



Board of Directors

Charles Clusen
Chair

James McMartin Long
Michael Wilson
Vice-Chairs

Barbara Rottier
Secretary

David Quinn
Treasurer

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

Peter Bauer
Executive Director

Christopher Amato
*Conservation Director
and Counsel*

October 26, 2022

Robert Daley
NYS DEC Region 5
Division of Lands & Forests
P.O. Box 296
Ray Brook, NY 12983

**RE: Adirondack Rail Trail Construction - Phase I Tree Cutting
Notice, ENB Notice October 12, 2022**

Dear Rob:

Protect the Adirondacks (PROTECT) has reviewed the proposed Work Plan for the new parking lots on the Remsen-Lake Placid Travel Corridor for the new Adirondack Rail Trail. Two parking lots are proposed on both sides of Route 86 at Fowler's Crossing between Saranac Lake and Ray Brook. We see the need for this project and believe that safe and adequate parking should be provided for the public to access this new trail. We envision that the new Adirondack Rail Trail will be very popular and see high levels of public use once it is built and opened.

The Work Plan does propose a high level of tree destruction. However, for the reasons explained below, given the nature of this project and its location, Protect the Adirondacks does not see the level of tree cutting as material or substantial, and we do not find that this project impairs the wild forest character of this part of the Forest Preserve.

This project was noticed by the Department of Environmental Conservation (DEC) in the October 12, 2022 Environmental Notice Bulletin (ENB). According to the proposed Work Plan dated September

22, 2022, the project includes tree cutting, clearing, and grading to build two parking areas on the Adirondack Rail Trail. The Work Plan proposes cutting of 355 trees on 0.82 acres. DEC intends to undertake this project in 2023.

Transparency and Openness

We applaud the DEC on the completeness of the information provided in the ENB notice as previously requested by PROTECT. Including easy access to Work Plans in ENB notices is important because it helps the public to get the necessary information to submit comments on proposed Forest Preserve management actions. We are also pleased to see that DEC has created a Work Plans page on its website where draft plans are posted. We encourage the DEC to also create a page where all final approved Work Plans will be posted, organized by year and DEC region, to serve as a long-term resource for Forest Preserve Work Plans.

Work Plan Format

The recent Court of Appeals decision *in Protect the Adirondacks v Department of Environmental Conservation* clarified the criteria for state agencies to consider when evaluating compliance with Article 14, Section 1 (the “Forever Wild” clause) of the New York Constitution of proposed state management actions in the Forest Preserve. The *Protect* decision builds on earlier Article 14 decisions to identify factors that must be considered by state agencies in these matters.

As set forth in detail in our comments on DEC’s proposed Forest Preserve Work Plan template, tree cutting is one important factor to use in evaluating Article 14 compliance, but there are additional constitutional criteria that must be considered. As set forth in our comments, we urge the DEC to change its Work Plan template to move beyond an assessment solely of “Tree Cutting” and revise this section for “Article 14 Compliance.”

Article 14 Compliance

An assessment of a specific management activity on the Forest Preserve must go beyond tree cutting. Protect the Adirondacks has submitted its ideas to the DEC as to how its State Lands Work Plans should be revised. We have similarly shared these ideas with the Forest Preserve Trails Stewardship Working Group. The Adirondack Rail Trail parking lots project at Fowler’s Crossing requires a full Article 14 compliance assessment.

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

- 1) Is the purpose of the project permissible under the Constitution?
- 2) Is the proposed cutting, removal or destruction of trees “material” or “substantial?”
- 3) Are the impacts of the proposed project on the existing wild state of the Forest Preserve constitutionally permissible?
- 4) Does the project require greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers?
- 5) Is the degree of alteration of the existing Forest Preserve terrain constitutionally permissible?
- 6) Does the proposed project comport with the ultimate objective of Article 14 of protecting the Forest Preserve as Wilderness?

Is the purpose of the project permissible under the Constitution? This is an important question for the DEC to answer. While we hope that the DEC will not be proposing an unconstitutional project in a draft Work Plan, it’s important for the public to understand the reasoning by the DEC as to why it believes that a specific proposed management action passes constitutional muster. The Work Plan for the new parking lots on the Adirondack Rail Trail includes no such assessment, and we urge that the DEC changes its Work Plan template to include a statement as to the constitutionality of a proposed project.

The Adirondack Rail Trail project at Fowler’s Crossing provides public access to a Forest Preserve resource, in this case a railroad converted to a multi-use public recreation trail. All land owned by the State of New York within the boundaries of the Adirondack and Catskill Parks is Forest Preserve. The railroad is over 150 years old and the state came into ownership of the rail corridor more than 30 years ago. Since then, the state has slowly organized a comprehensive management program for the rail corridor. The section from Lake Placid to Tupper Lake will be converted to a multi-use recreation trail, where the ties/tracks are removed, and the railway is resurfaced. Parking areas have long been part of the Forest Preserve landscape to facilitate public use. The 0.82-acre size of the proposed parking lots shows an effort to limit the impact, while providing safe public access to the Forest Preserve. Protect the Adirondacks sees this project as allowable under the State Constitution.

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).

Is the proposed cutting, removal or destruction of trees “material” or “substantial?” The amount of tree cutting proposed for the 0.82-acre area is heavy in regards to constitutional standards. Again, we applaud the DEC for documenting tree cutting starting at 1” DBH, and believe that this is the rightful standard going forward. In the “State Land Tree Tally,” which we think should be changed to “Forest Preserve Tree Tally,” we believe that the classes of trees should be re-organized at 1-2”, 3-4”, 5”, 6” and so forth.

A constitutional assessment of tree cutting must look at historic standards. 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. In the *Protect* decision, the courts found that cutting an average of 735 trees per mile was unconstitutional. These cases have shaped Forest Preserve law and inform interpretations about what is impermissible “material” or “substantial” tree cutting depending on the circumstances.

Tree cutting impacts should be assessed on the number of trees per mile or per acre. The proposed project seeks to destroy 355 trees on 0.82 acres, an average of 433 trees per acre. This level rivals the level of tree cutting in the *MacDonald* decision, which was found to be unconstitutional. That said, we note that tree cutting is one of six considerations for constitutional compliance, though it can be singularly determinative. The tree cutting proposed seeks to cut 208 trees of 2” DBH or less, which likely consists largely of tree that grew up on the side of the rail corridor over the past two decades when the corridor was erratically maintained. We also note that the rail trail corridor between Lake Placid and Tupper Lake will be maintained to a narrower width in the future as a fully constructed recreation trail than it was as a railroad corridor, which will facilitate extensive new tree growth. The tree cutting is also proposed at a location on the side of a state highway and within close proximity to a highly developed area.

All of these factors mitigate what otherwise would be a high level of tree cutting when measured against Article 14 case law. Given that this project complies with most of the other Article 14 compliance criteria, we do not see the level of tree cutting as reaching the “material” or “substantial” thresholds.

Are the impacts of the proposed project on the existing wild state of the Forest Preserve constitutionally permissible? 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 must consider the preservation of the “wild forest” state of the lands and waters of the Forest Preserve. The ecological complexity or uniqueness of the parcel in question is also an important factor in this assessment. These assessments must be made by the DEC in its Work Plan that proposes to build the parking lots at Fowlers Crossing for the Adirondack Rail Trail.

In its natural, undisturbed condition the Forest Preserve exists in a wild state as required by the State Constitution. This is the case for the vast majority of the Forest Preserve. Some areas are developed for various administrative or public recreation purposes. The “wild forest” state must be maintained and upheld upon completion of the proposed project.

The proposed parking lots project is located in a degraded part of the Forest Preserve – an old railroad corridor. The ecologic complexity of this site is low. This project is located on the periphery of the Forest Preserve in a detached parcel of Wild Forest heavily influenced by highways and nearby development. This is a frontcountry part of the Forest Preserve that generally can facilitate more intensive structures and improvements than backcountry areas. The land clearing and grading for the relatively small 0.82-acre parking areas will not undermine the existing Wild Forest character of the surrounding Forest Preserve. The preservation of the “Wild Forest” state of the Forest Preserve is not a major issue for this project in this location.

Does the project require greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers? This standard was first articulated by the courts in 1930 and reaffirmed in 2021. The original public recreational uses in the Forest Preserve were hiking, camping, hunting, fishing, paddling, snowshoeing, and skiing, and the courts have affirmed their constitutionality. Other uses have been allowed on the Forest Preserve over the years as technology and public outdoor recreational activities have changed. Certain uses, such as alpine ski trails and facilities, paved bike trails, and paved roads, have required constitutional amendments.

This criterion requires that a proposed project be assessed by its intended use and impacts, as well as the site’s history. There are two major issues here. First, parking lots for Forest Preserve users have been around for more than 100 years and have long been seen as important improvements to facilitate public use. There are plenty of hiking trails in the Adirondack Forest Preserve accessed by roadside parking lots.

Second, and more of a challenge, is the fact that the Adirondack Rail Trail will be used principally for bike riding and snowmobiling. There is no case law on the lawfulness of bike riding or snowmobiling on the Forest Preserve. Historically, the courts have only specifically identified hiking and camping, and associated activities, as authorized activities, and have been silent on all other uses. Though the state has built up a massive infrastructure for mechanical and motorized recreation on the Forest Preserve, it should acknowledge the constitutional gray area around these activities. Hundreds of snowmobiles riding the Adirondack Rail Trail on a busy Saturday in February surely has a greater impact on “the natural development of the Forest Preserve than is necessary to accommodate hikers.” As a trail, the footprint of the Rail Trail will be considerable.

If the proposed project exceeds this standard, which in this case it clearly does, then the DEC should explain how it achieves constitutional compliance through mitigation or other factors. We see nothing in the Work Plan, or the UMP, that details how these impacts will be mitigated. While in and of themselves the two small parking areas may be constitutionally permissible, they will service a larger trail of intense and concentrated activities where we have no specific constitutional guidance.

Is the degree of alteration of the existing Forest Preserve terrain constitutionally permissible? In the *Protect* decision the courts specifically drew attention to trail width, grading, and the size and level of bench-cutting as some of the factors that made Class II snowmobile trails unconstitutional. A proposed project must be evaluated for the scale of its proposed terrain alteration in its assessment of constitutional compliance.

Some of this information is included in the “Earthwork and Disturbance, Including Identification of Work Outside Trail Corridor” section. These are important things that should be included in a Work Plan. The total footprint of a project and the impacts projected from terrain modifications are important to assess and include.

In this case, the project avoids significant terrain modifications and minimizes soil disturbance by not significantly changing the grade or design of the former railroad. The parking area will be landscaped to blend in with the natural setting of the surrounding Forest Preserve far more than the existing industrial rail corridor. The Work Plan outlines steps for best practices for construction and at 0.82 acres limited the overall disturbance of the total project.

Does the proposed project comport with the ultimate objective of Article 14 of protecting the Forest Preserve as Wilderness? Like the “wild forest” state criteria above, the Court of Appeals provided direction to state agencies. Here, the Court stated

that the Forest Preserve should be managed with the “ultimate objective of protecting the forest as wilderness.” At 0.82 acres in size and located on the side of the highway and near a highly developed part of the Adirondack Park, the proposed project does not undermine the state’s primary focus on managing the Forest Preserve as a massive wildlands complex. This is a small part of the Forest Preserve that will not impact other Forest Preserve lands.

Project Description/Desired Condition(s)

The information provided in this section is satisfactory.

Analysis of Project Location and Design Alternatives

The information provided in this section is satisfactory. We note that the approved UMP adequately covered alternatives for the Rail Trail. Public parking along the rail trail is necessary.

Description of Measures Taken to Mitigate Impacts on Vegetation, Water Quality, Wild Forest Character and the Aesthetics of the area

We note the recognition of a nearby “Recreational River” as designated under New York State’s Wild, Scenic, Recreational Rivers Act (WSRR). We note the wetlands protections stated in the Work Plan and the plans to include a Storm Water Pollution Prevention Plan (SWPPP), seek wetland permits from the Adirondack Park Agency and Army Corps of Engineers, and other necessary permits.

Identification of Rare, Threatened or Endangered Species

We note the identification of the nearby “Dwarf Shrub Bog Community” with the status of “Vulnerable.” Appropriate measures have been planned for its protection.

Description of Use of Motorized Equipment and/or Motor Vehicles, if any

We note that the work to build these parking areas will require motor vehicles.

Other Relevant Considerations

None were listed.

Conclusion

Protect the Adirondacks finds that the DEC has taken adequate measures in its planning and design of this project to protect the character and ecological integrity of the Forest Preserve.

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