



Board of Directors

April 26, 2022

Charles Clusen
Chair

Aaron Graves
New York State Department of Environmental Conservation
Region 6 Potsdam Sub Office
190 Outer Main Street, Suite 103,
Potsdam, NY 13676

Marilyn Murphy DuBois
James McMartin Long
Michael Wilson
Vice-Chairs

Barbara Rottier
Secretary

RE: Proposed Low's Lower Dam and Parking Area Reconstruction

David Quinn
Treasurer

Dear Mr. Graves:

Nancy Bernstein
John Caffry
Andy Coney
Dean Cook
James C. Dawson
Lorraine Duvall
Robert Glennon
Roger Gray
Evelyn Greene
Sidney Haring
Dale Jeffers
Mark Lawton
John Nemjo
Peter O'Shea
Philip Terrie
Chris Walsh

Protect the Adirondacks (PROTECT) has reviewed the revised plans by the Department of Environmental Conservation (DEC) for the rehabilitation of Low's Lower Dam on the Bog River and related work on the nearby parking areas used by paddlers for access to the Bog River/Hitchens Pond/Low's Lake waterway in the Five Ponds Wilderness Area.

For the reasons explained below, given the unusual nature of this project and its location, PROTECT does not object to it on constitutional grounds, despite the relatively large number of trees that would be destroyed.

PROTECT has reviewed both the original and revised work plans. We also inventoried the area in 2021. Many of our members use this area for access to the waterway.

Peter Bauer
Executive Director

This revised project was noticed in the April 6, 2022 Environmental Notice Bulletin. According to the revised work plan dated March 3, 2022, the project includes grading in the existing dam and parking areas and adjacent areas, and cutting a total of 746 trees in a total area of 0.38 acres; the DEC intends to undertake this project from 2022 to 2024.

Protect the Adirondacks

PO Box 48, North Creek, NY 12853 · 518.251.2700

www.protecttheadirondacks.org · info@protectadks.org

Follow Us on Twitter @ProtectAdkPark & Like Us on Facebook

We are pleased to see that the proposed new large parking lot on an undisturbed site has been dropped from the work plan. If that were still part of the project, the amount of tree cutting and new terrain alteration for the project as a whole would probably be unconstitutional.

Transparency and Openness

Protect the Adirondacks congratulates the DEC on the completeness of the information provided in the ENB notice. PROTECT had called on the DEC, as part of its Transparency Plan, to start posting and making accessible all proposed work plans. Including access to work plans in ENB notices is important, as it helps to provide the public with the information necessary to submit comments on proposed Forest Preserve management actions. It also appears that the DEC has created a new page on its website where Forest Preserve work plans will be posted and archived. We see this as another positive step towards public transparency in Forest Preserve management.

Forest Preserve Constitutional Compliance

The recent Court of Appeals decision in *Protect the Adirondacks v Department of Environmental Conservation and Adirondack Park Agency* clarified the criteria for state agencies to consider when evaluating compliance of proposed state management actions in the Forest Preserve with Article 14, Section 1 of the New York Constitution. The *Protect* decision joins the *MacDonald* decision from 1930 and the *Balsam Lake* decision from the 1990s in spelling out a series of factors that must be considered by state agencies in these matters.

Tree cutting is one important factor to use in evaluating Article 14 compliance. It has likely been used more than other factors over the decades because it is quantitative, not qualitative, and thus it is relatively easy to apply. There is now a series of additional more subjective constitutional criteria, beyond objective tree cutting numbers, that also require analysis for a proposed project. These include:

Wild State: The *Protect* decision stated “the constitution provides for access and enjoyment of the Forest Preserve as a wild forest.” (p. 10) To comply with this directive from the *Protect* decision, the DEC should consider the preservation of the “wild forest” state of the Forest Preserve in its actions to repair the Low’s Lower Dam and modify the parking lot.

In this case, the dam is an industrial form in a wild setting and the parking area was built somewhat haphazardly in an open area near the dam. The removal of some trees to repair the dam and to slightly expand the parking area will not impair the wild forest state of the Forest Preserve in this location given the existence of these

longstanding structures and improvements, which generally predate public ownership of the land. It is also important to note that the additional clearing and grading will be along the margins of the existing cleared areas of the parking lot and road, rather than in newly cleared locations.

Terrain Alteration/Trail Width: The *Protect* decision also established new standards for trail widths, which was one factor among several that led the Court of Appeals to find Class II snowmobile trails to be unconstitutional. The Class II trails were at least 9 to 12 feet wide, and wider in many places. The court stated “The trails may not be built like roads for automobiles or trucks, but neither are they constructed as typical hiking trails.” (p. 11)

Additionally, the *Protect* decision described other factors that contributed to the unconstitutionality of the Class II trails, such as “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.” (p. 11) The court also referenced “grading and leveling” and the “removal of rocks and other components” as factors that led to Class II trails violating Article 14:

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 (art XIV, §1) and therefore cannot be accomplished other than by constitutional amendment. (p. 1)

Thus, the alteration of the terrain, in a variety of ways, must be considered by the DEC and APA when planning Forest Preserve management actions that involve any new or existing structures and improvements.

The Low’s Lower Dam and parking area are already highly altered parts of the Forest Preserve. The state’s responsibility, given these longstanding structures and improvements, is to undertake rehabilitation of the dam and enhancement of the parking area with the lightest touch possible. While the state certainly could not go into an untrammled natural area of the Forest Preserve and build new structures and improvements like these, it has more latitude to maintain what is there, if these facilities are necessary to protect existing natural resources. In such cases, the state should undertake such actions with the minimum possible level of disturbance to the Forest Preserve.

The Ultimate Objective of Wilderness: Another standard from the *Protect* decision is based on the statement that the state’s Forest Preserve management must highlight the “ultimate objective of protecting the forest as wilderness.” (p 9) The *Protect* decision also cited the *MacDonald* decision in directing that Forest Preserve actions must have no “greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers.” (p. 10) This factor must be considered.

In the case of the Low’s Lower Dam and parking area, these structures and improvements were deemed necessary in the Unit Management Plan to support the existing Hitchens Pond habitat and provide public access to this area of the Forest Preserve. The “ultimate objective of protecting the forest as wilderness” is a guiding directive from the Court, but maintaining preexisting facilities that are absolutely necessary for public safety and access can be given some consideration.

Tree Cutting and 1” DBH Trees

The DEC proposes tree cutting for this project in three areas, two for rehabilitation of the Low’s Lower Dam (1A, 1B) and one for enhancement of the Low’s Lower Dam parking area (1C). PROTECT has reviewed the work plan and we inventoried the area in 2021.

PROTECT recognizes that for this project the DEC has counted all trees of 1” DBH or greater that will be cut. PROTECT believes that this is what the law requires and is pleased to see that the DEC has done so here. This shows that the DEC can effectively count individual trees down to the 1” DBH standard and use this data to develop a work plan. PROTECT believes that the DEC should codify this practice in its planned revision of LF-91-2, its tree cutting policy.

Tree Cutting Numbers and Precedent

PROTECT is concerned about the high levels of tree cutting in a small area that would be required for this project.

A review of the work plan finds a total of 746 trees will be destroyed in three areas. A total of 333 trees will be destroyed in two small areas, covering a total of 0.16 acres, to facilitate reconstruction of the Lower Dam. This would result in the cutting of 2,081 trees per acre.

However, the work plan shows that many of these trees have grown up in the decades since the dam was constructed, and they appear to have encroached on the dam and its supporting embankments and appurtenances, and other previously disturbed areas.

Others appear to block the access to the dam needed to undertake the repairs necessary for dam safety.

The modifications to the parking area will destroy 413 trees on 0.22 acres, which would total 1,859 trees per acre. Overall, the project would destroy 1,963 trees per acre.

This level of tree cutting greatly exceeds the historic levels which were addressed by the courts in the *MacDonald*, *Balsam Lake*, and *Protect* cases.

Conclusion

These calculations create significant legal concerns for Protect the Adirondacks. On the one hand, the level of tree cutting violates historic constitutional standards for such a small area. On the other hand, there are public safety, structure maintenance, and public access issues to weigh, along with the full range of Article 14 case law considerations discussed above.

Again, if these were new proposed actions they would not be allowed. If they were significant expansions of existing facilities they would not be allowed. Tree cutting is an important Article 14 compliance metric for the DEC and APA, but it is not the only one to consider, though it is the easiest factor to quantify and evaluate.

Given the issues discussed above, Protect the Adirondacks does not object to the proposed management actions at the Low's Lower Dam and parking area on Article 14 grounds.

On behalf of the Board of Directors of the Protect the Adirondacks, please let me express our gratitude for the opportunity to submit these public comments.

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