



February 27, 2023

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and Counsel**

Peter Frank
NYSDEC
Division of Lands and Forests
625 Broadway
Albany, NY 12233-4254

RE: DRAFT NYS DEC Forest Preserve Work Plan Policy

Dear Peter,

Protect the Adirondacks (PROTECT) is pleased to submit comments on the draft Commissioner's Forest Preserve Work Plan Policy (Work Plan Policy) prepared by the NYS Department of Environmental Conservation (DEC) for assessing the impacts of construction and management activities on the Forest Preserve. Protect the Adirondacks applauds DEC's effort to establish a process for ensuring that its activities on the Forest Preserve comply with Article 14 of the NYS Constitution, the Adirondack Park State Land Master Plan (APSLMP), the Catskill Park State Land Master Plan, the Environmental Conservation Law, and DEC rules, regulations, and policies.

A clear procedure for analyzing and demonstrating Article 14 compliance is a much-needed improvement over the status quo. The new Commissioner's Forest Preserve Work Plan Policy is an important reform of Forest Preserve management in the wake of the 2021 Court of Appeals decision in *Protect the Adirondacks v. Department of Environmental Conservation and Adirondack Park Agency*.

Many of our thoughts and concerns have been expressed in letters submitted to the DEC last fall and we're gratified that many of these ideas have been addressed. Our comments on the formal draft Work Plan Policy are below.

Part I. Summary

No comments.

Part II. Policy

In the “Definitions” section PROTECT suggests that in order to ensure consistency the definitions for “structure” and “improvement” be changed to match the definitions of those terms in the APSLMP. It’s important that the terms used by the two agencies that jointly manage the Forest Preserve mean the same things.

In the definition of “earthwork”, we suggest removing “and in a new position”.

Part III. Purpose and Background

This is an important section that serves as a guide for current and future staff in their work to develop a Forest Preserve Work Plan. While we agree with many of the overall statements, we suggest that a fifth bullet on page 3 be added and placed first that reads: “Assessing full compliance with Article 14 and Forest Preserve law and policies.”

In section III.A “Applicable Article 14 Considerations”, PROTECT is pleased to see that DEC recognizes that the “provisions of Article XIV §1 are paramount to DEC’s obligation to provide for the ‘care, custody and control’ of the Forest Preserve.” (p. 3) DEC’s analysis of whether “a particular project would alter the wild forest character of the Forest Preserve such that it would violate the Forever Wild Clause” is an important milestone in the state’s Forest Preserve management. (p. 3) We support DEC’s proposal to include an analysis of whether a proposed Work Plan complies with Article 14.

The first sentence of section III.A is not entirely accurate. UMPs often do not include assessments of whether the purpose of a proposed project is a permissible use of the Forest Preserve under Article 14. Also, much of the Forest Preserve still does not have an approved UMP, and most existing UMPs were approved before the 2021 Court of Appeals decision in *Protect the Adirondacks v. Department of Environmental Conservation and Adirondack Park Agency* was decided, so they include projects that are now clearly unconstitutional. Whether or not a proposed project is a permissible use is a threshold question that needs to be addressed in each work plan. See *Association for the Protection of the Adirondacks v. MacDonald* (bobsled run was *per se* unconstitutional based on its intended use).

DEC’s analysis, including its answers to the three critical questions that are identified in section III.A (pp. 3-4), should be included as a written statement. Having these important constitutional questions clearly answered in the draft Work Plans is critical to ensuring that DEC has “fully considered” the Forever Wild clause and has conducted the necessary Article 14 analysis in the development of a draft Work Plan. This analysis is also vital for public review and comment on the draft Work Plans.

In the assessment of tree cutting, all trees 1” DBH or more must be counted. The tree tally can then be used to answer the question about whether the “proposed cutting, removal, or destruction of timber [is] ‘material or substantial’”.

The description of the terrain alteration work should be used to answer the question about whether the “degree of alteration of the existing Forest Preserve terrain [is] permissible?”

The description of the existing wild state of the Forest Preserve should be used to answer the question about whether “the impacts of the proposed project on the existing wild state of the Forest Preserve [are] permissible?” This must include an assessment of whether the proposed project would “require greater interference with the natural development of the Forest Preserve than is necessary to accommodate hikers”. *Protect the Adirondacks v. Department of Environmental Conservation and Adirondack Park Agency*, 37 NY3d 73, 83 (2021). A proposed project cannot proceed if it would exceed that threshold of “interference” with the wild state of the Forest Preserve. *Id.* Additionally, the proposed project must be in accordance with the “ultimate objective of protecting the forest as wilderness”. *Id.* This factor must be met in order for a proposed project to meet the constitutional test, ensuring that the Forest Preserve is “forever kept as wild forest lands”.

As mentioned above, DEC’s answers to these questions should be a separate and distinct section in the Work Plan. Therefore, section V.A “Procedure” needs to articulate precisely where in the Work Plan these questions will be answered.

The Work Plan Policy should state that any proposed activities that do not satisfy Article 14 will not be approved.

In the procedure for review of Work Plans, the policy should identify the next steps to be taken if the Director of Lands and Forests disapproves a Work Plan. See Work Plan Policy p. 10 (subsection “j”).

Consistent with SEQRA (ECL Article 8), all Work Plans should be required to avoid tree cutting, terrain alteration (earthwork), and other alteration of the wild nature of the Forest Preserve. Only where that is not possible, such impacts should be both minimized and mitigated and the measures that will be taken to minimize and mitigate those impacts must be fully explained. Nevertheless, even where measures to minimize or avoid such impacts will be incorporated in the proposed project, the project may not be undertaken if doing so would result in a violation of Article 14.

Last, Forest Preserve Work Plans should be consistent and the Olympic Regional Development Authority, and any other entity that deals with Forest Preserve lands, should use the new format.

Part IV. Responsibility

PROTECT suggests that a sentence be added defining who within the Division of Lands and Forests will ensure that there is adequate information provided to the public and opportunities for public involvement. We also suggest that for Work Plans in the Adirondack Park the Adirondack Park Agency (APA) staff reviewing the Work Plan be identified.

Part V. Procedure

We are concerned, as we always have been, about maintenance activities in units of the Forest Preserve where there is no approved Unit Management Plan (UMP). This issue is addressed in section V.A “Work Plans for the Construction of New Structures/Improvements and/or the Expansion or Modification of Existing Structures/Improvements.” The Work Plan policy states “In areas of the Adirondack Park Forest Preserve without an adopted UMP, modifications of existing facilities or improvements will be allowed, subject to consultation with the APA in accordance with the APA/DEC Memorandum of Understanding and Work Plan approval.” Given the DEC’s desire to make its Forest Preserve planning more open and transparent, we believe that in situations where the APA is consulted it should provide a written statement setting forth its assessment of the proposed maintenance activity and any directions it provides, and the APA statement should be included in the Work Plan. This Work Plan policy requires various DEC public statements and disclosures, and the APA should be held to that same standard for public transparency.

That said, it is our position that the APSLMP prohibits new structures or improvements, and expansions or modifications of existing facilities or improvements (defined in the Work Plan Policy as a “material change or replacement” (p. 5)) in areas without an approved UMP. *See* APSLMP at 23, 29, 33, 36 (prohibiting “new structures or improvements” in various Forest Preserve land classifications “except in conformity with finally adopted unit management plans”).

We agree that new structures or improvements “must be approved in a UMP” (p. 5) before work can be undertaken. If there is an approved UMP, but it does not anticipate an expansion or modification (e.g., a reroute of an existing trail) of the structure or improvement that is identified in the UMP, then we agree that DEC must prepare a draft Work Plan that includes “a detailed description of the circumstances requiring” (p. 5) the expansion or modification and obtain approval from the Forest Preserve Coordinator for the Adirondacks or Catskills, whichever is applicable. However, we believe that greater thought needs to go into defining the point where a UMP amendment and public vetting should be undertaken. That option does not appear to be considered here.

This section should also address areas of the Forest Preserve that are outside of either the Adirondack Park or Catskill Park, but are located in Forest Preserve counties.

PROTECT supports the inclusion of a mandatory ENB Notice and opportunity for public comment of at least 14 days, and we ask that this be increased to at least 30 days. We also urge the DEC to post all final Forest Preserve Work Plans on a page on the DEC website where Work Plans are listed by year and by DEC Region.

In section V.A1 “Description of Desired Conditions for the Project”, this section should provide a detailed description of the desired conditions and outcomes for the proposed project. We believe that the discussion of Article 14 compliance is best handled in a dedicated section as outlined above. This section should deal specifically with the proposed structure or improvement

and the intended outcome. This section should be detailed and include an assessment about the level of anticipated use.

In section V.A2 “Description of Project Specifications”, the listed requirements are all necessary.

In section V.A3 “Description of Measures to Avoid, Minimize, and Mitigate Impacts to Natural Resources”, we believe that this is an important section as the success of a given project will largely be determined by how well this section is completed. We support the Work Plan Policy’s inclusion of a thorough discussion of the need to describe a proposed activity’s impacts on natural resources and the “surrounding forest/ecological communities.” (p 6)

In section V.A3a, all trees 1” DBH or greater must be counted. It’s common for tree age/class information to be provided in a Work Plan, so we see no need to separate the 1-3” DBH trees from the age/class data for tree cutting. It should be emphasized that every effort should be made to minimize tree cutting, regardless of size, in every Work Plan.

In section V.A3b, with respect to terrain alteration, the Work Plan Policy should include a definition of what is considered “significant earthwork.” Certainly, a decision for significant earthwork needs a justification and mitigation efforts, but there should also be an assessment as to the impacts on the wild state or wild forest character of the surrounding Forest Preserve. Earthwork often introduces human geometric forms to the Forest Preserve, that endure through time, and disrupt the natural setting. Section V.A3b should be broadened accordingly.

We support the steps enumerated in section V.A3c “Impacts to Streams, Waterbodies, and Wetlands.”

We support the steps enumerated in section V.A3d “Impacts to Rare, Threatened, or Endangered Species.”

Section V.A4 “Analysis of Project Location and Design Alternatives” is important because it will help to inform the public about the complexity of a project and the choices that the DEC made in its proposed Work Plan. We support the Work Plan Policy’s inclusion of a section that will assess at least one additional alternative proposal.

We support the steps enumerated in section V.A5 “Maps.”

We support the steps enumerated in section V.A6 “Description of the Proposed Use of Motorized Equipment or Motorized Vehicles to Facilitate Construction, if any, in Compliance with Commissioner’s Policy 17 (CP-17).”

We support the steps enumerated in section V.A7 “Description of Applicable Standards for Accessibility by People with Disabilities.”

In section V.A8 “SEQRA”, we believe that if a proposed action has been reviewed pursuant to SEQRA, the Work Plan should identify when that review took place and reference the document memorializing the review. In addition, where DEC believes that a proposed project has been

adequately reviewed in a Generic EIS, the Department should identify the specific portions of the GEIS relied upon.

In section V.A9 “Public Notice”, we support the process enumerated, but also call for all final Work Plans to be posted on a Forest Preserve Work Plans page on the DEC website, organized by year and DEC Region.

In section V.A10 “Review and approval process for Work Plans involving Construction or Modification of New or Existing Structures or Improvements,” we support the steps outlined to ensure compliance with applicable laws and policies at the beginning of the process.

Projects that are authorized in UMPs have been vetted for APSLMP compliance, but often not for Article 14 compliance. The draft policy calls for an Article 14 compliance assessment in section V.A10d. We think that an assessment of Article 14 compliance should come early in the process, before lots of time and energy has been expended by Forest Preserve managers.

In section V.A10f, we suggest that DEC Counsel’s Office be included as part of the Central Office Review Team so that there will be a legal review of the draft Work Plan and draft ENB notice.

In section V.A10b, we believe that in instances where APA consultation is required that a written statement by APA should be included in the proposed Work Plan. In section V.A10h/i the DEC lays out a process whereby a proposed project is approved or disapproved after the mandatory public comment period. We believe that DEC should include an option for modification of a project based on public comments.

There should be a new V.A11, titled “Implementation of Work Plans,” that states who is responsible for implementing projects in accordance with the approved Work Plan, and who is responsible for monitoring implementation to ensure compliance with the approved Work Plan.

In section V.B “Ordinary Maintenance Work Plans” we do not oppose the use of Ordinary Maintenance Work Plans for ordinary maintenance activities that require tree cutting, removal or destruction or earthwork or activities that materially change the use or appearance of the land or vegetation. However, the following should be added to the end of the first paragraph: “, or will likely result in increased usage of the structure or improvement.”

We also do not oppose the use of stewardship agreements, rather than Work Plans, for maintenance activities that do not require tree cutting, removal or destruction or earthwork (such as mowing or maintenance within the footprint of existing structures). However, stewardship agreements would not be subject to the same scrutiny of review as set forth in the proposed Work Plan Policy. Therefore, tree cutting, removal or destruction or earthwork that is to be undertaken pursuant to stewardship agreements should also require Work Plans.

All projects undertaken pursuant to a stewardship agreement, with or without a Work Plan, should be closely monitored by DEC for compliance with Article 14 and all applicable laws, regulations and policies.

The draft template for Ordinary Maintenance Work Plans, found in Attachment 2 of the Work Plan Policy, should be titled “Forest Preserve Work Plan for Ordinary Maintenance Project”, rather than “Forest Preserve Application”.

Section V.B1 “Ordinary Maintenance Activities Requiring Work Plans” appears to cover all of the bases for review and public disclosure.

Part V.C Emergency Procedures

We recognize that existing Forest Preserve procedures may need to be modified or suspended temporarily in emergency situations “involving the protection of human life.”

Part VI. Related References

Add the citation to the 2019 Appellate Division decision in *Protect the Adirondacks v. Department of Environmental Conservation and Adirondack Park Agency*. This was affirmed by the Court of Appeals, and it provides important background and context for the 2021 decision.

Also add the applicable Parts and Sections of the NYCRR. DEC’s regulations are referenced in the Summary and in Part III, so the citations should be provided here for ease of reference by Work Plan preparers.

Work Plan Template

We urge DEC to ensure that the final Work Plan Template is consistent with the criteria, organization, and headings of the Work Plan Policy.

Inexplicably, the “Regulatory Clearance Checklist” still does not list Article 14 compliance as a requirement.

The differentiation between 1” trees and 3” trees on page 1 should be removed.

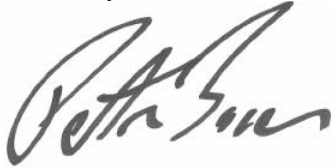
The form should include an affirmation by a DEC attorney that she or he has reviewed the Work Plan and has determined that it is consistent with the Work Plan Policy, Article 14 of the NYS Constitution, and, as applicable, the Adirondack Park State Land Master Plan, the Catskill Park State Land Master Plan, the Environmental Conservation Law, and DEC rules, regulations, and policies.

Assessment and Revision

The Commissioner’s Policy should include a mandatory assessment at some point in the future after a number of Forest Preserve Work Plans have been prepared. This could be done at 3 years or 5 years down the line. We believe that the DEC and greater Adirondack and Catskill Forest Preserve communities will learn a lot over the next several years as this new important policy is completed and implemented.

On behalf of the Board of Directors of Protect the Adirondacks, please accept our gratitude for the opportunity to share our comments on this important Forest Preserve policy.

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