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October 3, 2022

Jeff Rider, Acting Director
Division of Lands and Forests
NYS Department of Environmental Conservation
625 Broadway
Albany, NY 12233

RE: NYS DEC Forest Preserve Work Plans

Dear Jeff,

Protect the Adirondacks has reviewed several draft Work Plans recently posted on the NYS Environmental Notice Bulletin (ENB) that were prepared by the Department of Environmental Conservation (DEC) for various Forest Preserve management activities. The Work Plans use a new template that outlines and describes proposed Forest Preserve management activities and includes an assessment of ecological impacts and legal compliance. PROTECT welcomes DEC's adoption of the new template, which is a significant improvement over the older version. We also commend DEC's decision to post all draft Work Plans on its website where they are easily accessible to the public and to notice them in the ENB.

As discussed below, PROTECT has identified a number of ways that the new Work Plan template and process could be improved. We request that DEC consider our proposed revisions.

Work Plan Consistency and Title

We suggest that Work Plans be consistent for all Forest Preserve work, in both the Catskill and Adirondack Forest Preserves, throughout DEC Regions 3, 4, 5, and 6. This summer, Work Plans posted to the ENB by DEC have used different formats. The Work Plans posted by the Olympic Regional Development Authority (ORDA) also use a different format, even though the proposed work is on the Forest Preserve.

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Our second suggestion is for the title. We suggest that the title be changed to “Forest Preserve/State Lands/Conservation Easement Project Work Plan.” At nearly 3 million acres, the Forest Preserve represents the largest block of State lands. With its constitutional protection and extensive Wilderness areas, it stands apart from all other State lands. We believe that the Work Plan template should spotlight the significance of the Forest Preserve in DEC’s (and ORDA’s) management planning work.

Location and Project Type

The location information provided is adequate for the public to ascertain where the proposed project is to occur, although the descriptions in the “Project Type” section could be improved. For example, a recent draft Work Plan for the “Elm Ridge Trail Six Reroute” states that this project is a “modification of existing facility.” It would be better if “Project Type” was more specific and included details such as “Hiking Trail”, “Trailhead”, “Parking Area”, “Campsite”, “Road”, or “Bridge” rather than the somewhat vague “modification of existing facility”.

Project Description/Justification

The “Project Description/Justification” section is important and provides the DEC with the opportunity to fully describe and explain a proposed project in plain English. Inclusion of this section is good practice.

Article 14 Compliance

The “Trees to be Removed” section needs to be revised. The destruction of timber on the Forest Preserve is an important constitutional consideration, governed by four major decisions by New York State courts interpreting Article 14, Section 1, the famed “forever wild” clause of the State Constitution. Those decisions make clear that tree cutting is just one of several factors in determining compliance with Article 14. Consequently, we suggest that the heading for this section be changed to “Constitutional Compliance” or “Article 14 Compliance” in order to more accurately reflect the full range of factors that must be considered by DEC in assessing compliance with Constitutional mandates governing the management of the Forest Preserve.

The criteria that the DEC Forest Preserve managers must use to assess Article 14 compliance are found in the four historic Article 14 decisions. The 2021 “*Protect*” Court of Appeals decision builds upon the 1930 “*MacDonald*”, 1993 “*Balsam Lake*”, and 2019 Appellate Division “*Protect*” decisions.¹ The 2019 and 2021 *Protect* decisions require that an

¹ *Assn. for Protection of the Adirondacks v. MacDonald*, 253 N.Y. 234 (1930); *Balsam Lake Anglers Club v Dept. of Env'tl. Conserv.*, 199 AD2d 852 (3d Dept. 1993); *Protect the Adirondacks v. NYS Dept. of Env'tl. Conserv.*, 175 A.D.3d 24 (3d Dept. 2019).

assessment of Constitutional compliance for a proposed Forest Preserve Work Plan must consider six principal factors:

- 1) whether the purpose of the project is a permissible one under the Constitution;
- 2) whether the cutting, removal or destruction of trees associated with the Work Plan is “material” or “substantial”;
- 3) whether the impacts of the Work Plan on the existing wild state of the Forest Preserve are constitutionally permissible;
- 4) whether the project requires greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers;
- 5) whether the level of alteration of the existing Forest Preserve terrain is constitutionally permissible; and
- 6) whether the Work Plan comports with the ultimate objective of Article 14 of protecting the Forest Preserve as Wilderness.²

[1] Permissible Purpose: This is a threshold question that must be addressed. For instance, the Court of Appeals has found that a bobsleigh run and snowmobile trails whose purpose is to connect communities are not permissible purposes for projects in the Forest Preserve. Likewise, roads, alpine ski centers, and bike lanes along roads have required constitutional amendments. Camping, hiking, and cross-country skiing have been found by the courts to be permissible purposes for construction and tree cutting in the Forest Preserve.

[2] Tree Cutting/Destruction of Timber: Tree cutting has historically been used as a principal factor in Article 14 caselaw and DEC management because it’s an objective measure that can be quantified. Trees or stumps can be accurately counted. Thus, the courts can rule on whether “the timber thereon” was “sold, removed or destroyed.”

The findings of the trial court and the Appellate Division in the *Protect* case that trees 1”-3” DBH are constitutionally protected “timber” (which were relied upon in the Court of Appeals decision) provide an important clarification to guide DEC’s tree cutting and removal analysis.

The 1930, 1993, and 2019 Article 14 decisions focused heavily on tree cutting. The *MacDonald* decision introduced a test that any cutting for State management projects must not be “material” or “substantial.” In *MacDonald*, the State’s highest court found that the State’s plans to cut 2,500 “large and small” trees on 4.5 acres of Forest Preserve to build a bobsleigh track violated Article 14.

In 1993, in the *Balsam Lake* decision, the Appellate Division found that the State’s plans to cut 350 big and small trees (the State counted trees down to 1” DBH in its court documents) to extend a cross-country ski trail by 2.3-miles did not violate Article 14. These two cases served as constitutional bookends for Forest Preserve law, one making a finding about an impermissible action, the other making a finding about a permissible one. The line of what is impermissible “material” or “substantial” tree cutting will often lie somewhere between the two, depending on the circumstances.

² *Protect the Adirondacks! Inc. v. NYS Dept. of Env'tl. Conserv.*, 37 N.Y.3d 73 (2021).

[3, 4] Wild State and Interference with Natural Development: Tree cutting, of both big and small trees, was at the heart of the *MacDonald* and *Balsam Lake* decisions. Before the *Protect* case, the courts had not focused as much on other parts of the Article 14 clause, such as the requirement that the Forest Preserve “be forever kept as wild forest lands.” However, in *Protect*, the Court of Appeals recognized that the “forever wild” protections of Article 14 extend beyond prohibiting the cutting of trees. In *Protect*, the Court of Appeals affirmed the *MacDonald* tree cutting tests of “material” and “substantial,” but went further in clarifying that tree cutting is just one of several factors that need to be evaluated in determining compliance with the “forever wild” clause.

The *Protect* decision articulated a new “wild forest” management directive for Forest Preserve managers. Quoting from the 1930 *MacDonald* decision, the Court stated:

[D]efendants 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.” 37 NY3d at 84.

In the *Protect* decision, Class II snowmobile trails were found to be unconstitutional because they “require greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers.” *Id.* at 83.

Citing the *MacDonald* decision, the *Protect* decision also made it clear that attempts to minimize the affected acreage and amount of tree cutting, and mitigating erosion, were not sufficient to make an otherwise unconstitutional project permissible. *Id.* at 84.

The *Protect* decision requires that Forest Preserve managers consider the impacts on the “wild forest” state of the Forest Preserve of their planned management actions. These factors must be scrutinized in DEC Work Plans. And, contrary to what some critics claim, nothing in the *Protect* decision suggests that building, maintaining, or improving hiking trails is unconstitutional; in fact, the Court used hiking trails as the touchstone of what type of recreational development is constitutionally permissible). *See, e.g., id.* at 83 (“Further, the Class II trails require greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers.”)

[5] Terrain Alteration: The *Protect* decision also established a new standard for trail width, an important factor that led the Court of Appeals to find Class II snowmobile trails to be unconstitutional. Class II trails are at least 9 to 12 feet wide with a flat tread area, and wider in many places where extensive bench cuts are made on both sides of the trail. The Court found such trail dimensions to exceed what is constitutionally permissible because they are not comparable to typical hiking trails. *Id.* (“The trails may not be built like roads for automobiles or trucks, but neither are they constructed as typical hiking trails.”)

Additionally, the *Protect* decision describes other factors contributing 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.” *Id.* at 84. The Court found such massive cuts to violate the mandate that the land be “forever kept as wild forest lands.” The Court also referenced “grading and leveling” and the “removal of rocks and other components” as factors that may render trails constitutionally impermissible. Thus, to the extent that a Work Plan calls for changes to the existing Forest Preserve terrain, those changes must be carefully scrutinized in light of Article 14’s constraints.

[6] The Ultimate Objective of Protecting the Forest as Wilderness: The *Protect* decision states that Forest Preserve management must be in accordance with the “ultimate objective of protecting the forest as wilderness.” *Id.* at 83. In essence, the *Protect* decision highlights the critical importance in Article 14 that the Forest Preserve must be “forever kept as wild forest lands.” This factor is yet another important test for state managers to scrutinize in their development of a Forest Preserve Work Plan.

All six of these factors should be addressed in detail in the Work Plan template and in each Work Plan.

Additional Sections

PROTECT supports the inclusion of the following sections to Work Plans for Forest Preserve projects:

- (i) earthwork and disturbances, including work outside of trail corridors;
- (ii) analysis of project alternatives and discussion of why other alternatives were rejected;
- (iii) impacts to wetlands;
- (iv) impacts to rare, threatened, and endangered species and species of special concern;
- (v) description of planned use of motorized equipment and motor vehicles;
- (vi) other relevant considerations, which is a useful catch-all for miscellaneous considerations; and
- (vii) names, titles, and contact information for the staff involved in preparation of the Work Plan.

Checklist

On the “Regulatory Clearance Checklist—State Lands and Conservation Easement Projects” in the Work Plan template we suggest that the “Lands and Forests” checklist section be revised. Currently, this section lists four categories to be checked “Yes” or “No” under the “Required” columns. These are:

- Unit Management Plan

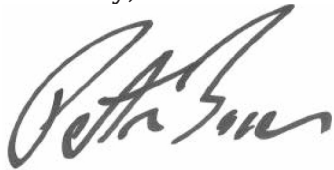
- Tree Cutting
- Protected Native Plants
- Historic Preservation

To be consistent with the *Protect* decision, DEC should revise the checklist to substitute “Article 14 Compliance” for “Tree Cutting”.

Protect the Adirondacks supports DEC’s revisions to its Work Plan template and its efforts to improve public notice of proposed projects in the Forest Preserve. We hope that the Department will consider our suggestions for improving the Work Plan process.

On behalf of the Board of Directors of Protect the Adirondacks, please accept our gratitude for the opportunity to share our concerns about strengthening the Forest Preserve management program.

Sincerely,



Peter Bauer,
Executive Director

- Cc:
- | | |
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