To Be Argued By: Hannah Chang
Time Requested: 20 Minutes

New York State
Court of Appeals

ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE and PROTECT THE ADIRONDACKS! INC.,

Appellants,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY; LEILANI ULRICH, in her capacity as Chairperson of the New York State Adirondack Park Agency; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and BASIL SEGGOS, in his capacity as Acting Commissioner of the New York State Department of Environmental Conservation,

Respondents.

APL-2018-00112

REPLY BRIEF OF APPELLANTS

CHRISTOPHER AMATO, ESQ.
ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE
P. O. BOX 9247
NISKAYUNA, NY 12309
TEL.: (518) 860-3696

HANNAH CHANG, ESQ.
EARTHJUSTICE
48 WALL STREET, 19TH FLOOR
NEW YORK, NY 10005
TEL.: (212) 845-7382
FAX: (212) 918-1556

Attorneys for Appellants

Dated: December 6, 2018

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PRELIMINARY STATEMENT

The Court is faced in this case of first impression with pure questions of law. Does the conflict of laws provision in the Wild, Scenic, and Recreational Rivers System Act ("Rivers Act"), ECL 15-2721, apply to Respondents' decision to open Chain Lakes Road South to public motor vehicle use? Does the Rivers Act provision allowing certain existing uses to continue in protected river areas—referred to in briefing as the existing use exemption—supersede the mandate in the Adirondack Park State Land Master Plan ("Master Plan") that existing non-conforming uses on newly classified Forest Preserve lands be removed or discontinued? At stake in the answers to these questions is the Rivers Act itself and the protections it affords to ensure that rivers within the state wild, scenic, and recreational rivers system are conserved for present and future generations. Also at stake is the Master Plan and the protections it affords to ensure that Forest Preserve lands in the Adirondack Park are kept "forever wild."

Respondents Department of Environmental Conservation ("DEC") and the Adirondack Park Agency ("APA") (jointly, the "Agencies") contend that the Master Plan gives DEC license to apply the Rivers Act's existing use exemption despite the Rivers Act's requirement, embodied in its conflict of laws provision, for more restrictive management, and the more protective mandate in the Master Plan requiring discontinuance of non-conforming existing uses. The logical

extension of this argument is that DEC can ignore the Master Plan and the Forever Wild protections of the state Constitution, and selectively apply provisions of the Rivers Act. But the Agencies have no authority to eviscerate the Rivers Act and the Master Plan at their choosing. Rather, as explained below, fundamental rules of statutory interpretation must be employed to answer these questions of law.

As Appellants Adirondack Wild and Protect the Adirondacks! Inc. set forth in their opening brief, DEC cannot lawfully apply the Rivers Act's existing use exemption to allow recreational motor vehicle use on Chain Lakes Road South for two independent reasons. First, the Rivers Act's conflict of laws provision applies to the facts of this case because of the inconsistency between the Rivers Act's existing use exemption and the Master Plan's blanket prohibition of non-conforming uses on Forest Preserve lands—in this case, the prohibition of public motor vehicle use in a Wild river area, which must be managed as Wilderness. Application of the Rivers Act's conflict of laws provision means that the Master Plan's more restrictive provisions must prevail, and thus motor vehicle use on the portion of Chain Lakes Road South within the Wild river area of the Hudson River is impermissible regardless of any historical use. Second, and in any event, the Rivers Act's general exemption for existing uses cannot and does not supersede the Master Plan's specific and detailed prohibition of non-conforming uses on constitutionally protected Forest Preserve land.

ARGUMENT

POINT I
AS A MATTER OF LAW, DEC HAS NO AUTHORITY TO ALLOW MOTOR VEHICLE USE ON CHAIN LAKES ROAD SOUTH

The question of whether the Rivers Act's conflict of laws provision applies is one of pure statutory interpretation. Accordingly, although DEC and APA erroneously indicate otherwise, *see, e.g.*, Resp'ts' Br. at 27-28, 37, "there is little basis to rely on any special competence or expertise of the administrative agency," and this Court "need not accord any deference to the agency's determination." *Albano v Bd. of Trustees of N.Y. City Fire Dept., Art. II Pension Fund*, 98 NY2d 548, 553 (2002); *see also Lewis Family Farm, Inc. v N.Y. State Adirondack Park Agency*, 64 AD3d 1009, 1013, 2009 NY Slip Op 05890 (3d Dept 2009) (affirming the Supreme Court's conclusion that "it was not required to defer to the APA's interpretation of the APA Act and the Rivers System Act as the agency charged with their enforcement" because "pure legal interpretation of clear and unambiguous statutory terms . . . requires no such deference") (internal quotations and alterations omitted).

The two legal theories advanced by Respondents to justify application of the Rivers Act's existing use exemption both fail because they fly in the face of basic canons of statutory construction. First, as explained below, the inclusion in the existing use exemption of the phrase "[n]otwithstanding anything herein contained

to the contrary," ECL 15-2709 (2), does not bar application of the Rivers Act's conflict of laws provision, *id.* § 15-2721. Second, the Master Plan's recognition that DEC "has the authority independent of the master plan to regulate uses of waters and uses of wild, scenic and recreational rivers running through state land," Master Plan at 4 (A.574), does not "eliminate[] any conflict between its provisions and those of the Rivers Act," as Respondents wrongly claim. Resp'ts' Br. at 27.

A. The Rivers Act's Existing Use Exemption Does Not Prevent Application of the Act's Conflict of Laws Provision

Respondents argue that the language of the Rivers Act's existing use exemption "authorizes the continuation of an existing use, without alteration or expansion, notwithstanding any other provision of the Rivers Act, *including the conflicts provision*." Resp'ts' Br. at 26. The existing use exemption states:

> "Notwithstanding anything herein contained to the contrary, existing land uses within the respective classified river areas may continue, but may not be altered or expanded except as permitted by the respective classifications, unless the commissioner or agency orders the discontinuance of such existing land use."

ECL 15-2709 (2). Respondents focus on the first clause of this sentence and make the unsupportable leap that "herein" refers to the entire Rivers Act (including the conflict of laws provision) and not simply to the specific provision in which the existing use exemption is located, ECL 15-2709 (2).

To the contrary, the Rivers Act's statutory framework makes clear that the term "herein" refers only to ECL 15-2709 (2) itself, and not the entire statute. ECL

15-2709 sets forth the "[a]dministration of the [s]ystem." The conflict of laws provision stands separately at ECL 15-2721. ECL 15-2709 (2), within the provision relating to the administration of the system, is a key sub-provision because, in addition to including the existing use exemption, it specifies, for each river classification, the land uses that are allowed or prohibited within the protected river area. ECL 15-2709 (2) states in its entirety:

> "2. After inclusion of any river in the wild, scenic and recreational rivers system, no dam or other structure or improvement impeding the natural flow thereof shall be constructed on such river except as expressly authorized in paragraphs b and c of this subdivision. *Notwithstanding anything herein contained to the contrary, existing land uses within the respective classified river areas may continue, but may not be altered or expanded except as permitted by the respective classifications, unless the commissioner or agency orders the discontinuance of such existing land use.* In the event any land use is so directed to be discontinued, adequate compensation therefor shall be paid by the state of New York either by agreement with the real property owner, or in accordance with condemnation proceedings thereon. The following land uses shall be allowed or prohibited within the exterior boundaries of designated river areas depending on the classification of such areas:
>
> > a. In wild river areas, no new structures or improvements, no development of any kind and no access by motor vehicles shall be permitted other than forest management pursuant to forest management standards duly promulgated by regulations.
> >
> > b. In scenic river areas, the continuation of present agricultural practices, the propagation of crops, forest management pursuant to forest management standards duly promulgated by regulations, limited dispersed or cluster residential developments and stream improvement structures for fishery management purposes shall be permitted. There shall be no mining, excavation, or construction of roads, except private

> roads necessary for residential, agricultural or forest management purposes, and with the further exception that public access through new road construction may be allowed, provided that there is no other such access within two land miles in either direction.
>
> c. In recreational river areas, the lands may be developed for the full range of agricultural uses, forest management pursuant to forest management standards duly promulgated by regulations, stream improvement structures for fishery management purposes, and may include small communities as well as dispersed or cluster residential developments and public recreational areas. In addition, these river areas may be readily accessible by roads or railroads on one or both banks of the river, and may also have several bridge crossing and numerous river access points."

ECL 15-2709 (2) (emphasis added). In other words, this sub-provision sets forth the restrictions on land use within each river classification. When read in context, the "notwithstanding" language clearly applies solely to the restrictions and prohibitions set forth in ECL 15-2709 (2) itself, rather than to the entire statute.

Basic canons of statutory construction support this conclusion. It is fundamental that "[a]ll parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof." Statutes Law § 98. Far from harmonizing the various Rivers Act provisions, Respondents' proposed interpretation would nullify the conflict of laws provision, a key part of the Act designed to ensure the highest level of protection for protected rivers and their adjacent river areas.

Moreover, the self-referencing term "this title" appears multiple times in the Rivers Act, as opposed to the term "herein." For instance, the statute specifies that "[n]othing in *this title* shall preclude a section of the state wild, scenic and recreational rivers system from becoming a part of the national wild and scenic rivers system," ECL 15-2717 (emphasis added); *see also id.* § 15-2715 ("The Commissioner or agency shall . . . submit . . . proposals for the addition to the . . . rivers system of river areas which, in their judgment, fall within one or more of the descriptive classes set out in *this title*.") (emphasis added); *id.* § 15-2723 ("Any person who violates any provision of *this title* . . . .") (emphasis added).

In contrast, the legislature used the term "herein" elsewhere in the Rivers Act to refer to language within a sub-provision of the statute. For instance, ECL 15-2707 (2) states that "[a]ll rivers in the system shall be relatively free of pollution and the water quality thereof of a standard sufficiently high to meet the primary management purposes enumerated *herein*." ECL 15-2707 (2) (subsequently enumerating the management objectives of each river classification) (emphasis added). Similarly, ECL 15-2707 (2) (a) (3) requires that "[m]anagement of wild river areas shall be directed at perpetuating them in a wild condition as defined *herein.*" ECL 15-2707 (2) (a) (3) (referring to the definition set forth in ECL 15-2707 (2) (a), that a wild river is a river "free of diversions and impoundments, inaccessible to the general public . . . and with river areas primitive

and undeveloped . . ."). Thus, in crafting the Rivers Act, the legislature was fully cognizant of—and repeatedly utilized—"this title" to refer to the entire statute and "herein" to refer to a sub-provision. Respondents' proposed interpretation of the existing use exemption would have this Court ignore the clear choices made by the legislature in deliberately using different words to describe the entire statute as opposed to a sub-provision of the statute. *See* Statutes Law § 231 ("In the construction of a statute, meaning and effect should be given to all its language, if possible, and words are not to be rejected as superfluous when it is practicable to give to each a distinct and separate meaning."); *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 (2001) ("We have recognized that meaning and effect should be given to every word of a statute."). Respondents' claim that the first clause of the existing use exemption "resolves any conflict that would otherwise trigger applicability of the Master Plan's more restrictive provisions" must therefore fail. Resp'ts' Br. at 26.

B. The Master Plan's Recognition of DEC's Independent Authority under the Rivers Act Also Does Not Preclude Application of the Rivers Act's Conflict of Laws Provision

Respondents narrowly focus on the Master Plan's recognition that DEC "has the authority independent of the master plan to regulate . . . uses of wild, scenic and recreational rivers running through state land . . . ." Master Plan at 4 (A.574). They attempt to use this straightforward recognition of DEC's separate authority

and obligations under the Rivers Act to support the erroneous conclusion that "the Master Plan itself resolves any conflict that would otherwise trigger applicability of the Master Plan's more restrictive provisions." Resp'ts' Br. at 27. Here again, Respondents ignore fundamental canons of statutory construction.

Within a statute, language "must be analyzed in context and in a manner that harmonizes the related provisions and renders them compatible." *Mestecky v City of New York*, 30 NY3d 239, 243 (2017), *rearg denied*, 30 NY3d 1098 (2018) (internal quotation marks and citations omitted). Moreover, statutes are to be construed in harmony whenever possible. *See* Appellants' Br. at 29; *see also Matter of Dutchess County Dept. of Social Servs. v Day*, 96 NY2d 149, 153 (2001) ("Courts must harmonize the various provisions of related statutes and construe them in a way that renders them internally compatible.") (internal quotation marks and alteration omitted) (citing *Matter of Aaron J.*, 80 NY2d 402, 407 [1992]).

The Master Plan's recognition of DEC's independent authority to regulate protected river areas on Forest Preserve lands under the Rivers Act must be read together with other provisions, both within the Master Plan itself and the Rivers Act, to give effect to and harmonize these related statutes. Respondents ignore three relevant provisions. First, as detailed in Appellants' opening brief, the Rivers Act is clear that "[a]ny section of the state wild, scenic and recreational rivers system that is or shall become a part of the Forest Preserve, the Adirondack or

Catskill Parks or any other state park . . . shall be subject to the provisions of this title, *and* the laws and constitutional provisions under which the other areas may be administered." ECL 15-2721 (emphasis added). In other words, the Rivers Act explicitly states that its provisions apply *in addition to*, not in lieu of, any other provisions that apply to protected river areas within the Forest Preserve and the Adirondack Park—here, the Master Plan and the New York State Constitution's Forever Wild clause, NY Const. art XIV, § 1.

Second, the Rivers Act's division of jurisdiction—to DEC for river areas on Forest Preserve lands within the Adirondack Park and to the APA for river areas on privately owned land within the Adirondack Park—includes an explicit reservation of DEC's duties and powers under the Master Plan: "This section shall not be construed to divest [DEC] from the exercise of functions, powers and duties which have not been delegated by law to the [APA]." ECL 15-2705. DEC, not APA, has "responsibility for the administration and management of [the lands under its jurisdiction] in compliance with the guidelines and criteria laid down by the master plan." Master Plan at 12 (A.582). DEC's duties and functions under the Master Plan are thus precisely the ones that the Rivers Act explicitly indicates are not divested.

Finally, the Master Plan's recognition of DEC's independent authority under the Rivers Act also must be read in harmony with the Master Plan's plain language

that its classification system and guidelines "are designed to be consistent with and complementary to both the basic intent and structure of [the Rivers Act]." Master Plan at 43. The overarching intent and purpose of the Rivers Act is to protect certain unique and valuable rivers in the state "for the benefit and enjoyment of present and future generations." ECL 15-2701. This protective intent is reflected in the language and structure of the Rivers Act, which includes a conflict of laws provision that ensures that "the more restrictive provisions" of any applicable laws protecting river areas within the state wild, scenic and recreational rivers system supersede conflicting, less protective provisions. *Id.* § 15-2721. In line with its intent "to be consistent with and complementary to" the Rivers Act, the Master Plan likewise reflects this legislative intent to protect river areas within the state wild, scenic, and recreational rivers system:

> "No river or river area will be managed or used in a way that would be less restrictive in nature than the statutory requirements of the Wild, Scenic and Recreational Rivers Act, Article 15, title 27 of the Environmental Conservation Law, or than the guidelines for the management and use of the land classification within which the river area lies, but the river or river area may be administered in a more restrictive manner."

Master Plan at 44 (A.614) (emphasis added). This language, which has the force of a legislative enactment, *Adirondack Mountain Club, Inc. v. Adirondack Park Agency*, 33 Misc 3d 383, 387, 2011 NY Slip Op 21292 (Sup Ct, Albany County 2011), also is notable because while the Master Plan is "constitutionally neutral,"

Master Plan at 1 (A.571), it is the blueprint for the governance of constitutionally protected Forest Preserve land in the Adirondack Park, which is to be kept "forever wild." NY Const. art XIV, § 1.

All of these provisions, read to be "consistent with the spirit, purpose and objects of" the underlying statute, to give "a sensible and practical over-all construction, which is consistent with and furthers its scheme and purpose and which harmonizes all its interlocking provisions," and to "harmonize the various provisions of related statutes" to render them "internally compatible," necessarily requires the conclusion that the more protective provisions of the Master Plan barring motor vehicle use in Wild River areas apply to the situation before this Court. *Town of Aurora v Vill. of E. Aurora*, — NY3d — 2018, WL 6047999, at *4, 2018 NY Slip Op 07923 (Ct App Nov. 20, 2018) (internal citation omitted); *People ex rel. McCurdy v Warden, Westchester County Corr. Facility*, 164 AD3d 692, 693-694 (2d Dept 2018); *Brown v Glennon*, 203 AD2d 846, 848-849 (3d Dept 1994). In other words, the Rivers Act's conflict of laws provision, reflecting the legislative intent to provide the greatest protection to river areas within the system,

requires that the Master Plan's prohibition on motor vehicle use in Wilderness areas—as opposed to the Rivers Act's existing use exemption—apply.[1]

Respondents' argument to the contrary—that the Master Plan's reference to DEC's "authority independent of the master plan" eliminates any conflict between the Master Plan and the Rivers Act, Resp'ts' Br. at 27—ignores basic tenets of statutory construction and instead reads this language arbitrarily to override other provisions within the Master Plan and the Rivers Act. This cherry-picking of which provisions of the law to apply is untethered from fundamental principles of statutory construction and should be rejected.

POINT II
THE RECORD DOES NOT SUPPORT RESPONDENTS' DETERMINATION THAT PUBLIC MOTOR VEHICLE USE ON CHAIN LAKES ROAD SOUTH IS AN EXISTING USE AND DOES NOT ALTER OR EXPAND THAT USE

This Court need not consider the Schachner Report because the Master Plan prohibits all public motor vehicle use on the portion of Chain Lakes Road South

[1] Respondents note in their brief that "the land on which most of Chain Lakes Road (South) is located (including the one-mile segment at issue here)" is classified as Wild Forest, where motor vehicle use is permitted. Resp'ts' Br. at 11. This characterization does not acknowledge that the one-tenth-mile wide sliver of Wild Forest classified for purposes of allowing development of the Class II Community Connector at issue snakes between vast swaths of lands classified as Primitive to the west and Wilderness to the east. *See* A.60 (map). This characterization also is irrelevant, because as Respondents acknowledge, *see* Resp'ts Br. at 18–19, a one-mile segment of Chain Lakes Road South traverses a Wild River area, which the Master Plan governs as Wilderness, where public motor vehicle use is prohibited.

that is located within the Wild River area of the Hudson River, and it is therefore irrelevant whether such use of the road is an existing one. In any event, as already set forth in Appellants' opening brief, the record simply does not support Respondents' claim that public motorized use of Chain Lakes Road South constitutes an existing use; nor does it support Respondents' conclusion that opening the road to public motor vehicle use will not not alter or expand any existing use. *See* Appellants' Br. at 36-43.

Respondents assert that "[t]he Complex Plan recognizes that much of the Complex Area was historically accessible to the public for recreational purposes . . . ." Resp'ts' Br. at 12. In fact, however, the Unit Management Plan ("UMP") concedes that "[a]lthough the public has travelled through these lands throughout history and individuals have had recreational access to these lands with permission of the landowners (through leases and other types of agreements), *the general public has not had unfettered use of portions of the Complex Area in over one hundred years*." UMP at 1 (A.277) (emphasis added). Even if public motor vehicle use were an existing use on Chain Lakes Road South, though, Respondents' claim that the development of a Class II Community Connector

snowmobile trail on this road will not alter or expand that use does not withstand scrutiny.[2]

First, the Agencies attempt to add the additional requirement that an alteration be "*material*," Resp'ts Br. at 31, but nothing in either the Rivers Act or the implementing regulations imposes a "materiality" test, and Respondents' effort to write this additional requirement into the Act should be rejected.[3] Second, as articulated in Appellants' opening brief and in the concurrence and dissent in the Appellate Division, the Schachner Report does not establish that the lands in question were open to *public* motorized use. To the contrary, the report serves only to confirm that such use was available solely to the private landowner, its employees, and its private lessees and their guests. *See* Appellants' Br. at 36-37; A.16. Thus, as explained in Appellants' opening brief, even if motorized use were an existing use, the opening of Chain Lakes Road South constitutes an alteration and expansion of that use. *See* Appellants' Br. at 39-43.

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[2] Respondents make much of the distinction between the nature of the use and the identity of the user, *see* Resp'ts' Br. at 36-37, but this artificial distinction is immaterial. Even assuming, as Respondents contend, that the word "alter" refers to an alteration in the *nature* of the use, the UMP nevertheless plainly alters the alleged existing use.

[3] This question of statutory interpretation, a pure question of law, is due no deference. *See Albano*, 98 N.Y.2d at 553. Contrary to Respondents' claim, the question of whether the Rivers Act's use of the term "alter" actually means "materially alter," is not a question that involves the agency's "knowledge and understanding of underlying operational practices." Resp'ts' Br. at 37.

CONCLUSION

For all the reasons stated above and in Appellants' opening brief, this Court should reverse the Opinion and Order below and order the relief requested in Appellants' Petition, including:

1. annulling and vacating the APA's Conformance Determination and DEC's Findings Statement for the Essex Chain UMP;
2. remanding the matter to Respondents for the development and approval of an Essex Chain UMP that complies with law;
3. enjoining and restraining Respondents from implementing the Essex Chain UMP pending preparation and approval of a revised UMP that conforms with all applicable law;
4. awarding Appellants costs and reasonable attorneys' fees; and
5. granting Appellants such other and further relief as the Court deems just and proper.

Dated: December 5, 2018
New York, New York

Respectfully submitted,

Hannah Chang
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005
212-845-7382

Christopher Amato
Adirondack Wild: Friends of the Forest Preserve
P. O. Box 9247
Niskayuna, NY 12309
(518) 860-3696
camato@adirondackwild.org

Attorneys for Appellants

WORD COUNT CERTIFICATION

This brief complies with the word count limitation set forth in 22 N.Y.C.R.R. § 500.13(c), because it contains 3,955 words, excluding the parts exempted by 22 N.Y.C.R.R. § 550.13(c)(3). Microsoft Word 2016 computed this word count.

Dated: December 6, 2018
New York, New York

Respectfully submitted,

Hannah Chang
Earthjustice
48 Wall Street,
15th Floor
New York, NY 10005
212-845-7382
hchang@earthjustice.org

THE STATE OF NEW YORK
COURT OF APPEALS

----------X

ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE, and PROTECT THE ADIRONDACKS! INC.,

Appellants,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY; LEILANI ULRICH, in her capacity as Chairperson of the New York State Adirondack Park Agency; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and BASIL SEGGOS, in his capacity as Acting Commissioner of the New York State Department of Environmental Conservation,

Respondents.

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AFFIDAVIT OF SERVICE

Index No. APL-2018-00112

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, KAISHA OLIVER, being duly sworn, deposes and says:

1. I am not a party to this action and I am over 18 years of age.

2. On Wednesday, December 5, 2018, I served three true and correct copies of the Reply Brief of Appellants Adirondack Wild: Friends of the Forest Preserve and Protect the Adirondacks! Inc. via Federal Express upon said counsel at the address below:

   Laura Etlinger, Esq.
   Assistant Solicitor General
   Division of Appeals and Opinions
   Office of the Attorney General
   The Capitol
   Albany, New York 12224

Dated: New York, New York
December 5, 2018

Kaisha Oliver

Sworn to before me this
5th day of December 2018

JONATHAN JAMES SMITH
NOTARY PUBLIC-STATE OF NEW YORK
NO. 02SM6335228
QUALIFIED IN NEW YORK COUNTY
MY COMMISSION EXPIRES 01-04-2020

Notary Public