. American Tobacco Company, 3 M.3d 1103(A), *3-*4 (Sup. Ct., N.Y. Co. 2004) (public knowledge of hazards of smoking); Prince Hall Grand Lodge v. Supreme Council, 32 M.2d 390, 391, 393 (Sup. Ct., Kings Co. 1962)(history of Negro Masonic lodges); see also Friends of Thayer Lake v. Brown, 27 N.Y.3d 1039, 1044 (2016)(inviting the parties to provide historical evidence at trial on navigability-in-fact of Adirondack waterway).[13]

In the present case, the Court identified the meaning of the word "timber", as used in the Forever Wild Clause, as a factual issue to be determined at trial. Decision and Order, January 25, 2017, pp. 21-22. A historian is uniquely qualified to shed light

[13] Dr. Terrie had presented an expert affidavit on the State's motion for summary judgment in that case. T. 36:7-24.

on that question. In particular, Dr. Terrie was able to put that question in the context of the economic, health, social and conservation concerns of the time. FOF 15, 23-24, 31-33, 40. He also provided the foundation for introducing into evidence the pages of Webster's dictionary from 1890 (FOF 36-38), which is an invaluable tool for the Court in ascertaining the common meaning of timber in 1894. See Yaniveth R. v. LTD Realty Co., 27 N.Y.3d 186, 192-193 (2016)(relying upon "dictionaries from the relevant time period" to define term not defined in local law).

Dr. Terrie was also able to put into context the reasons why the delegates to the Constitutional Convention were motivated to put the Forest Preserve beyond the reach of the Executive and Legislative branches, by enshrining the Forever Wild Clause in the Constitution. Therefore, his testimony was properly allowed. Hunter v. Underwood, 471 U.S. at 228-229; Oneida Indian Nation of Wisconsin v. State of New York, 732 F.2d at 265.

Defendants objected to the admission of Exhibit 6, an excerpt from the influential 1849 book *The Adirondack; or Life in the Woods*, by J.T. Headley, for which Dr. Terrie's testimony provided the foundation. T. 93:3-17. The objection was solely as to its relevancy, consistent with their "objection to the relevance of all this". T. 93:4. Just as Dr. Terrie's testimony was relevant (id.), so to was his testimony about Headley and the influence of his writings. T. 89-94. Most importantly, this

testimony and this exhibit showed how the word "timber" was understood to have a broad meaning at the time of the Constitutional Convention of 1894. T. 89:4-90:9, 93:20-94:17. Therefore, Exhibit 6 is relevant and it was properly admitted into evidence. T. 93:12-14.

Defendants also objected to the admission of Exhibit 27, which, as Dr. Terrie's testimony showed, was a page from one of his books that contained an exact quote from the *Report on the Progress of the State Land Survey* by Verplanck Colvin, the New York State Surveyor. T. 55:14-56:10, 99:1-7. Defendants first objected that the exhibit did not satisfy the best evidence rule. T. 100:4-5. However, the best evidence rule "simply requires the production of an original document where its contents are in dispute and sought to be proven." Schozer v. William Penn Life Insurance Co., 84 N.Y.2d 639, 643 (1994). The rule is designed to guard against mistakes in copying and protect against fraud, perjury and faulty memories. Id. at 643-644. Secondary proof of the contents of a document may be admitted upon a satisfactory explanation of the unavailability of the original. Id. at 644.

Here, the parties had already stipulated as to the authenticity of Exhibit 27 (T. 99:22-100:100:2; Court Ex. 2, p. 3, item 3(b)), Dr. Terrie explained that he did not have the original Colvin report available because it was "very hard to find", but was located in libraries, museums and a few private

collections (T. 99:10-16), and testified that when he wrote his book, he had verified that he had accurately quoted it (T. 98:11-20, 99:17-21). Thus, the best evidence rule was satisfied. Id.

Defendants also objected to this exhibit on the same relevancy grounds that they had objected to Dr. Terrie's testimony in general. T. 100:6-10. For the reasons set forth above, this objection is meritless.

POINT IV:

THE CLASS II TRAILS SHOULD HAVE BEEN THE SUBJECT OF AN AMENDMENT TO ARTICLE XIV

Article XIV, § 1 can only be amended with the approval of the People of the State of New York. Constitution, Art. 19, §§ 1-3. It can not be altered by the Legislature (FOF 28) or the Executive branch. Id.

As shown at Point I above, the Class II trails are prohibited by the Constitution. If DEC wishes to build them, so as to promote the mechanized sport of snowmobiling, it has the option of pursuing an amendment to the Constitution. Id. For instance, Article 14, § 1 has been amended for similar purposes multiple times, including to allow the construction of downhill ski trails on three different mountains in the Forest Preserve, the construction of the interstate highway known as the Northway on Forest Preserve lands, and the elimination of hazards on other

state highways on up to 400 acres of the Forest Preserve. See Constitution, Art. 14, § 1; see also Ass'n for the Protection of the Adirondacks v. MacDonald, 253 N.Y. at 240 (describing similar amendments in 1918 and 1927).

If DEC wishes to build the Class II trails, it need only convince the Legislature, and then the People, to approve their construction and the resultant destruction of the Forest Preserve. See Constitution, Art. 19, § 1.

POINT V:

PLAINTIFF'S EXPERT'S TREE COUNTS WERE PROPERLY ADMITTED

The methodology employed by Plaintiff's expert Steven Signell for counting trees was acceptable. There was no novel scientific method employed which would have required a Frye hearing. Parker v. Mobil Oil Corp., 7 N.Y.3d 434, 446-447 (2006).

Mr. Signell (or his assistant Peter Bauer) counted trees and/or stumps on the four principal trails at issue herein. FOF 102-103, 109. Mr. Signell counted live trees using standard forestry techniques for measuring or estimating trees' DBH. FOF 103-109. As for trees which had already been cut, the fact that their stumps no longer reached breast height required that they be measured at stump height. FOF 107. As Mr. Signell testified, this is an appropriate technique under the circumstances. FOF 106-107. Indeed, under similar circumstances in the Balsam Lake Anglers Club case, DEC itself has counted trees in this way. FOF

108. Mr. Signell also testified that the 1" diameter cut-off that he applied in doing his tree counts had its foundation in a U.S. Forest Service research protocol. FOF 106.

In any event, because the Constitution does not distinguish between large and small trees, and there is no rational basis for DEC's 3" DBH policy, the 1" cutoff adopted by Mr. Signell was reasonable. Point I.B, supra; FOF 107.

The only relatively novel aspect of Mr. Signell's methodology was the use of the Fulcrum computer program, or "app", to compile the data that he and his assistant collected. He testified as to the widespread use of this program in many fields, including forestry, and including his own experience with it. FOF 103. In addition, this was not a new scientific theory or methodology that would have required a Frye hearing. Id.[14] It was merely a way of tallying data, that could have otherwise been written down by hand. FOF 104.

POINT VI:

WILLIAM AMADON WAS PROPERLY PERMITTED TO TESTIFY AS AN EXPERT ON ADIRONDACK TRAILS AND THEIR CONSTRUCTION

Plaintiff's witness William Amadon testified as an expert on Adirondack trails and their construction. FOF 201-212. Despite having relatively little formal training in that field, he has decades of experience in it, gained from observing the work of

[14] It is worth noting that at no time did the Defendants request a Frye hearing. See id. at 445.

others, and from actual work experience. FOF 212. This qualified him to testify as an expert.

An "expert [witness] should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed the information imparted or the opinion rendered is reliable." Price v. NYC Housing Authority, 92 N.Y.2d 553, 559 (1998)(expert in criminal behaviour analysis was allowed to testify despite lack of formal training in certain fields). "An expert may be qualified without specialized academic training through long observation and actual experience." Matott v. Ward, 48 N.Y.2d 455, 460 (1979). "Specific academic training may not always be necessary since an individual's expertise in some fields can be gained through real world experience." Gross v. Sandow, 5 A.D.3d 901, 903 (3d Dept. 2004)(an experienced excavating contractor can testify as an expert on questions related to that field). See also 58A N.Y.Jur.2d, *Evidence & Witnesses*, §§ 652, 653.

Mr. Amadon's testimony established that he had the requisite years of observation and real world experience to be able to testify as an expert on the subjects of foot trails in the Adirondacks, how they are constructed, and how that differs from the Class II trails. FOF 212.

POINT VII:

APA IS A PROPER PARTY TO THIS ACTION

Defendant APA is a proper party to this action because it colluded with DEC to perform the challenged action, and it could be inequitably affected by the judgment herein. Pursuant to Constitution Article 14, § 5, this action seeks to restrain an ongoing violation of Constitution, Article 14, § 1, the Forever Wild Clause. The Defendants twice moved to dismiss the action against APA, on the grounds that there was "no evidence that any actions by anybody at APA has led to the construction of these trails in a manner that violates Article XIV, § 1" (T. 1641:6-9), and the Court reserved decision on those motions. T. 1445-1448, 1638-1642. The motions should be denied.

An agency is a necessary and proper party to any action which challenges an action by that agency. Jeanty v. NYS Dept. of Correctional Services, 36 A.D.3d 811, 812 (2d Dept. 2007) (dismissing action against one agency for failure to name the second state agency "which issued the determination challenged herein"); Brancato v. NYS Board of Real Property Services, 7 A.D.3d 865, 867 (3d Dept. 2004) (dismissing action for failure to name both agencies with authority over matter at issue); McNeill v. Town Board of Ithaca, 260 A.D.2d 829, 830 (3d Dept. 1999)(dismissing action against town board for failure to also name planning board as defendant, where planning board had made the determination at issue); Seittleman v. Sabol, 217 A.D.2d 523, 527 (1st Dept. 1995)(action against defendant city agency should

not be dismissed because it was responsible for making the initial determinations in a program administered by defendant state agency); *cf.* Headriver, LLC v. Town Board of Riverhead, 2 N.Y.3d 766, 768 (agency whose determinations are "merely advisory" was not necessary party).

When two or more agencies have approved an action, each of them must be named as a party. Jeanty v. NYS Dept. of Correctional Services, 36 A.D.3d at 812; Brancato v. NYS Board of Real Property Services, 7 A.D.3d at 867; Wittenberg Sportsmen's Club v. Town of Woodstock Planing Board, 16 A.D.3d 991, 993 (3d Dept. 2005)(dismissing action against planning board for failure to also name zoning board of appeals, where both boards had a role in approving the project at issue); Brignoni v. Abrahamson, 278 A.D.2d 565, 566-567 (3d Dept. 2000)(dismissing action against a state agency for failure to name a second state "agency that affected the action under review"); McNeill v. Town Board of Ithaca, 260 A.D.2d at 830; Seittleman v. Sabol, 217 A.D.2d at 527.

Here, although APA employees were apparently not wielding the chainsaws and driving the excavators, APA played a substantial role in the routing, design, siting, and approval of the Class II trails. FOF 221-236. APA and DEC have entered into a memorandum of understanding to govern their work in jointly managing the Adirondack Forest Preserve. FOF 224-227, Ex. AA. Before DEC could undertake the construction of the Class II trails, each of them required the approval of APA. FOF 222-232.

Indeed, APA did approve each of the unit management plans and work plans which authorized the construction of these trails. FOF 223, 232. In addition, an APA employee helped DEC choose the routes for some of the trails and select which Forest Preserve trees should be destroyed. FOF 233-234.

An agency is also a necessary and proper party when it may be inequitably affected by the judgment in a case. Brancato v. NYS Board of Real Property Services, 7 A.D.3d at 867; Dawn Joy Fashions v. Commissioner of Labor, 18 1A.D.2d 968, 969 (3d Dept. 1992). Here, APA is charged with a significant role in the management of the Forest Preserve in the Adirondack Park, and it has specific duties regarding Class II trails. Executive Law § 816; FOF 221-236; Ex. X, pp. 8-11.[15] Its ability to perform its legal duties could be adversely affected by the outcome of this case. T. 1640:21-1641:4. Therefore, it is a proper party. Id.

Defendants' motions to have APA dismissed from the case should be denied.

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[15] The Adirondack Park State Land Master Plan (Ex. X) has the force of law. Adirondack Mountain Club v. APA and DEC, 33 M.3d 383, 387 (Sup. Ct. Albany Co. 2011); Helms v. Reid, 90 M.2d at 604.

POINT VIII:

PORTIONS OF THE DEPOSITION TRANSCRIPTS OF FIVE OF DEFENDANTS' EMPLOYEES WERE PROPERLY ADMITTED AT TRIAL; THE ADMISSIONS IN DEFENDANTS' ANSWER WERE ADMISSIBLE

Plaintiff read into the record selections from the deposition transcripts of five of Defendants' employees (T. 138-171), and excerpts from the deposition transcript of one of those employees were admitted as Exhibit 164. T. 1627-1638. These transcripts were properly used at trial. See FOF 237-246.

A. Defendants' Deposition Testimony Was Admissible at Trial for Any Purpose

CPLR § 3117(a)(2) provides that:

> (a) At the trial ... any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions: ...
>
> (2) the deposition testimony of a party ... or of any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given ...

Therefore, Plaintiff was properly allowed to use these transcripts at trial without calling these employees as witnesses.

B. Defendants' Employees Had Speaking Authority on The Subjects for Which Their Transcripts Were Used And Their Statements Are Binding on the Defendants

The four DEC employees whose transcripts were read into evidence pursuant to CPLR § 3117(a)(2) were designated by DEC as

its witnesses for purposes of depositions pursuant to CPLR § 3106(d). FOF 239-243; Appendix Exhibit F. When a party determines which of its employees will be deposed under § 3106(d), those persons are deposed as the authorized representatives of that party. See Hurrell-Harring v. State of New York, 112 A.D.3d 1217, 1220 (3d Dept. 2013); Tower v. Chemical Bank, 140 A.D.2d 514, 515 (2d Dept. 1988); Lotz v. Albany Medical Center Hospital, 85 A.D.2d 836, 837 (3d Dept. 1981)

APA Employee Walter Linck was not originally designated as Defendants' witness for deposition. Instead, he was deposed pursuant to court order, after APA's originally designated representative turned out to lack sufficient knowledge of the relevant issues. T. 245; Decision and Order, October 20, 2015, p. 4. In effect, this made him APA's sole representative who was deposed. See Hurrell-Harring v. State of New York, 112 A.D.3d at 1220 (defendant was required to produce additional witnesses for depositions when its originally chosen representative "possessed insufficient knowledge concerning the subject matter raised").[16]

Therefore, all five of these witnesses had speaking authority for purposes of this case, and their statements are

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[16] As discussed at Point VII above, the Defendants twice moved to have APA dismissed as a defendant in this case. Even if that motion were to be granted, Mr. Linck's deposition transcript was still properly used at trial because APA "was a party at the time the deposition was given" and he was an employee of APA at that time. CPLR § 3117(a)(2). See *McKinney's Practice Commentaries*, C3117:4 (issue of using transcript of employee of former party was "settled" by 1996 amendment to CPLR).

admissible and binding on the Defendants. Herbert v. Dryden Mutual Insurance, 54 M.3d 1205(A), *3 (fn 3)(Sup. Ct., Tompkins Co. 2017)(statements of company vice president who was designated for deposition had speaking authority and his statements were binding on his employer); Goodwin v. Same One Realty, LLC, 25 M.3d 1213(A), *2 (Sup. Ct., Kings Co. 2009) (designation of building manager for deposition cloaked him with speaking authority); Duran v. Bushwick House, LLC, 24 M.3d 1240(A) (Sup. Ct., Kings Co. 2009)(designation as "witness for purposes of examination before trial cloaked the witness with 'speaking authority'").

In the alternative, three of the four DEC employees were senior managerial employees, who supervised the planning and construction of the Class II trails. FOF 51, 76, 239. Two of them, Tate Connor and Peter Frank, testified at trial. The other two DEC employees and APA employee Walter Linck were on Defendants' Witness List (Appendix Exhibit G), although Defendants elected not to call them at trial. Therefore, they all had speaking authority over these matters. Candela v. City of New York, 8 A.D.3d 45, 48 (1st Dept. 2004); Johnson v. Hallam Enterprises, Ltd., 208 A.D.2d 1110, 1111 (3d Dept. 1994).

Because these witnesses were cloaked with speaking authority, their admissions are binding on the Defendants. Rivera v. NYC Transit Authority, 54 A.D.3d 545, 547 (1st Dept. 2008) (deposition testimony of party is admissible against that party as an admission); Candela v. City of New York, 8 A.D.3d at

48; Johnson v. Hallam Enterprises, Ltd., 208 A.D.2d at 1111; 58 N.Y.Jur.2d, *Evidence and Witnesses*, § 321 (statement by corporation's agent can be received into evidence as an admission by the company).

C. The Admissions in Defendants' Answer Are Evidence of the Facts Admitted

Plaintiff read into the record certain allegations from the Complaint herein, and the corresponding admissions from Defendants' Answer. FOF 72-74. Such admissions constitute formal judicial admissions by the Defendants of the facts alleged. Performance Comercial Importadora v. Sewa International Fashions, 79 A.D.3d 673, 674 (1st Dept. 2010); Bogoni v. Friedlander, 197 A.D.2d 281, 291 (1st Dept. 1994).

CONCLUSION

The construction of the Class II Community Connector snowmobile trails has caused the destruction of a substantial amount of timber on the Forest Preserve and impaired the wild forest lands of the Forest Preserve to an unconstitutional degree. This action by the Defendants violated Article 14, § 1 of the Constitution and must be enjoined pursuant to Article 14, § 5.

Dated: July 31, 2017

CAFFRY & FLOWER
Co-counsel for the Plaintiff
John W. Caffry, Of Counsel
Amanda J. Kukle, Of Counsel
100 Bay Street
Glens Falls, New York 12801
(518) 792-1582

BRAYMER LAW, PLLC
Co-counsel for the Plaintiff
Claudia K. Braymer, Of Counsel
P.O. Box 2369
Glens Falls, New York 12801
(518) 882-3252

To: ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorney for Defendants DEC and APA
Loretta Simon, AAG, Of Counsel
Meredith Lee-Clark, AAG, Of Counsel
The Capitol
Albany, New York 12224
(518) 474-1191

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