June 9, 2021

Hon. Basil Seggos, Commissioner
NYS Department of Environmental Conservation
325 Broadway
Albany, NY 12233

Hon. Terry Martino, Executive Director
NYS Adirondack Park Agency
PO Box 99
Ray Brook, NY 12977

RE: Reform of Forest Preserve Management, Policies, and Regulations

Dear Commissioner Seggos and Ms. Martino:

The May 4, 2021 decision by the New York Court of Appeals ruled that Class II Community Connector Snowmobile Trails violated Article 14, Section 1 of the New York Constitution. This ruling capped an 8-year legal challenge by Protect the Adirondacks against the Department of Environmental Conservation (DEC) and Adirondack Park Agency (APA). This ruling is not surprising, as it confirms the position that Protect the Adirondacks has taken since the early 2000s. For two decades Protect the Adirondacks, its predecessor organizations, and many others, have been telling anyone who would listen that Class II trails, or anything like them, violated Article 14, Section 1, the famed forever wild clause, of the State Constitution. In the end, eight of the twelve judges who looked at the evidence found that Class II trails were unconstitutional, which is remarkable given that eight of twelve Americans don't agree on much of anything these days.

The Court of Appeals decision was issued more than one month ago, yet we have heard only silence from the two state agencies responsible for the constitutional violations. DEC issued a tepid and misleading statement that failed to even say the name "Class II Community Connector Snowmobile Trail." For its part, all that APA could muster was a stray comment by one Board member who wondered aloud at APA's May meeting about what the decision means.

In the last month neither agency has taken responsibility for this decision, or indicated any direction that can be taken to remedy the agencies' dereliction of their duty to protect the Forest Preserve. Neither agency has tried to explain to the public how it is that they ended up on the wrong side of forever wild. Neither agency has stated how it plans to reform its Forest Preserve management and policies to comply with the Court's ruling and start the hard work to get back on the right side of forever wild and the right side of history.

Protect the Adirondacks believes that both agencies have a lot of work to do. This work involves revising the policies that authorized construction practices for Class II trails, changing the management plans that authorized miles of new Class II trails, the active restoration of the Forest Preserve lands that were damaged by construction of Class II trails, and amending the major policies that were circumvented and undermined by DEC and APA in their quest to build a Class II trail network of several hundred miles in the Adirondack Forest Preserve, to ensure that this can never happen again.

THE STATE'S PLANNING FOR THE CLASS II TRAILS IGNORED THE CONSTITUTION FOR DECADES

The construction of a Class II Community Connector Snowmobile Trail network in the Adirondack Park on Forest Preserve lands was a major priority for the Cuomo Administration and its political allies among elected officials in the Adirondacks and North Country. Protect the Adirondacks always saw this as the largest expansion of motorized use in the history of the Forest Preserve, and the largest violation of the forever wild clause, perhaps ever. The vehemence with which the Cuomo Administration embraced Class II trails alarmed us. Though the idea of a Class II snowmobile trail system had been alive at the DEC for more than a decade, embraced enthusiastically by senior staff, different administrations were wary of them, and took to heart our complaints, and the complaints of others, about their unconstitutionality.

Both of the organizations that later merged to form Protect the Adirondacks participated in Governor Pataki's Snowmobile Focus Group. For several years, the Pataki Administration took the position that a new type of wide snowmobile trail, which came to be known as the Class II trail, could only be approved if the Adirondack Park State Land Master Plan (APSLMP) was amended. But after years of pressure, the Pataki Administration relinquished that position and decided to subvert the Master Plan instead. In the end, the Snowmobile Focus Group played a key role in producing the Snowmobile Plan for the Adirondack Park, though its members were divided. Throughout the Snowmobile Focus Group process, and in our public comments on the draft Snowmobile Plan in 2004, we argued that Class II trails would necessitate a level of tree cutting that would violate Article 14 and that they would violate the APSLMP. At every step of the way in the development of the Snowmobile Plan we raised issues about its lack of compliance with Article 14.

In a 2004 public comment letter on the draft Snowmobile Plan, one of PROTECT's current attorneys, John Caffry, wrote:

> The Plan (page 16) recognizes that it must conform to the Constitution, but then never holds its proposals up against Article XIV and assesses whether or not they would pass

> constitutional muster. As one of the few attorneys who has been involved in litigating an Article XIV case (see Balsam Lake Anglers Club v. NYSDEC, 199 A.D.2d 852 (3d Dept. 1993), it is my opinion that the Plan clearly fails that test.

On its way out the door, the Pataki Administration, ambivalent about what to do with the problematic Snowmobile Plan for the Adirondack Park, waited until its last days in October 2006 to finalize it.

In 2007 and 2008, the Spitzer Administration put the brakes on the Snowmobile Plan and Class II trails, but unfortunately that period did not last long. In hindsight, that's too bad because there were people in the Spitzer Administration who took seriously the public's concerns that Class II trails violated the State Constitution.

The Paterson Administration, under pressure from local governments, and APA and DEC senior staff, greenlighted the development of the 2009 snowmobile trail "Management Guidance" that set the policy for snowmobile trail siting, construction, and maintenance on Forest Preserve lands in the Adirondack Park. During a public hearing on this guidance, Protect the Adirondacks wrote that Class II trails represented "unconstitutional uses of the Forest Preserve."

For draft Wild Forest Unit Management Plan after draft Wild Forest Unit Management Plan, Protect the Adirondacks submitted comments that Class II trails violated Article 14. Here's a sample comment to the APA regarding the Saranac Lake Wild Forest UMP:

> Class II community connector snowmobile trails are designed and built for snowmobiles to travel 25 miles per hour or higher and be groomed with large, tracked groomers. No other recreational "trail" use sees this kind of speed. No other trail system in the Forest Preserve requires 9-11 foot wide trails, specifically designed and constructed to allow regular grooming with large multi-ton motor vehicles and high-speed snowmobile travel. Unlike other trails built by hand, these trails are excavated with heavy machinery, utilize extensive bench cutting, remove thousands of trees over 3 inches diameter at breast height (DBH), remove tens of thousands of trees under 3 inches DBH, remove the entire native understory, often replace the native understory with a grass mix, open the forest canopy, often fracture and chip away bedrock, utilize oversized bridges often equipped with reflectors, and are built to handle operation of motor vehicles. No other recreational activity in the Forest Preserve, outside of Intensive Use Areas, requires such profound terrain alteration and destruction of natural resources.
>
> PROTECT believes that class II community connector snowmobile trails violate Article XIV, Section 1 of the NYS Constitution.

Along with violating Article 14, the other tragedy of the Cuomo Administration's embrace of Class II trails was its abuse of the APSLMP. The APSLMP defines a snowmobile trail as "a marked trail of essentially the same character as a foot trail" and mandates that it be "compatible with the wild forest character of an area." A snowmobile trail "should be designed and located in a manner than will not adversely affect adjoining private landowners or the wild forest atmosphere...". Class II trails are 9-12 feet in width, and often wider, very different that a foot trail.

For years, in comments on UMPs, Protect the Adirondacks stated that Class II trails simply do not have the character of a foot trail and violated both the wild forest character and the wild forest atmosphere of the land. Protect the Adirondacks consistently stated that Class II trails did not conform to vital APSLMP standards, yet both the DEC and APA continued to embrace the fiction that they were the same as a foot trail.

A Class II trail's tread surface is graded, leveled, and flattened by a multi-ton excavator. Extensive bench cuts are dug into side slopes that parallel the trail for long distances, protruding rocks are removed, extensive tree cutting is done, all understory vegetation is removed, and oversized bridges are built to support multi-ton groomers. In places bedrock may be fractured and chipped or gravel may be used to stabilize the trail surface. Large bridges have been built and outfitted with plastic reflectors for nighttime driving.

A "foot trail" is where people walk single file. They step over roots and rocks. The trail surface is uneven and follows the terrain. There are scarcely any stumps of cut trees. Vegetation on the side often encroaches, and the trail is canopy covered. Steppingstones and split logs are commonly used to pass over streams and wet areas. Unlike Class II trails, there are no reflectors or large directional traffic signs.

The Class II Community Connector Snowmobile Trail was a fundamentally new type of trail in the Forest Preserve. At every step of the way, the DEC and APA leadership undermined state policies and the State Constitution in their zeal to build Class II trails.

The gears of justice grind slowly, and though our concerns were blown off year after year after year, when the evidence was assembled for a fair and impartial review, without fear or favor, where political influence could not be used to subvert the plain language of Article 14, Class II trails were found to be illegal. The Court of Appeals rejected all of DEC's and APA's rationalizations for the trails:

> Further, the Class II trails require greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers. Their construction is based on the travel path and speed of a motorized vehicle used solely during the snow season. The trails may not be built like roads for automobiles or trucks, but neither are they constructed as typical hiking trails.

The Court also found that the trails are "the same width as an interstate highway lane and [wide] enough to accommodate two SUVs, side-to-side." Echoing one of the framers of Article 14 at the Constitutional Convention of 1894, the Court concluded that "the door is closed because the planned Class II trails are constitutionally forbidden."

DEC AND APA MUST REFORM THEIR MANAGEMENT OF THE FOREST PRESERVE

In light of the May 4, 2021 decision by the Court of Appeals, DEC and APA must work to repair their Forest Preserve management programs and earn the trust of the public by showing that

both agencies have heard the Court and taken to heart its decision. The list below details some of the work that DEC and APA must undertake to get back on the right side of forever wild.

Public Statements: Neither the DEC nor APA have managed, in more than a month, to say anything of substance about the Court of Appeals decision that found that both agencies violated Article 14, Section 1, of the State Constitution. While the courts have held the DEC and APA accountable for violating Article 14, it appears that the leadership at both agencies has not been able to muster the will to hold themselves accountable.

The silence of both agencies shows a profound disrespect for the public. The Forest Preserve is the People's land, and while DEC and APA are stewards of this incredible land, they do so on behalf of the People of the State of New York. When the DEC's and APA's stewardship goes so terribly awry that it's found to violate the forever wild clause of the State Constitution, the leadership of the DEC and APA should take responsibility and show the People how it is that they plan to get back on track. Publicly taking responsibility is the first step on the long road ahead for both agencies to get back on the right side of forever wild.

This is a high priority action in the short-term.

Restoration of Damaged Areas: There are large stretches of Forest Preserve lands that were damaged by the building of more than 20 miles of Class II trails, some of which will never go anywhere. These areas need to be restored. Many acres of Forest Preserve have been damaged during the construction of Class II trails and these lands must be repaired and reforested. Piles of lumber were stockpiled in these areas, over-sized bridges were built, culverts were put in, bench cuts were cut into miles of hillsides, street signs were installed, stumps and boulders were moved, grass was planted in the forest, and 25,000 trees were destroyed. All of this damage must be cleaned up, the damage must be repaired, and the ecology of the forest must be restored to its preexisting condition.

The DEC and APA must detail to the public what exactly their plans are to restore these damaged lands. If this is not done soon, Protect the Adirondacks may have no choice but to ask the courts to order DEC and APA to do it.

This is a high priority action in the short-term.

Interim Guidance for Foot Trail Construction and Maintenance: Unbelievably, DEC has no existing policy or guidance document for foot trail construction and maintenance. The testimony of DEC staff during the trial revealed that, at most, trail classification is an ad hoc affair, which can vary from UMP to UMP. To compound matters, ever since the Appellate Division ruled that the Class II trails were unconstitutional, DEC and some conservation organizations have claimed that the decision would make it impossible to build or maintain foot trails on the Forest Preserve. Nothing could have been further from the truth, and the Court of Appeals decision made that clear. The Court of Appeals decision was clear that foot trails are very different from Class II trails and are absolutely permissible on the Forest Preserve. In many ways, the Court of Appeals decision can be read as an historic *affirmation* for foot trail construction and maintenance on the Forest Preserve.

Despite this, DEC has not issued any guidance on implementation of the Court's decision, leaving trail maintenance crews in limbo. DEC must clear the air as soon as possible, so that crucial foot trail work can continue, in conformity with Article 14.

This is a high priority action in the short-term.

Revision of LF-91-2 Tree Cutting Policy: The trial and all three resulting court decisions settled the issue about the meaning of the word "timber" in Article 14 and the legal status of small diameter trees on the public Forest Preserve. Timber means all trees, not just large trees said to have merchantable value, and so Article 14, Section 1, protects all trees on the Forest Preserve. The court record is clear that the first 27 to 34 miles of Class II trails destroyed over 25,000 trees 1" DBH and greater.

The trial revealed that the DEC policy on tree cutting on the Forest Preserve (LF-91-2) was not based on science. The court decisions show that this policy needs to be revised. The courts were clear that trees of 1" DBH must be both counted and protected during state management activities on the Forest Preserve. LF-91-2 needs to be revised and brought into alignment with the decisions by the courts. In addition to covering all trees 1" DBH and above, it must assign clear responsibility for a determination as to whether each proposed tree cutting action on the Forest Preserve complies with the Constitution.

This is a high priority action in the short-term.

Revision of Snowmobile Trail Construction and Maintenance Guidance and Snowmobile Bridge Design Guidance: The snowmobile trail Management Guidance was framed in 2009 as the means to control Class II trail construction actions in the field in order to protect the Forest Preserve. Instead, the DEC and APA relied upon dubious interpretations of different passages that opened up the Forest Preserve to widespread abuse and damage and resulted in the violation of Article 14 of the State Constitution. For instance, the Guidance states:

> When undertaking any of the types of work described below with motorized landscaping equipment (almost exclusively on Class II Trails), only careful use of appropriate low-impact landscaping equipment will be approved, as determined by a "minimum requirement" decision making approach set forth in theSnowmobile Trail Work Plan. For example, use of bulldozers and creation of "dugways" will not be approved. Operators of low-impact landscaping equipment will conduct their work in optimal environmental conditions and in a manner that will not contribute to any potential degradation of the wild forest setting. All work will be done with appropriate DEC oversight.

Somehow, "low impact landscaping equipment" grew to include the use of a 6-ton excavator to smoothly grade the trail tread. The "minimum requirement" grew into the practice of using these machines to grade the trail surface from one end of the trail to the other. The Guidance says that "Limited leveling and grading may be undertaken using appropriate low-impact landscaping equipment as specified in a Work Plan." How did "limited" use turn into uninterrupted use from one end of the trail to the other? These machines caused a great deal of damage by their use to remove stumps and boulders and flatten trails that was documented in the trial record.

The Guidance also stated:

> On Class II trails, elimination or reduction of side slopes will be accomplished primarily by means of full bench cuts for which appropriate landscaping equipment may be used.The need for bench cuts will be minimized through proper trail layout. The tapering of side slopes will be allowed outside the cleared trail width. The areas dressed and tapered will be re-vegetated to restore stability and natural site conditions after the fullbench cut is created.

Somehow, "the need for bench cuts to be minimized" turned into a nearly continuous use of bench cuts that ran for hundreds of yards at a time, section after section, on the Seventh Lake Mountain Trail and the Newcomb to Minerva Trail, especially on the Harris Lake section. Bench cuts, with "tapered" upslopes and downslopes, were regularly measured at widths well in excess of 12 feet on turns and slopes, reaching 20 feet wide or more in some places. In the words of the Court of Appeals, this is "a span wide enough to site a two-car garage."

Though the Guidance says that bench cuts should be "minimized" on these trails, they became the dominant feature. Extensive bench cuts caused a great deal of damage that was documented in the trial record.

These are just two items, and there are many others, such as the fact that the Guidance never mentions Article 14. The Guidance failed to prevent damage to and degradation of the Forest Preserve. This document was flawed when it was approved by both agencies and it was flawed because of how flagrantly DEC and APA disregarded it in their field operations. The Guidance either needs to be rescinded or revised. In the short-run, the DEC and APA need to state that it is no longer valid.

The snowmobile trail Management Guidance must be reformed.

Revision of Wild Forest Unit Management Plans: There are numerous UMPs for Wild Forest Areas that authorize the construction of Class II trails. These UMPs need to be revised to delete these trails.

Wild Forest UMPs that authorized Class II trails must be reformed.

Revision of Campground Unit Management Plans: There are numerous UMPs for campground Intensive Use Areas that authorize cutting hundreds or even thousands of trees, and the planned building of structures and improvements that are not consistent with Article 14. These UMPs need to be revised to bring them into compliance with Article 14.

Campground UMPS that do not conform to the Court of Appeals decision must be reformed.

Revision of 2006 Adirondack Park Snowmobile Plan: The 2006 Snowmobile Plan for the Adirondack Park, produced by the DEC and the Office of Parks, Recreation, and Historic Preservation (OPRHP) is no longer relevant. While the goal of building community connector snowmobile trails may still exist, the use of the Forest Preserve to make connections requiring long stretches of wide new trails is no longer a viable option because such use of the Forest

Preserve violates Article 14 of the Constitution. The DEC and OPRHP need to revoke the approval of this plan, and revise it if such a plan if is to continue to exist.

The Snowmobile Plan for the Adirondack Park must be reformed.

Revision of the Adirondack Park State Land Master Plan: In addition to the violation of Article 14, Section 1, by DEC and APA, the abuse of the Adirondack Park State Land Master Plan during the planning of the Class II trials is another sad chapter. The APSLMP defines a snowmobile trail as "a marked trail of essentially the same character as a foot trail" and mandates that it be "compatible with the wild forest character of an area." Though Protect the Adirondacks, and others, complained to the DEC and APA for years that Class II trails were nothing like foot trails, both agencies obdurately persisted in that fallacy.

The courts fully recognized these differences. The State Supreme Court decision stated: "Many of the plaintiff's arguments are premised upon the proposition that the trails are constructed as to have the same effect on the Preserve as forest roads. It is clear to the Court from the evidence presented that the trails at issue herein do not share the identical essential characteristics of foot trails or forest roads, but rather fall somewhere between the two."

The Court of Appeals wrote:

> Further, the Class II trails require greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers. Their construction is based on the travel path and speed of a motorized vehicle used solely during the snow season. The trails may not be built like roads for automobiles or trucks, but neither are they constructed as typical hiking trails. Under DEC's 2009 guidance document, the Class II trails are not to exceed nine feet in width except on sharp curves, steep slopes, and bridges,where a 12-foot width is allowed—the same width as an interstate highway lane and enough to accommodate two SUVs, side-to-side. The proposed bench cuts—cuts into sloped ground and removal of the cut soil, rock and trees to create a "bench" upon which a trail can be placed—require clearing the land on the up- and down-slopes of the trail, resulting in the clearing of the forest floor up to 20 feet in width in certain areas—a span wide enough to site a two-car garage.

The impartial review by the trial court and appellate courts in this case found what DEC and APA willfully chose not to see -- a clear distinction between Class II trails and foot trails. For over two decades, DEC and APA pretended that Class II trails were the same thing as a foot trail. The willful blindness of the state agencies and their inability to admit the simple facts, so apparent to most people when out in the forest, has caused untold damage to the credibility of DEC and APA. DEC and APA have a lot of work to do to regain the public trust in matters regarding the APSLMP. Both agencies need to come clean and inform the public where they failed in their fidelity to the APSLMP and how they plan to change in the years ahead.

To prevent such failures in the future, the APSLMP must be revised to integrate the analysis of consistency with Article 14 into the approval process for UMPs and other planning documents for the Forest Preserve. DEC and APA can no longer ignore Article 14 during this process. The

APSLMP must also be revised to better define snowmobile trails, so as to make the definition more enforceable.

The Adirondack Park State Land Master Plan must be reformed.

CONCLUSION

Protect the Adirondacks urges DEC and APA to proceed with haste to embrace reform of their Forest Preserve management. In its recent decision, the state's highest court said:

> On this appeal, we must determine whether the state's plan for the construction of approximately 27 miles of Class II community connector trails designed for snowmobile use in the Forest Preserve is permissible under the New York Constitution. The plan requires the cutting and removal of thousands of trees, grading and leveling, and the removal of rocks and other natural components from the Forest Preserve to create snowmobile paths that are nine to 12 feet in width. We conclude that construction of these trails violates the "forever wild" provision of the New York State Constitution (part XIV, §1) and therefore cannot be accomplished other than by constitutional amendment.
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> Applying *MacDonald* to the appeal before us, we conclude that the planned 27 miles of snowmobile trails may not be built without constitutional amendment.
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> If the trails at issue here are equally important to New York as those projects were, then the people can express their will accordingly through the democratic process. Until they say otherwise, however, the door is closed because the planned Class II trails are constitutionally forbidden.

The state's highest court said that Class II trails may not be built in the Forest Preserve. The state's highest court said that "the door is closed" on Class II trails. Protect the Adirondacks stands ready to assist the DEC and APA to regain their lawful footing as they work to comply with Article 14 and rebuild their Forest Preserve management programs.

Sincerely,

Peter Bauer
Executive Director

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