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August 23, 2021

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**Executive Director**

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

**RE: DEC's Response to the *Protect the Adirondacks* Decision is Unacceptable**

Dear Commissioner Seggos:

Protect the Adirondacks has a number of concerns about the response by the Department of Environmental Conservation (DEC) to the May 4, 2021 Court of Appeals decision in *Protect the Adirondacks v. Department of Environmental Conservation and Adirondack Park Agency (APA)*. This decision struck down the DEC's plans to build a network of Class II Community Connector Snowmobile Trails across the Adirondack Forest Preserve. In the months after the release of this decision, it appears that the DEC's response to this decision has been largely to ignore it, and to conduct its management of wide snowmobile trails and other projects on the Forest Preserve largely as if it were still business as usual.

This apparent course of action was revealed by DEC at the July 20<sup>th</sup> Forest Preserve Advisory Committee (FPAC) meeting and in recent Environmental Notice Bulletin (ENB) notices. Protect the Adirondacks finds that there are a number of troublesome issues in how the DEC plans to move ahead after the *Protect* decision. We believe that the DEC is making a grave mistake in largely ignoring the Court, and deliberately misreading the decision, in how it plans to move ahead with significant construction projects on the Forest Preserve, and in how it plans to administer snowmobile trails on the Forest Preserve.

**Protect the Adirondacks**

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We urge the DEC to change course, embrace the full scope of the *Protect* decision, and develop an interim plan, to be followed by permanent reforms, for the management of snowmobile trails and for how it undertakes construction projects on the Forest Preserve.

Specifically, the problems with DEC's response to the *Protect* decision include:

**Decision to Rescind the 2009 Snowmobile Trail Construction and Maintenance**

**Guidance:** In an order dated June 30, 2021, you rescinded this document. The *Protect* decision effectively made the Guidance null and void because its primary focus was the construction and maintenance of Class II trails. While we see this rescission as the correct choice, we believe that the DEC's related decision to resurrect an outdated and failed policy from 1998 is a poor decision. The DEC would be better served by working with a number of groups to develop an interim plan that complies with the full scope of the *Protect* decision, and then working on a longer-term regulatory solution.

**Decision to Review UMPs to Remove Class II Trails:** The *Protect* decision struck down Class II trails, which had been widely approved in many recent Wild Forest area Unit Management Plans (UMPs). The DEC's commitment at the FPAC meeting to review the approvals for these trails in UMPs is correct. However, if they are just reclassified as Class A trails under ONR-2, rather than being removed from the UMPs, that would not be appropriate, as discussed below.

**ONR-2 and DEC's Decision to Maintain the Class II Snowmobile Trail System by**

**Another Name:** While we support the DEC's decision to rescind the 2009 Snowmobile Trail Construction and Maintenance Guidance, we're troubled by the DEC's insistence that its only option is to go back to Office of Natural Resources Policy #2 (Snowmobile Trails - Forest Preserve) (ONR-2) for trails in the Adirondack Park. In your June 30<sup>th</sup> order you state "While the 2009 Guidance superseded ONR-2 for the Adirondack Forest Preserve, ONR-2 remained the governing policy for the Catskills and will continue to be used in the Catskill Park. Staff should rely on this policy for the management and construction of snowmobile trails in the Forest Preserve."

We believe this decision is a mistake. ONR-2 is inadequate to direct the state's snowmobiling program in the Forest Preserve. ONR-2 is not consistent with the *Protect* decision and it also fails to provide proper guidance for managing snowmobile trails on the Forest Preserve in both the Adirondack and Catskill Parks. Its biggest problem is that it permits snowmobile trails to be cleared to a width that was found to be unconstitutional by the Court of Appeals.

Under ONR-2, Class A trails are 8 to 12 feet wide, very similar to Class II trails. ONR-2 states in Sections 3 and 4:

3a. Class A trails may be kept clear to a width of eight (8) feet on straight or gently curved stretches of trail and to a width of twelve (12) feet on curves and steep grades.

4a. Class A trails may be kept clear to a width of eight (8) feet on straight or gently curved stretches of trail and to a width of twelve (12) feet on curves and steep grades where the cutting of trees or other woody growth of over three (3) inches DBH is not necessary.

The Class A trail in ONR-2 is not appreciably different from the Class II trail. The Court of Appeals in the *Protect* decision found that “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” and then found those trails to be unconstitutional. *Protect the Adirondacks* finds it hard to believe that a court would view Class A trails in ONR-2 any differently.

### **ONR-2 Provides Conflicting or Incoherent Direction on Snowmobile Trail**

**Management on the Forest Preserve:** ONR-2 is an outdated snowmobile trails policy. ONR-2 also fails to address or provide guidance on major practical snowmobile trail administration issues that the DEC likely has not thought through. These relate to both what the policy includes, and what is omitted.

For example, on the question of snowmobile trail mileage on the Forest Preserve, ONR-2 states “The state should encourage the development of snowmobile trails on private lands. To the extent that such trails become available, the mileage of snowmobile trails on wild forest land should be proportionately reduced.” If only this was true. The DEC has approved hundreds of miles of snowmobile trails on privately owned lands where the state holds conservation easements in the Adirondack Park since 2000, yet overall Forest Preserve snowmobile trail mileage has continued to increase at the same time. Clearly, the DEC is not complying with ONR-2 on this count. If DEC is relying on ONR-2 in the Adirondacks, when is it that we should expect to see snowmobile trail mileage on the Forest Preserve proportionally reduced?

ONR-2 creates other problems too. At the July 20<sup>th</sup> FPAC meeting snowmobile advocate members voiced their position that since Class II trails were now illegal, they wanted to revisit approved Wild Forest Area UMPs to reopen “interior” snowmobile trails had been closed in exchange for building new Class II trails on the periphery. DEC staff present agreed with that sentiment. Unfortunately, that sentiment would appear to violate ONR-2, which states “Existing snowmobile trails less than five miles in length, or otherwise inappropriate for snowmobile use, should

be converted to ski touring trails.” Most of the “interior” snowmobile trails closed as the result of construction of Class II trails were either short dead-end trails or were trails that had long been abandoned. ONR-2 further states “Dead-end snowmobile trails shall not be established and any such trails now in existence shall be closed unless such trail dead-ends at a specific facility or feature used by the public in the winter season.” Reopening the closed trails would appear to violate this requirement of ONR-2 in most cases.

Another problem in ONR-2 is on the question of multiple use trails. The DEC has made the “multi-use trail” a major policy objective. Many of the Class II trails were called multi-use trails, as DEC maintained they would also be used for hiking, horseback riding, and mountainbiking. Protect the Adirondacks always maintained that the multi-use trails were a policy fiction. The reality that we saw in the field was that the design and construction methods of Class II trails made them unattractive for other users. However, ONR-2 pre-dates the DEC’s adoption of the multi-use trail concept and directs DEC planners to build and maintain separate trail systems. ONR-2 states “Care should be taken to designate separate areas for incompatible uses such as snowmobiling and ski touring or horseback riding and hiking.”

Last, ONR-2 provides scant guidance on trail design, construction and maintenance, which are all important issues that contributed to the Class II trails being found to be constitutionally impermissible. ONR-2 is silent on bench cutting, removal of rocks, roots or stumps, use of heavy machinery, and grading of the tread surface, among other important features that both defined the Class II trails and have become staples of modern snowmobile trails. Thus, Protect the Adirondacks believes that these trail building techniques are all prohibited under ONR-2. To that extent, ONR-2 is consistent with the *Protect* decision, but this needs to be clarified.

For all of the reasons shown above, ONR-2 is an incoherent policy for the management of snowmobiling on the Forest Preserve in the Adirondack Park.

**Not Restoring Damaged Class II Trails is Unacceptable:** At the July FPAC meeting, DEC staff talked about doing only very limited restoration of the Class II trails that were struck down as illegal. Staff mentioned that there may have to be some tree planting to narrow the trails. DEC staff also said that their management of Class II trails in the future would be relatively unchanged and that they planned to continue to use existing Class II trails, such as the Seventh Lake Mountain Trail, as community connector snowmobile trails.

This idea of the DEC staff does not address many of the impacts of Class II trail construction on the Forest Preserve. In finding these trails to be unconstitutional, the Court of Appeals specifically pointed to “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 Newcomb to Minerva Class II trail was only partially built. On extensive stretches of the trail the courts blocked tree cutting. DEC has no plan for how to build a bridge over the Boreas River needed for this trail. The DEC staff also seems to not realize that the Newcomb to Minerva trail is a trail to nowhere, blocked by private landowners who have zero interest in a trail through their lands at the Minerva end. This trail will never be completed, so it should be formally closed, regraded, and replanted, and the bridges and stockpiled supplies must be removed.

Protect the Adirondacks strongly objects to DEC’s decision not to undertake major restoration efforts, and/or trail closures on the illegal Class II trails. Because the initial decision by the trial court found that the trails were constitutional, it never addressed Protect the Adirondacks’ request in its original 2013 Complaint that DEC be ordered to restore the damage caused by trail construction. We hope that we do not have to return to that court to have it decide this issue. Protect the Adirondacks urges the DEC to voluntarily reconsider its unwise position.

**DEC’s Decision to Ignore the Courts and Rely Upon the Discredited LF-91-2 Tree Cutting Policy is Unacceptable:** The Court of Appeals decision on May 4, 2021 was consistent with the lower court decisions with regards to the definition of the word “timber” in Article 14, Section 1, of the state Constitution. Both of the lower courts found that trees under 3” DBH were “timber” under Article 14 and the Court of Appeals did not overrule those findings.

The Court of Appeals stated that 25,000 trees were destroyed in the first 27 miles of Class II trail construction. This was an important factor in its determination that Class II trails violated the Constitution.

The Court’s reliance on the figure of 25,000 trees in its decision followed the Appellate Division, Third Department’s July 2019 decision which found that 25,000 trees had been destroyed by the state’s tree cutting for the Class II trails. The Appellate Division based its decision on the trial court’s decision and the factual record from the 2017 trial, where evidence was presented, and credited by the trial court, that proved that 25,000 trees 1” DBH or greater were destroyed. The Appellate Division affirmed the trial court’s definition of the historic meaning of the word “timber” in Article 14 to mean all trees and determined that a tree under 3” DBH was indeed a tree that merited constitutional protection. The Court of Appeals then relied upon these findings in reaching its decision.

The DEC has chosen to misread the Court of Appeals decision and say that it was somehow silent on the issue of the meaning of the word “timber” and when a tree merits constitutional protection under Article 14. The Court of Appeals’ reliance on the lower courts’ finding that 25,000 trees were destroyed disproves that wishful thinking.

We believe that LF-91-2 is not consistent with the Constitution and that the DEC should revise its tree cutting policy to recognize that all trees 1” DBH and larger must be counted. DEC should also revise its policy to specifically require an analysis of whether each project being reviewed meets the “substantial extent” and “material degree” test for tree cutting and other construction activities under the 1930 *MacDonald* decision and the *Protect* decision.

DEC’s failure to revise its tree cutting policy will invite legal challenges to future projects that will likely result in injunctions that could also collaterally affect other projects that involve tree cutting on the Forest Preserve. DEC would be better off fixing its policy to come into compliance with the Constitution.

### **DEC’s Decision to Greenlight Forest Preserve Projects that Likely Violate**

**Constitutional Tree Cutting Levels:** Recent ENB notices for various DEC construction projects on the Forest Preserve rely upon the LF-91-2 tree cutting policy. This policy was widely discredited during the trial in the *Protect* lawsuit as being inconsistent with the spirit and intent of Article 14, Section 1. As shown above, the courts in the *Protect* case agreed that Article 14, Section 1, protected all trees 1” DBH and larger on the Forest Preserve. The trial testimony also showed that LF-91-2 was not based on science. LF-91-2 must be rescinded and replaced with an updated policy where all trees 1” DBH are protected and subject to the longstanding *MacDonald* “material degree” and “substantial extent” test as required by the case law of the three relevant Article 14 decisions in *MacDonald*, *Balsam Lake*, and *Protect*.

At least two current projects appear to cross the line for allowable tree cutting on the Forest Preserve. These are:

#### **ENB Region 3 Notices 7/14/2021**

##### **Tree Removal for the Relocation of a Section of the Long Path Trail**

The action involves cutting and removal of 1,267 trees three inches or larger in diameter at breast height (DBH) to facilitate the relocation and construction of six miles of new multiple-use trail that will allow snowmobile use during appropriate weather conditions. This project will be completed through an approved work plan and is identified in the approved 2019 Sundown Wild Forest and Vernooy Kill State Forest Unit Management Plan. Trail construction will not exceed standards for Class B trail as defined in Office of Natural Resource Policy #2, Snowmobile Trails - Forest Preserve. Tree cutting will be in compliance with Lands and Forests Policy #91-2 on

Cutting, Removal or Destruction of Trees and Other Vegetation on Forest Preserve Lands.

The project is located in the Sundown Wild Forest in the Towns of Rochester and Wawarsing, New York.

### **ENB Region 6 Notices 6/30/2021**

#### **Tree Removal for the Bog River Dam Rehabilitation Project and Parking Areas**

The action involves the cutting and removal of 655 trees three inches or larger in diameter at breast height (DBH) for maintenance and new construction in the vicinity of the Bog River Dam, also known as Low's Lower Dam. The dam will receive maintenance which will replace deteriorated masonry and gate hardware, repair the penstock, remove a former powerhouse structure and anchor the dam to the bedrock/earth below to bring it up to current dam safety standards. Additionally, existing parking areas along the Lower Dam Road will be expanded and improved, and a new parking area adjacent to the road will be constructed. The existing parking area near the dam will also be upgraded to meet ADA/accessible parking standards.

This project will be completed through an approved work plan and is identified in the approved 2002 Bog River Unit Management Plan. Tree cutting will be in compliance with Lands and Forests Policy # 91-2 on Cutting, Removal or Destruction of Trees and Other Vegetation on Forest Preserve Lands.

The project is located in the Eastern Five Ponds Access Primitive Area, Round Lake Wilderness Area in the Town of Piercefield, St. Lawrence County, New York.

Protect the Adirondacks has not yet completed its fieldwork to assess the total level of cutting of trees between 1" DBH and 3" DBH that these projects will require, but will have this data soon. The preliminary tree counts raise questions about the compliance of these projects with the *Protect* and *MacDonald* decisions, as they do not appear to comply with those decisions.

**The Better Way Forward is for DEC to Comply With the Courts' Decisions:** Protect the Adirondacks is assessing its options, which include going back to court. We have been contacted by other organizations that are also considering new legal options.

There is a better way. We urge you to take charge of the DEC's response to the *Protect* decision and sit down with the interested groups immediately to flesh out a viable program for how the DEC will move ahead to manage snowmobiling and other construction projects on the Forest Preserve. We've provided many ideas above. This will be a better path forward than inviting continued legal challenges, which, if DEC's track record over the last few years

is any indication, may also cause unnecessary disruption of even beneficial Forest Preserve projects.

On behalf of the Board of Directors of Protect the Adirondacks, please let me express our gratitude for the opportunity to share our concerns with you.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Bauer". The signature is fluid and cursive, with the first name "Peter" being more prominent than the last name "Bauer".

Peter Bauer,  
Executive Director

CC: Governor Kathy Hochul  
R. Shah, Executive Chamber  
K. O'Leary, Executive Chamber  
R. Isacowitz, Executive Chamber  
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