**No. APL-2019-0166**

To Be Argued By: John W. Caffry
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**STATE OF NEW YORK**
**COURT OF APPEALS**

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**PROTECT THE ADIRONDACKS! INC.,**

**Respondent-Appellant,**

**-against-**

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

**Appellants-Respondents.**

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# REPLY BRIEF OF RESPONDENT-APPELLANT


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## INTRODUCTION

When this Court was last called upon to carry out its constitutional role in the preservation of the Forest Preserve[1] over 90 years ago, it held that one of the intentions of the framers of what is now Article 14, § 1 of the State Constitution was "to preserve these [lands] in the wild state now existing". Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 240-241 (1930). In so doing, it found that

> [t]he Forest Preserve and the Adirondack Park within it are for the reasonable use and benefit of the public, as heretofore stated. 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. (See 'The Problem of the Wilderness' by Robert Marshall in 'The Scientific Monthly,' Feb. 1930, p. 141.)

The Court's holding on the need to preserve the wild lands of the Forest Preserve, even as they were being used by the public, was guided by Marshall's recently published essay.[2] Id.

Although he soon became a national figure, Marshall's roots and earliest wilderness experiences were in the Adirondacks.[3] As

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[1] See Constitution Article 14, § 5.

[2] Available at: http://pages.pomona.edu/~wsteinmetz/ID1/RMarshall_problemof%20wilderness.pdf. Last accessed on January 25, 2021.

[3] See *Bob Marshall in the Adirondacks*, Adirondack Almanack, www.adirondackalmanack.com/2010/01/bob-marshall-in-the-adirondacks.html. Last accessed on January 25, 2021.

His father Louis Marshall had been a delegate to the New York Constitutional Conventions of 1894 and 1915. R. 3252-3256. The

defined in his essay, for Marshall, "wilderness" denoted

> a region which ... possesses no possibility of conveyance by any mechanical means ...[and] ... that it preserves as nearly as possible the primitive environment. This means that all roads, power transportation and settlements are barred. But trails and temporary shelters ... are entirely permissible.

Marshall, supra, at 141. Thus, Marshall envisioned the appropriate uses of America's wild lands, including the Forest Preserve, as being those which required few, if any, changes to the land.

When the Court struck down the law authorizing the construction of an Olympic bobsleigh run on the Forest Preserve, it did so with Marshall's definition in mind. Id. at 241. Reasonable use of the forests was to be encouraged, but not at the expense of preserving "the wild state now existing". Id. at 242.

In so ruling, the Court upheld the intent of the framers of the Constitution of 1894. Although the initial impetus behind Article 14 was the protection of the forests and watersheds from destruction by commercial logging, the orations of the delegates to the Constitutional Convention revealed a much broader purpose,

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senior Marshall supported the adoption of the forever wild clause in 1894, and by 1915 he was a "chief advocate of retaining the strictures of forever wild" in the Constitution. Philip G. Terrie, *Forever Wild Forever, The Forest Preserve Debate at the New York State Constitutional Convention of 1915*, New York History, Vol. 70, No. 3, pp. 263-265, 272-273 (July 1989). Available at www.jstor.org/stable/43460261. Last accessed on January 24, 2021.

which one delegate described as being "to preserve what is left of our great natural reservoirs as nearly as possible as they were designated and constructed by the Almighty, for the benefit of the generations yet unborn". R. 607. See also Plaintiff's Brief,[4] pp. 9-13.

The wide, graded, grassy Class II snowmobile trails and their concomitant massive bridges and road-type signage, the construction of which altered many miles of forest habitat and destroyed tens of thousands of trees, are not consistent with the letter or the intent of Article 14, or with this Court's and Marshall's visions for the wild forest lands of the Adirondacks.

## SUMMARY OF THE REPLY ARGUMENTS

Plaintiff[5] is an aggrieved party in this matter and its cross-appeal should be heard by this Court. Although Plaintiff was the prevailing party in the Appellate Division, it only prevailed in part, where the court found that "the construction constitutes an unconstitutional destruction of timber". R. 5015.[6] It did not receive the complete relief requested because the Appellate Division failed to also find that the manner of

[4] Brief of Plaintiff-Respondent-Appellant dated September 22, 2020 ("Plaintiff's Brief").

[5] Plaintiff-Respondent-Appellant Protect the Adirondacks! Inc. ("Plaintiff").

[6] References to pages of the Record on Appeal are preceded by "R.".

construction of the trails violated the Constitution. R. 5015. In any event, regardless of whether or not it was aggrieved by the decision of the Appellate Division, Plaintiff should still be heard on the latter issue in response to Defendants'[7] appeal. See Point I, infra.

The cross-appeal presents reviewable issues of law. When it found that the Class II Community Connector snowmobile trails ("Class II trails") did not violate the mandate of Article 14, § 1 that the Forest Preserve must be "forever kept as wild forest lands", the Appellate Division failed to follow the holding of Association v. MacDonald, and applied an incorrect legal test. Rather than determining whether the trails would "preserve these [lands] in the wild state now existing" (id. at 242), it found only that the trails did not "impair[] the wild forest qualities of the Forest Preserve." R. 5015. This was a reversible error of law. See Point II.A, infra.

The Appellate Division also erred as a matter of law when it relied upon the Defendants' internal policies and procedures in violation of the parties' trial stipulation. Therefore, this Court should reexamine all of that court's factual findings that are supported by those documents. See Point II.B, infra.

The Record demonstrates that the Class II trails are not

[7] Defendants-Appellants-Respondents New York State Department of Environmental Conservation and Adirondack Park Agency ("Defendants").

consistent with preserving the Forest Preserve "in the wild state now existing". Id. at 242. The Defendants claim that this question may not be reviewed because the Appellate Division's decision was based entirely on nonreviewable affirmed findings of fact. However, much of the credited trial testimony by Plaintiff's experts on the longer-term impacts of the trails on the ecology and habitat of the Forest Preserve was not rebutted by the Defendants at trial, and neither of the lower courts made a determination on the effects of future habitat change along the trails. The Record shows that many miles of forest were changed to a grassland ecosystem. Habitat change on this scale does not "preserve these [lands] in the wild state now existing". Id. at 242. See Point III.B, infra.

Moreover, a close review of the Appellate Division's decision shows that, while it affirmed the trial court's finding on the law, it explicitly affirmed few of the findings of fact. Thus, this Court could review many of the important factual questions before it. Even the nonreviewable findings of fact support a determination that the Class II trails are unconstitutional. See Point III.A, infra.

When this Court applies the law to both the reviewable facts, and the nonreviewable facts, it should find that the manner of construction of the trails violated the Constitution.

POINT I

THE PLAINTIFF IS AN AGGRIEVED PARTY
AND ITS CROSS-APPEAL SHOULD BE HEARD

Plaintiff has cross-appealed (R. 5009) the holding by the Appellate Division that the Class II snowmobile trails at issue herein did not violate the forever wild mandate of Article 14, § 1 of the State Constitution (R. 5015), and this reply brief is submitted in support thereof. Defendants argue (Reply Brief,[8] pp. 29-30) that the cross-appeal should be dismissed because Plaintiff was not aggrieved by the decision and order of the Appellate Division (R. 5011-5020). Because it did not receive complete relief below, Plaintiff is an aggrieved party pursuant to CPLR § 5511 and its appeal should be heard. Even if the cross-appeal is dismissed, Plaintiff is still permitted to brief the issue raised by its cross-appeal because reversal of that determination by the Appellate Division would entitle Plaintiff to prevail on Defendants' appeal.

The Appellate Division ruled in favor of Plaintiff on one issue, finding that the cutting of 25,000+ trees for the Class II trails violated the prohibition of Article 14, § 1 of the State Constitution on the destruction of timber in the Forest Preserve. Protect the Adirondacks v. Department of Environmental Conservation, 175 A.D.3d 24 (3d Dept. 2019)(R. 5015, 5018). It

[8] Reply Brief for Defendants-Appellants-Cross Respondents dated December 7, 2020 ("Reply Brief").

held that "the construction of the Class II trails resulted in, or would result in, an unconstitutional destruction of timber in the Forest Preserve." R. 5018.

However, on a second issue, it ruled for the Defendants, finding that the Class II trails did not impair the wild forest qualities of the Forest Preserve (R. 5015), such that these trails did not violate Article 14's mandate that the Forest Preserve "shall be forever kept as wild forest lands". In doing so, that court left the Forest Preserve vulnerable to irreparable damage being done to its forever wild nature by its putative protector, Defendant Department of Environmental Conservation ("DEC"). Thus, despite being the prevailing party on one issue, due to the negative result on the other issue, Plaintiff is still an aggrieved party and may cross-appeal from the part of the Opinion and Order of the Appellate Division which favored the Defendants.

A prevailing party is still an aggrieved party pursuant to CPLR § 5511, and may appeal or cross-appeal the decision of a lower court, when it "is nevertheless prejudiced because [the decision] does not grant [it] complete relief" or if the party "received an award less favorable than [it] sought or a judgment which denied [it] some affirmative claim or substantial right." Parochial Bus Systems v. Board of Education of City of New York, 60 N.Y.2d 539, 544-545 (1983)(citations omitted). "[A] party is

generally considered to be aggrieved, for the purpose of appeal, if the order of the Appellate Division grants [it] only part of the relief [it] requested." Arthur Karger, *The Powers of the New York Court of Appeals*, at § 11:3.

Plaintiff's complaint alleged that:

> 82. The Class II Community Connector snowmobile trails and any similar trails violate Article 14, § 1 because: (a) a substantial amount of timber will be cut and destroyed in the construction of these trails; (b) these trails are not consistent with the wild forest nature of the Forest Preserve; and (c) the construction of these trails will result in the creation of a man-made setting in the Forest Preserve. R. 34-41.

The complaint requested, *inter alia*, the following relief:

> (A) Enjoining Defendants from constructing, in the Forest Preserve, Class II Community Connector snowmobile trails, and other trails having similar characteristics or requiring like amounts of tree cutting, trails requiring construction techniques that are not consistent with the wild forest nature of the Forest Preserve, or trails that result in the creation of a man-made setting for the sport of snowmobiling; R. 52.
>
> (B) Ordering Defendants to rehabilitate the damage done to the Forest Preserve so far by the construction of said trails, including, but not limited to, the replanting of trees on said trails; R. 52-53.

Thus, Plaintiff sought to remedy both the excessive destruction of timber for the building of the trails ("like amounts of tree cutting" (R. 52)) and the adverse effects on the wild forest nature of the land that resulted from the way in which the trails were constructed ("construction techniques that are not consistent with the wild forest nature of the Forest Preserve"

(R. 52)).

The Appellate Division granted the requested relief regarding the amount of tree cutting (R. 5015, 5018) but denied (R. 5015) the requested relief enjoining the use of construction techniques that are not consistent with the wild forest nature of the Forest Preserve, "trails having similar characteristics ... [and] trails requiring construction techniques that are not consistent with the wild forest nature of the Forest Preserve, or trails that result in the creation of a man-made setting for the sport of snowmobiling." R. 52.

Plaintiff is aggrieved because, although it obtained the requested relief regarding the number of trees cut, unless the other holding of the Appellate Division is overturned, the Forest Preserve is still at risk of destruction, even if fewer trees may be cut. The building of wide, flattened, graded corridors, from which all woody vegetation is cleared, and which alter the forest's ecosystem (Plaintiff's Brief, pp. 20-22, Point V; Point III, infra), for Class II trails, or for similarly constructed trails to be used for other purposes, will result in a Forest Preserve that is no longer forever wild.

These two parts of the requested relief derive from the fact that Article 14 protects the Forest Preserve from multiple separate threats:

> The framers . . . 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.

Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 242 (1930)(emphasis added); see also Plaintiff's Brief, Point V. The Appellate Division granted Plaintiff's requested relief regarding one threat, the destruction of the timber, but it did not grant the requested relief regarding the separate mandate that the Forest Preserve be "forever kept as wild forest lands". Therefore, Plaintiff is aggrieved for purposes of CPLR § 5511, and its cross-appeal should be heard.

Even if Plaintiff is not an aggrieved party, it may still seek review by this Court of the issue presented by its cross-appeal in response to the Defendants' appeal, "because a reversal of that incidental determination would entitle [Plaintiff] to prevail on this appeal, in the event [Defendants were] successful on the other issue in this case". Parochial Bus Systems v. Board of Education, 60 N.Y.2d at 546.

## POINT II

## THE CROSS-APPEAL PRESENTS REVIEWABLE ISSUES OF LAW THAT REQUIRE GRANTING PLAINTIFF'S APPEAL

Plaintiff's cross-appeal presents issues of law which are within this Court's jurisdiction under CPLR § 5501(b). Defendants argue that the issues presented by the cross-appeal are merely affirmed issues of fact and are therefore not

appealable. Reply Brief, Point III. However, the Appellate Division's decision was based on an incorrect interpretation of Article 14, § 1. It also improperly relied upon evidence of Defendants' internal policies, in violation of the parties' stipulation at trial. These are reviewable issues of law, and the cross-appeal should be granted.

### A. The Appellate Division Incorrectly Interpreted The Constitution's Requirement that the Forest Preserve "Shall Be Forever Kept As Wild Forest Lands"

Article 14, § 1 requires that the Forest Preserve "shall be forever kept as wild forest lands." In Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 242 (1930) this Court explained that this meant that Article 14 was intended "to preserve these [lands] in the wild state now existing." Here, the Appellate Division erred when instead of determining whether or not the land was being preserved, it looked at whether the construction of the Class II trails unconstitutionally "impairs" the wild forest nature of the Forest Preserve. R. 5015.

To preserve something is to "sav[e] that which already exists, and implies the continuance of what previously existed." *Black's Law Dictionary*, Fourth Edition (1951)(definition of "preservation"). See also *Webster's Encyclopedic Unabridged Dictionary* (1996)("keep safe from harm or injury", "keep up", "maintain", "retain"). On the other hand, "impair" is defined as

to "weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner". *Black's Law Dictionary*, Fourth Edition (1951). See also *Webster's Encyclopedic Unabridged Dictionary* (1996)("diminish in value").

The difference between these two terms is not mere semantics. The preservation of something, such as the wild state of the forest, requires that it be kept as it is, while impairment allows for changes, and implies a value judgment as to whether or not the changes are for the better or the worse. The lower courts' use of the weaker "impairs" interpretation of Article 14's mandate (R. viii, 5015) was inconsistent with the controlling law, as set forth in Association v. MacDonald, 253 N.Y. at 242.

The Defendants' Reply Brief did not dispute this argument, which was raised in Plaintiff's Brief (pp. 58-60), that the Appellate Division incorrectly interpreted Article 14. Instead, they continued to rely on the improper weaker "impairs" test, and also argued that the Appellate Division's factual findings are not reviewable. Reply Brief, pp. 4-5, 29-30.

The Appellate Division's finding that the Class II trails did not violate the requirement that the Forest Preserve "shall be forever kept as wild forest lands" was based upon an incorrect interpretation of the law, so it is fully reviewable by this Court. Applying the proper test to the facts requires a finding

that the manner of construction of the Class II trails does not "preserve these [lands] in the wild state now existing." Association v. MacDonald, 253 N.Y. at 242. The cross-appeal should be granted.

B. The Lower Courts Improperly Relied Upon the Defendants' Policy Documents

As shown by Point IV of Plaintiff's Brief, both of the lower courts improperly relied upon the Defendants' internal guidance and policy documents to support their findings that the construction of the snowmobile trails did not impair the wild forest nature of the Forest Preserve. None of Defendants' arguments actually address that fact. Their Reply Brief (p. 33) agrees with Plaintiff's argument that, pursuant to a trial stipulation (R. 4020-4121, 4223-4224), these documents were only introduced into evidence for a very "limited purpose". Nor did the Defendants dispute that a violation of such a stipulation by a court would be a reversible error.

Moreover, in claiming that the lower courts' decisions did not violate the stipulation, the Reply Brief (p. 33) only looks at the "stipulation and trial transcript", and not at the actual decisions that followed. It does not even attempt to refute Plaintiff's point that, in their decisions, which were rendered after the conclusion of said trial, the two lower courts went beyond that "limited purpose" and, in violation of the

stipulation, relied upon these documents to support their findings on the constitutional issue before them.

In its decision, the Appellate Division first stated that it agreed with Supreme Court's conclusion on this issue. R. 5014. Next, in the very same paragraph, it laid out the parameters for construction of the Class II trails that were created by "Defendants' guidance documents", such as trail relocation, trail width, and the use of certain construction techniques such as bench cuts. R. 5014. It then proceeded to use those very same parameters as the basis for its decision. R. 5014-5015.

Therefore, the Appellate Division's decision on the issue of whether the Class II trails violated Article 14's mandate that the Forest Preserve "shall be forever kept as wild forest lands" should be reversed because it improperly relied upon Defendants' internal guidance and policy documents as "evidence on the question of whether Class II community connector trails ... are constitutional under the New York State Constitution Article XIV, Section 1" (R. 4120-4121) and "whether Defendants' employees alleged following of those policies, procedures and standards was constitutional". R. 4121. See Plaintiff's Brief, Point IV.

## POINT III

## THE CONSTRUCTION OF THE CLASS II TRAILS PHYSICALLY DAMAGED THE FOREST PRESERVE LANDS, SIGNIFICANTLY ALTERED THE HABITAT ON THEM, AND DID NOT PRESERVE THEM IN THEIR WILD STATE

Article 14, § 1 of the New York State Constitution states in pertinent part that the Forest Preserve "shall be forever kept as wild forest lands". After it "was adopted and became part of the Constitution [on] January 1, 1895", the "forests were to be preserved as wild forest lands" and major changes to them were no longer permitted without a constitutional amendment. Association for the Protection of the Adirondacks v. MacDonald, 253 N.Y. 234, 240 (1930).

Here, construction of the Class II trails did not preserve the Forest Preserve in its wild state, but instead, caused significant alterations to the land, the building of massive bridges, the installation of traffic signs, and the creation straight, artificially "even and safe surface[s]" (Association for the Protection of the Adirondacks v. MacDonald, 228 A.D. 73, 82 (3d Dept. 1930)), specifically for the sport of snowmobiling.[9]

[9] Defendants argue that the Class II trails are not snowmobile trails, but are instead multi-use trails. Reply Brief, p. 1. Because the level of destruction to the Forest Preserve is unconstitutional, the purpose of the trails is irrelevant. Plaintiff's Brief, Point III.C. Moreover, they were clearly built as snowmobile trails, and Defendants' witnesses admitted this. R. 3288-3290, 3298-3300, 3310-3311, 3313-3314, 3322-3323, 4061, 4175, 4408, 4675. Any other use would be incidental to that purpose. Moreover, the Record does not support the claim that the trails were actually designed for other uses, or show that they are actually used for those purposes. Regardless of

Further, the construction of Class II trails will lead to long-lasting negative impacts on the Forest Preserve by causing habitat changes and other negative effects on its flora and fauna. Thus, Article 14 prohibits the construction of the Class II trails because they fail to "preserve ... the wild state now existing" in the Forest Preserve. Association v. MacDonald, 253 N.Y. at 242.

The Defendants argue (Reply Brief, pp. 33-34) that the Appellate Division's holding that Plaintiff did not prove that the construction of the Class II trails "impairs the wild forest qualities of the Forest Preserve" (R. 5015) is based solely on nonreviewable affirmed findings of fact. However, a careful examination of their decisions show that, on some issues, the lower courts did not make a finding of fact, and on some others, their findings were mixed. Moreover, to the extant that the factual issues that were actually ruled upon by the lower courts are nonreviewable, as a matter of law, the Class II trails have still done unconstitutional damage to the Forest Preserve.

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their intended purpose, the damage done to the Forest Preserve by their construction was unconstitutional.

A. Class II Trail Construction Used Intrusive Construction Techniques that Physically Damaged the Forest Preserve

Building the Class II trails required aggressive construction techniques, "bridges, bench cuts, grading, and [large] construction equipment" (R. xx) that damaged the physical features of the Forest Preserve. Defendants argue (Reply Brief, p. 34) that the Appellate Division "expressly affirmed the trial court's factual findings" regarding the use of bench cutting, turnpiking, and the characterization of the trails as being more similar to trails than roads.

However, Plaintiff's expert testimony, which was credited by Supreme Court, showed that Class II trails are "substantially larger" (R. xx) and more invasive than foot trails and that their "bench cuts ... are clearly more substantial that [sic] those normally required for a foot trail". R. xxv. Supreme Court found that "the signage on the community connector trails also is not akin to that of foot trails, and is, in certain areas, more akin to road signs". R. xxiv. Supreme Court (R. xix) noted that the "evidence presented" showed that the Class II trails "fall somewhere between" foot trails and roads, and are "more roadlike" in some respects ("greater straight lengths, grading, removal of obstacles such as rocks, bridging and bench-cutting"). R. xxvi-xxvii. The Appellate Division, while reaching a similar conclusion on the law, did not actually affirm, or reject, many

of the specific findings that were made by the trial court.

The Appellate Division's decision made no findings about the impact or import of the Class II trails' massive bridges. R. 5015. These bridges are up to 12 feet in width, and are marked with highly visible reflectors and traffic signs, which are also found at trail intersections. R. 704-705, 721, 761, 774-777, 829-831, 850, 2514-2516, 3535-3537, 3641, 3941-3942, 3985, 4038-4041. Defendant Adirondack Park Agency ("APA")'s own witness admitted that signs such as this look similar to road signs, are not something that would be expected to be seen in a wild forest (R. 829-831), and that the bridges are "much larger than a typical foot-trail bridge." R. 836-837.

Leveling the trails involved cutting and filling steep slopes, removal of rocks, logs, hummocks (mound rising above the ground), the duff layer of the soil, and stumps, and flattening the trails. R. 700-703, 706, 759, 770-777, 816-818, 3368, 3405, 3544, 3606-3643, 3926-3928, 3965-3966, 3973, 3976, 3978-3997, 4260, 4268, 4337-4338, 4578-4580, 4748, 4753. The bench cuts created level benches along the hillsides (R. 2512- 2513, 3520, 3526, 3539-3544, 3938, 3977-3983, 4341-4343), which are up to 75 feet long (R. 3937). The trail construction compacted the soil, which causes physical changes to the surface of the trail and the soil underneath the trail. See R. 819.

As a result of these construction techniques (and the

resulting negative ecological impacts (see Point III.B, infra)), Class II trails have many of the physical characteristics of roads, especially when compared to foot trails, which do not require wide swaths of cleared land or grading. R. 700-705, 761, 774, 822, 3519-3522, 3527-3537, 3546-3547, 4851-4852. Regardless of whether or not the Class II trails are more road-like or more trail-like, their impacts are significant.

Foot trails typically have a tread width of 14 to 26 inches wide and a total cleared area of 3 to 6 feet. R. 4351. They meander through the forest, and avoid trees, roots, stumps, and rocks whenever possible, rather than removing them. R. 636, 682, 745-749, 763, 811, 3694-3697, 3704-3707, 3922-3923, 3926-3928, 3931-3934, 3936, 4010-4012, 4913-4916. By contrast, the Class II trails follow a straight route through the forest, with a clearing of a minimum of 9 feet wide, and up to 20 feet wide, cutting, bulldozing, removing, and flattening everything in their path. R. 754-759, 763, 3926-3928, 3931, 3937-3938, 3942-3943.

Even though DEC claims to have closed some older snowmobile trails to use by snowmobiles to reduce forest fragmentation, those closures did not offset the negative impacts of the Class II trails on the Forest Preserve, as the trial court found that the effect of these closures was "not in and of itself significant." R. xxvi. The court also "note[d] the lack of evidence from the defendants on the re-vegetation of [the closed]

trails which has occurred since or as a result of the trail closures". R. xxvi. The Appellate Division's discussion of a different aspect of habitat fragmentation (R. 5015) does not change these findings by the lower court, which favored Plaintiff's position. See CPLR § 5501(b). See also Plaintiff's Brief, Point V.B.

As shown above, the construction of the Class II trails caused significant negative changes to the physical characteristics of the Forest Preserve, and did not preserve the Forest Preserve in its wild state. See Association v. MacDonald, 253 N.Y. at 242. Accordingly, the construction of the Class II trails is "forbidden by the Constitution". Id. at 241.

### B. Class II Trail Construction Caused Short-term and Long-term Changes to the Habitat and Ecology of the Forest Preserve

As a result of biological and physical changes to the Forest Preserve, the construction of the Class II trails has changed the habitat and ecology of the Forest Preserve land on which they were built and the adjoining land, and will continue to negatively impact the wild forest nature of the Forest Preserve. R. 3740-3741. Defendants did not rebut Plaintiff's compelling evidence on this issue, and neither of the lower courts made a finding of fact on it.

The Class II trails caused habitat changes that will alter

the composition of the forest floor's vegetation, and also lead to the future spread of invasive species. Defendants argue (Reply Brief, p. 34) that the Appellate Division "expressly affirmed the trial court's factual findings" regarding the future spread of invasive species, so that this Court can not consider this factual issue. However, while that decision did describe some of this testimony (R. 5014), it did not actually make findings about the larger issue of future habitat change along the trails, or about the increased potential for the future spread of invasive species due to changes in the forest canopy as a result of the creation of the Class II trails. R. 5014-5015. The trial court did not address this testimony at all. Thus, these issues may be considered by this Court without it being restrained by the limitations of CPLR § 5501(b).

Plaintiff's expert forest ecologist, Stephen Signell, conducted a rigorous statistical analysis of the increased presence of grassland habitat on the Seventh Lake Mountain Trail as a result of opening up the forest canopy, which allowed more sunlight to reach the forest floor. This changed the habitat in the affected areas from forest to grassland, and allowed grasses to invade the forest. R. 653-671 (photos); 3745-3761.

Mr. Signell's quantitative analytical study of the presence or absence of grass on the trail showed that there are statistically significant, measurable, differences between the

amount of grass on Class II trails, compared to the amount of grass (or lack thereof) in the Forest Preserve adjoining the Class II trails. R. 653-668, 3745, 3759. He found that 56% of the 117 sites on the 11.9-mile trail that he studied had grass growing on the trail, and no grass growing off the trail. R. 3745-3746, 3755-3758.[10] It was Mr. Signell's opinion, based on these differences, that these Forest Preserve areas now have a grasslands ecosystem, rather than the forest ecosystem that existed before the trail was built. R. 3738, 3755-3760, 3763-3764; see R. 3487, 3519.

Plaintiff's expert conservation biologist, Dr. Ronald Sutherland, recognized that some of the forest canopy over the Class II trails had remained closed (R. 3669), but also gave his opinion that in some areas, the forest canopy had been opened. R. 3545. Defendants' expert, Dr. Timothy Howard, reported his observations that some parts of the one trail that he visited "had closed canopy" (R. 4460), but he also admitted that "there were certainly other parts where there were openings in the trail where we had open gaps, canopy gaps." R. 4460. Despite this debate among the witnesses as to the degree to which the canopy was or was not opened up, according to the witnesses' subjective definitions thereof, there was no dispute that the construction

[10] Mr. Signell's testimony was supported by dozens of photographs and an eight-minute video. R. 653-668, 700-703, 707-712, 767-769. The video (Exhibit 76) is in the Record following R. 678.

of the Class trails had altered the habitat on over half of the trail mileage that was analyzed in Mr. Signell's study.

Dr. Sutherland testified that the amount of grass that Mr. Signell's study had found to be growing on that trail created a significant impact on the ecology of the forest because "different species are able to basically flow up and down th[e] trail and colonize more of the forest interior environment that they would otherwise not have access to". R. 3601.[11] See R. 3545-3554, 3599-3616, 4460. In addition, he testified that the Class II trails would affect wildlife populations. R. 3602-3606. Defendants' witnesses did not rebut this testimony.

Defendants' expert witness Dr. Howard agreed that linear corridors through forests will have detrimental impacts on them and can be pathways for invasive species. R. 4547-4548. He also agreed that it "can take decades for a forest to completely recover from the presence of roads, trails or linear corridors that were once used by vehicles or snowmobiles". R. 4551. Defendants' witness did not have objective data to rebut Mr.

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[11] The trial court opined that Dr. Sutherland's testimony was not well supported on this point. R. xiv. In doing so, it failed to appreciate that this witness was providing additional scientific background (R. 3601) for the unrebutted effects that Mr. Signell had found on the ground. The combination of Signell's field research and opinion (R. 3745-3761) and Sutherland's scientific explanation (R. 3601) overcomes any shortcomings that the court may have perceived in Sutherland's testimony. Indeed, the court also found that Dr. Sutherland was "a well-qualified expert in the field of Environmental Science". R. xx.

Signell's robust data set quantifying the extent and ecological effects of canopy alteration.

Defendants did offer testimony about the spreading on the disturbed areas of a "conservation mix" of seeds containing grasses, shrubs, and other nonwoody vegetation (R. 4375) to control erosion (R. 4271-4272, 4762). This fact supports Mr. Signell's testimony that the construction of the Class II trails will contribute to the introduction and spread of species that are not associated with a forest habitat.

The evidence shows that over time the Class II trails will cause invasive species to spread through the Forest Preserve along the trail corridors, leading to the loss of native vegetation and animals. R. 727, 3545, 3555-3559, 3590-3593, 3470-3742, 4548.

Despite finding Mr. Signell to be a credible expert witness (R. xiv), and despite the fact that Defendants offered no proof to rebut Mr. Signell's testimony, Supreme Court (R. xxiv) and the Appellate Division (R. 5015) focused on a few initial disputed sightings of invasive plants on trails outside of Mr. Signell's study area. They did not determine the trails' long-term impacts on forest habitat, which both parties' experts agreed would occur. Thus, this issue should be considered by this Court.

The building of the trails will also cause additional damage to the Forest Preserve's trees over time. Some of the most

obvious long-term impacts include the destruction of additional trees and damage to the roots of other trees adjacent to the Class II trails. R. 708, 712-713, 783, 3538-3541, 3574-3585, 3597-3599, 3642, 3665, 3739-3741, 3930-3931. See Plaintiff's Brief, pp. 19, 21, 60. Trees along the sides of the newly built trails, which have not yet been directly destroyed by DEC, are prone to dying post-construction due to: (i) construction equipment having damaged their bark or cut their roots; (ii) the forest canopy being compromised such that there is "greater wind penetration ... lead[ing] to trees falling over directly or being tipped up and then falling over" (R. 3582); and (iii) "alterations in the microclimate around the tree ... lead[ing] to lower water availability and ... stressing a tree enough to cause it to die" (R. 3582). R. 708, 712-713, 838, 3539-3541, 3579-3586, 3928-3931.

This is not a risk with hiking trails, because tree roots are not cut, and the trails are not excavated or flattened. R. 747-752, 3905-3941. This is a reviewable issue because the trial court (R. xxi) and Appellate Division (R. 5014-5015) did not address this issue in their decisions.

Also, even if few or no old growth trees were actually cut down, the trails still caused adverse habitat change in stands of old growth trees. R. 685-692, 3648-3649, 3654-3655, 3665-3666, 3727-3728, 3776. Dr. Sutherland testified that these impacts to

this significant "globally endangered" ecosystem would be detrimental to it (R. 3654-3655) for a variety of reasons (R. 3482, 3510-3511, 3545-3554, 3599-3616). See also Plaintiff's Brief, pp. 60-61.

As shown above, the Class II trails will continue to negatively impact the wild forest nature of the Forest Preserve well past the completion of their construction. See also R. 3597-3600, 3665, 3755-3760, 4852-4859. APA's own staff witness admitted that the Class II trails had adverse and significant impacts. R. 818, 824, 829-830, 836. The ecological damage to the land under the trails and the adjoining land will persist for decades and will lead to ongoing damage to the wild forest nature of the Forest Preserve, in violation of Article 14, § 1.

## CONCLUSION

Plaintiff's cross-appeal should be granted. Even if this Court does not review any of the factual findings by the lower courts, the proven adverse effects of the Class II trails on the wild forest nature of the Forest Preserve render them unconstitutional. Regardless of whether they are road-like, or whether they instead "are more similar to hiking trails than to roads" (R. 5014), these trails: are from 9 to 20 feet wide, unnaturally cleared, flattened and straightened, require massive 12 foot wide bridges, include numerous signs that are "akin to

road signs" (R. xxiv), and will alter the forest habitat for much of their length. See Point III, supra; Plaintiff's Brief, Point V.A.

None of these things are found in a wild forest. This Court should find that, on these facts, the construction of the Class II trails did not "preserve these [lands] in the wild state now existing." Association v. MacDonald, 253 N.Y. at 242; Point II.A, supra. Even if this Court were to apply the weaker "impairs" standard used by the lower courts (R. 5015), upon the facts, as found by those courts, it should find that the Class II trails, as a matter of law, unconstitutionally impair the wild forest nature of the Forest Preserve.

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**CERTIFICATION OF COMPLIANCE WITH RULE 500.13(c)(1)**

John W. Caffry, an attorney for the respondent-appellant, hereby certifies as follows: the foregoing reply brief was prepared on a computer word-processing system. A monospaced typeface was used, as follows:

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