



Board of Directors

December 8, 2021

Charles Clusen
Chair

Emma Lamy
Olympic Regional Development Authority
2634 Main Street
Lake Placid, NY 12946

Marilyn Murphy DuBois
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Vice-Chairs

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Secretary

RE: 2021 ORDA Whiteface Mountain Ski Center Intensive Use Area Unit Management Plan Amendment

David Quinn
Treasurer

Dear Ms. Lamy:

Nancy Bernstein
John Caffry
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Dean Cook
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Philip Terrie
Chris Walsh

Protect the Adirondacks has a number of concerns regarding the Olympic Regional Development Authority's ("ORDA") newly proposed Draft Unit Management Plan ("UMP") Amendment for the Whiteface Mountain Intensive Use Area (the "UMP Amendment"). Protect the Adirondacks believes ORDA's plans violate Article 14 of the State Constitution, the forever wild clause, in a number of areas -- new downhill mountain bike trails, high elevation "lift-serviced hiking trails," and "lift-serviced mountain bike trails." We're also concerned about plans for new alpine ski trails and widening existing trails because it appears that ORDA is close to the constitutional limits on ski trails.

Please find below PROTECT's comments on a series of issues with the UMP Amendment.

Peter Bauer
Executive Director

ORDA's Compliance with Article 14 at Whiteface Mountain: Our review of the UMP Amendment finds that ORDA's plans to build a downhill mountain biking trail network would violate the Constitution and its overall alpine ski trail construction and widening plans would strain the UMP's constitutional compliance. The Whiteface Mountain Ski Center is on Forest Preserve land, which is protected under Article 14, Section 1 of the NYS Constitution. The Ski Center was constructed, and operates to this day, under a 1941 constitutional amendment that authorized construction of ski trails and "appurtenances thereto", for the purpose of creating a downhill ski area, which otherwise would have been prohibited by Article 14. The 1941 Whiteface amendment did not authorize any other type of construction.

Protect the Adirondacks

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Article 14, Section 1, the forever wild provision, of the NYS Constitution is a covenant between the governed and their government for the management of the Forest Preserve, one of the greatest public land systems in the United States. Major decisions for the Forest Preserve are not to be made unilaterally by state government leaders or state agencies, but are to be directly made by the People of the State of New York. Article 14, Section 1 states “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.”

Article 14, Section 1 was amended by the People of the State of New York in 1941 to authorize “constructing and maintaining not more than twenty-five miles of ski trails thirty to two hundred feet wide, together with appurtenances thereto, provided that no more than five miles of such trails shall be in excess of one hundred twenty feet wide, on the north, east and northwest slopes of Whiteface Mountain in Essex County.” In 1987, the People approved a second amendment that limits the total amount of trails at Whiteface that are more than 120 feet wide, but less than 200 feet wide, to less than 5 miles.

When the People approved the amendment for the Whiteface Mountain Ski Center in 1941, and approved the 1987 amendment, they did so to approve a downhill alpine ski area and not a summertime amusement park.

A Downhill Mountain Bike Trail Network is Not an Appurtenance to Winter Skiing: Use of the word “appurtenances” in the 1941 Whiteface Mountain amendment has consistently been taken to mean only the infrastructure that supports downhill skiing. The phrase “together with appurtenances thereto” is used not only for Whiteface Mountain, but also for the Gore Mountain and Belleayre Mountain ski areas that were similarly approved through constitutional amendments. The infrastructure to support downhill skiing has been taken to include ski lifts (from T bars to chair lifts to gondolas), snowmaking systems of pumps, sprayers, and water pipes, base lodges, maintenance buildings, ski racing association buildings, reservoirs, and parking lots. Merriam Webster’s Collegiate Dictionary, 10th ed., says an appurtenance is “ ... (b) “a subordinate part or adjunct,” and “(c) accessory objects.”

As discussed above, the 1941 Article 14 amendment authorized “appurtenances” to support “ski trails” at Whiteface Mountain. Facilities, infrastructure, and improvements for summertime non-alpine ski related activities, such as hiking and mountain bike riding, are not “appurtenances” that support alpine skiing. A mountain bike trail can hardly be considered to be a subordinate part or accessory object of a downhill ski area. Riding a bike does not require skis, nor is it part of the sport of skiing. The proposed major downhill mountain biking trail network at Whiteface Mountain is not covered under the 1941 constitutional amendment under the “appurtenances” umbrella.

Any New Lift-Serviced Hiking and Mountain Biking Trails Must Comply With Article 14: Given that it is not an appurtenance to the ski trails, the only way that the proposed large-scale downhill/“lift-serviced mountain bike” trail network can be constructed at Whiteface Mountain would be through a new amendment to Article 14, Section 1.

Generally, hiking trails and mountain bike trails are allowable uses on the Forest Preserve, in designated areas, if they do not unconstitutionally alter the Forest Preserve. However, the level of proposed tree cutting and land clearing for the new trails for lift-serviced mountain biking raises a series of constitutional issues.

Article 14 and Terrain Changes for Proposed Hiking/Mountain Biking Trails: The Whiteface UMP Amendment is proposing two new types of trails on the Forest Preserve: the “lift-serviced mountain biking trail” and the “lift-serviced hiking trail.” New types of trails on the Forest Preserve are constitutionally evaluated according to the level of changes to the Forest Preserve that are required to build them. The principal changes in the proposed UMP Amendment for new types of trails are the level of tree cutting and disturbance or terrain alteration. These two issues were at the heart of the May 4, 2021 Court of Appeals decision in *Protect the Adirondacks v. Department of Environmental Conservation and Adirondack Park Agency*. In that decision a new type of trail on the Forest Preserve, the Class II Community Connector Snowmobile Trail, was found to be unconstitutional due to the number of trees cut down and the amount of terrain alteration planned to build them.

Trail width is a constitutional issue in this analysis because the wider a trail is, the more trees that must be cut down and the more terrain that must be altered. ORDA plans a number of new mountain bike trails on 8-foot cleared corridors that require extensive clearing of the forest. ORDA also plans to “harden or surface” the trail treads with materials other than natural soils.

In the *Protect* decision, the Court stated that it struck down Class II trails in part because they required “greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers.” The Court also stated that the network of wide Class II trails was a major change to the Forest Preserve that required a constitutional amendment to allow construction. Hiking trails, single track narrow mountain bike trails, and cross-country ski trails are the types of trails that can be built in ways that do not require “greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers.”

In addition to the no-greater-interference-than-is-necessary-to-accommodate hikers rule, the Court added, while quoting from the 1930 *MacDonald* decision, “defendants and the dissent contend that the project’s impacts are justified because it enhances access to the Preserve and provides a variety of recreational opportunities. That analysis proceeds from a fundamental misunderstanding. The constitution provides for access and enjoyment of the Forest Preserve as a wild forest: ‘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.’” Here, the Court articulated a wild-forest-lands rule that forbids any activity that significantly alters the natural state of the Forest Preserve. Class II snowmobile trails changed the Forest Preserve in many ways, which is why they were found to be illegal, from the wide flat trail tread, removal of rocks and roots, extensive benchcuts that introduced human geometric forms to the forest, grass-covered corridors, among many other design features.

Given these tests in the *Protect* decision, ORDA is constitutionally required to review its proposed mountain bike trails for trail widths, for modifications to the terrain, and for things

like jumps and turns that are not part of a standard hiking trail. It should then change and scale back its plans to bring them into compliance with Article 14, to ensure that the damage to the Forest Preserve is not any greater than would be caused by a standard hiking trail.

Article 14 and Tree Cutting for Proposed Hiking/Mountain Biking Trails: In addition to changes to the terrain and the wild state of the forest, ORDA also proposes extensive tree cutting for its new trails that would violate historic constitutional standards. While, due to the 1941 constitutional amendment, the proposed new ski trails are not subject to these standards, the hiking and mountain biking trails are, because they are not appurtenances to the ski trails.

As to what constitutes an acceptable number of trees that can be destroyed on the Forest Preserve during a specific management activity, the three historic Article 14 cases – *MacDonald* (1930), *Balsam Lake* (1993), and *Protect* (2021) – provide the answers. The *MacDonald* and *Protect* decisions found that constitutional violations would result from planned state management activities on the Forest Preserve, each of which would have destroyed thousands of trees. In contrast, in the *Balsam Lake* case a state management action was deemed constitutional and permissible. All new trails should conform with the *Balsam Lake* decision, where the Appellate Division adhered to and utilized the 1930 *MacDonald* decision. The *Balsam Lake* decision was also used in the *Protect* decision by the Appellate Division, Third Department, when it found an unconstitutional level of tree cutting by the DEC-APA to build Class II trails.

The level of tree cutting in the *Balsam Lake* decision (which found that cutting 350 trees over 1” DBH over the course of 2.3 miles for a cross-country ski trail was allowable under Article 14) was neither substantial nor material using the *MacDonald* test. This level of tree cutting would usually also conform with the *Protect* decision in that new trails should not “require greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers” and that the wild forest “state” of the Forest Preserve is maintained. The *Protect* decision also affirmed that trees at a size of 1” DBH have constitutional protections.

The *Balsam Lake* standard is 152 trees destroyed per trail mile was allowable. ORDA has proposed a series of trails that greatly exceed that standard. ORDA’s tree cutting estimates are not exact counts, but are based on random samples. However, the cutting of 8,850 trees over 1” DBH over 19.5 miles is around triple the *Balsam Lake* standard. ORDA should note that the DEC is in the process of reworking its Forest Preserve tree cutting policy.

ORDA proposes roughly 5.65 miles of new hiking trails, some of which are high elevation “lift serviced” foot trails. ORDA proposes artificial surfacing of some of these trails. The terrain alteration standards and tree cutting standards discussed above also pertain to the hiking trails.

This system of hiking and mountain bike trails must conform to the *MacDonald* (1930), *Balsam Lake* (1993), and *Protect* (2021) standards. So far, it appears that it does not. The proposed trail system needs to be redesigned and scaled back to bring it into compliance.

Ski Trail Mileage and Widths: Another issue of concern under Article 14 is whether ORDA is in overall compliance with the ski trail limitations in the 1941 and 1987 constitutional

amendments. The UMP Amendment states that ORDA is in compliance with these caps. While ORDA provided a chart stating that it remains more than two miles under the constitutional maximums, it did not provide adequate maps, locations of its trail width measurements, an explanation of how the lands that include appurtenances are included in this calculus, or things like GPS coordinates. We urge ORDA to provide greater information and proceed with greater transparency in how it calculated that it is below the constitutional limits.

Mountain Bike Skills Park: Protect the Adirondacks is unaware of any other place in the Forest Preserve where this type of facility has been constructed. The 1-acre highly developed and intensively altered area appears to be unconstitutional. The proposed UMP Amendment states that “skills parks are a common feature at modern bike parks.” Yet, Whiteface is a downhill ski area, not a modern bike park. According to the UMP Amendment, these parks offer “a variety of riding features, such as rollers, berms, drops, balance beams ... (i.e.: wide balance beam, narrow balance beam, "S" balance beam).” ORDA states the “proposed skills park at Whiteface is located near the Bear Den base lodge in the forest to the east of new ski lift’s loading area. This skills area will be about an acre in size and can be constructed around large trees thereby minimizing significant tree cutting.”

In striking down the State’s plan to build a bobsled run for the 1932 Winter Olympics, the *MacDonald* decision prohibited facilities on the Forest Preserve which are not intended to provide public access to those lands. Trees may not be cut in the Forest Preserve for a use such as the “skills park”, which is unrelated to access to forever wild land, and which is not authorized by the 1941 amendment to Article 14 as an appurtenance to a ski area.

Compliance with the Mountain Bike Trail Guidance: The proposed UMP Amendment states that ORDA plans to “Construct new lift-serviced mountain biking trails connecting existing WFM facilities with a trail along the West Branch AuSable River and eventually connecting with the Flume Parking Lot off NYS Route 86 (in Wilmington Wild Forest). A total of 19.48 miles of singletrack mountain bike trails between 36 and 72 inches wide are proposed, including 6.25 miles of easiest (green) trails, 10.53 miles of more difficult (blue) trails and 2.7 miles of most difficult (black) trails.” This plan appears to be at variance with the APA’s published Management Guidance for mountain bike trails. The widest permissible trails have a 36 inch tread, which would be similar to ORDA’s proposed “green” trails. The “blue” trails would be the “easy” to “more difficult” trails in the Guidance, which are 24”-36” in width. ORDA’s “black diamond” trails would be the “very difficult” or “extremely difficult” under the Guidance, which are 12”-18” wide. We do not see how 72”-wide mountain bike trails would conform with the APA’s Management Guidance for mountain bike trails.

Bicknell’s Thrush Habitat: Bicknell’s Thrush is a state-listed bird species of special concern, which utilizes Whiteface Mountain as summer breeding habitat. ORDA proposes cutting over 33,000 trees for the new downhill ski trails, while also planning to undertake projects previously approved that will cut over 10,000 additional trees. ORDA should provide a map and tree cutting data for all trees which are in Bicknell’s Thrush habitat, above 2,800 feet. ORDA’s plans not to cut trees during nesting season is a step in the right direction, but a better approach would be to sparingly cut fewer trees above 2,800 feet. ORDA states that just 12.5 acres of the

2,910 acres of the total Intensive Use Area will be affected. ORDA does not provide the number for the total Bicknell's Thrush habitat that will be affected. ORDA should also provide data of the historic extent of Bicknell's Thrush habitat development among the total viable Bicknell's Thrush habitat in the Intensive Use area.

On behalf of the Board of Directors of Protect the Adirondacks, I thank you for the opportunity to share our views on this draft plan.

Sincerely,

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

Peter Bauer
Executive Director