

APL 2018-00112

To be argued by:
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Time Requested: 15 minutes

APPELLATE DIVISION THIRD DEPT. NO. 525165

State of New York
Court of Appeals

IN THE MATTER OF THE APPLICATION OF
ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE AND
PROTECT THE ADIRONDACKS! INC.,

Petitioners-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 SEGOS, IN HIS
CAPACITY AS ACTING COMMISSIONER OF THE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Respondents-Respondents.

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PRELIMINARY STATEMENT

At issue in this appeal is the propriety of a determination by the Department of Environmental Conservation (“the Department”) to allow seasonal motor vehicle use for snowmobiling and hunting on an existing road on state land in the Adirondack Park, notwithstanding the fact that, for one mile, the road traverses land designated as “Wild River” under the Wild, Scenic and Recreational Rivers System Act (“Rivers Act”).

The Department made the subject determination following the State’s acquisition of land in the Adirondack Park that contains most of Chain Lakes Road (South), a hardened, gravel road of 15 to 20 feet in width that enters the newly acquired land from public lands to the south and extends north for approximately six more miles. By allowing seasonal motor vehicle use on the one-mile segment at issue, the Department provided, with an existing road, the link needed for a 20.6-mile multi-use trail that will connect two towns in the Adirondacks and be available for public use, including snowmobile use. Although motor vehicles of any kind are typically prohibited in Wild River areas, the Rivers Act recognizes an

exception for the continuation, without alteration or expansion, of existing land uses. The Department concluded that this exception authorized the continuation of seasonal motor vehicle use for snowmobiling and hunting on the subject one-mile segment because the detailed historical study it commissioned established that motor vehicles had been used extensively and continuously on the entire length of Chain Lakes Road (South) since at least the 1920s, and snowmobiles in particular since at least the 1950s.

Petitioners challenge that determination, arguing that use of the subject one-mile segment is not governed by the existing-use exception in the Rivers Act, but rather by more restrictive provisions in the Adirondack Park State Land Master Plan (the “Master Plan”). The Appellate Division, Third Department, rejected that argument, finding unanimously that the Department’s authority under the Rivers Act is independent of the Master Plan. And the Appellate Division went on to sustain (albeit over a two-judge dissent) the Department’s record-based conclusion that it could authorize public motor vehicle use on the one-mile segment at issue under the existing-use exception in the Rivers Act. The

Appellate Division was correct on both points. This Court should therefore affirm.

QUESTIONS PRESENTED

1. Did the Department properly base its authority to approve the motor vehicle use at issue on the existing-use exception in the Rivers Act, notwithstanding the Master Plan's more restrictive provisions?

2. Did the Department rationally find on the record before it that the motor vehicle use at issue constituted the continuation of an existing use without material alteration or expansion?

STATUTORY AND REGULATORY FRAMEWORK

The development and use of lands and waterways in the Adirondack Park are governed by the State Constitution, as well as multiple state statutes, land-use-development controls, *see* Executive Law § 805(2)(a), local zoning laws, and development plans. This case involves three such authorities: the Rivers Act, Environmental Conservation Law ("ECL") §§ 15-2701 to 15-2723; the Adirondack Park State Master Plan (the "Master Plan") (A565-

698¹); and unit management plans developed by the Department, *see* Executive Law § 816(1).

A. The Wild, Scenic and Recreational Rivers System Act

The Legislature adopted the Rivers Act in 1972. L. 1972, ch. 869.² The Rivers Act governs rivers and their immediate environs in the State that are designated as part of the Wild, Scenic and Recreational Rivers System (the “Rivers System”). The purpose of the statute is to preserve the designated river areas “in free-flowing condition” and to protect them from “improvident development and use” “for the benefit and enjoyment of present and future generations.” ECL § 15-2701(2), (3). The Legislature determines

¹ References to documents in the Appellants’ Appendix are denoted as “A__” and references to documents in the Respondents’ appendix are denoted as “RA__.” Note that the appendices also includes pagination from the record that was before the Appellate Division. Page numbers for the Appellants’ Appendix appear in the upper left-hand corner of each page and page numbers for the Respondents’ Appendix appear at the bottom of each page.

² When enacted the Rivers Act was codified as part of the Conservation Law. *See* L. 1972, ch. 689, § 1 (enacting Conservation Law art. 5, part 3-C). In 1973, it became part of the Environmental Conservation Law. *See* L. 1973, ch. 400. § 39 (enacting ECL, art. 15, title 27).

which rivers to include in the Rivers System and designates each included river as “Wild,” “Scenic” or “Recreational.” *See* ECL §§ 15-2713 to 15-2714. The boundaries of the protected river areas on state land generally extend one-half mile from each bank. ECL §§ 15-2707(2)(a)(2), 15-2711.

Rivers or sections of rivers designated as Wild “are free of diversions and impoundments” and are usually “inaccessible to the general public except by water, foot or horse trail.” ECL § 15-2707(2)(a). The use of “motor vehicles,” defined to include snowmobiles, *see* ECL § 15-2703(7), is generally prohibited in Wild River areas on state land, *id.* § 15-2709(2), with two exceptions, including the existing-use exception at issue here: “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.” ECL § 15-2709(2) and (2)(a).³ Thus, if motor vehicles were used in a Wild River area

³ The second exception permits the use of motor vehicles for forest management purposes. *See* ECL § 15-2709(2)(a). As a practical matter, however, the State does not engage in forest management activities in the Adirondack Park. *See* N.Y. Const. art.

before the area's inclusion in the Rivers System, motor vehicle use may continue thereafter, provided there is no alteration or expansion, within the meaning of the Rivers Act.

The Rivers Act recognizes that sections of the Rivers System may be located in any number of different areas of the State, including the Forest Preserve, Adirondack Park, Catskill Park, and other state parks, wild life refuge areas, or similar areas, and thus may be subject to multiple statutes and constitutional provisions. ECL § 15-2721. The Rivers Act thus specifies that any such sections shall be subject to all such applicable statutes and constitutional provisions. *Id.* And the Rivers Act specifies further that, in case of a conflict between the Rivers Act and any such laws or constitutional provisions, the more restrictive provisions shall govern. *Id.*

At the same time, the Rivers Act expressly gives the Department "exclusive jurisdiction" over all designated "river

XIV, § 1; ECL § 15-2703(4) (defining "forest management" in relation to forestry practices).

areas” outside the Adirondack Park and those designated “river areas” within the Adirondack Park that are on state land. ECL § 15-2705.⁴ For those designated river areas within the Adirondack Park that are privately owned, the Rivers Act vests the functions, powers and duties of its provisions in the Adirondack Park Agency (the “APA”). *Id.*

B. The Master Plan and Unit Management Plans

The APA was created in 1971 by the Adirondack Park Agency Act. *See* L. 1971, ch. 706 (*codified as* Executive Law §§ 800–820). One of the APA’s duties is to plan for land use in the Adirondack Park. Executive Law §§ 805, 816. In furtherance of that duty, the Act directed the APA, in consultation with the Department, to draft

⁴ ECL § 15-2705 provides:

Notwithstanding provisions of any other general or special law, the functions, powers and duties encompassed by this section shall be vested in the Adirondack park agency as to any privately owned part of a river area within the Adirondack park as defined by law which may become part of the system; however, the commissioner shall have exclusive jurisdiction over all other river areas in the state and of all parts of river areas owned by the state located within the Adirondack park which may become part of the system.

an Adirondack Park State Land Master Plan to guide the development and use of state land in the Park.⁵ *See* Executive Law former § 807 (added by L. 1971, ch. 706, § 1).⁶ Governor Rockefeller approved the original Master Plan in 1972, and various amendments have been approved since. *See* Executive Law former §§ 807(1) and (2); Executive Law § 816(2). (A232.) The Master Plan specifically recognizes the APA’s authority and responsibility to interpret its provisions. (A582.)

In drafting the Master Plan, the APA was directed to classify the state land in the Park “according to [its] characteristics and capacity to withstand use” and to provide guidelines and criteria for its management and use. Executive Law former § 807(1). The resulting Master Plan recognizes seven basic land classifications—Wilderness, Primitive, Canoe, Wild Forest, Intensive Use, Historic,

⁵ The entire Master Plan is reproduced in the Appellant’s Appendix at A566-698. The Adirondack Park Land Use and Development Plan guides the development and use of private land in the Adirondack Park. *See* Executive Law § 805(1)(a).

⁶ Executive Law § 706, directing the APA to develop a Master Plan, was amended and renumbered as Executive Law § 816 by L. 1973, ch. 348, § 1.

and State Administrative—and two “overlays” to these basic classifications—Wild, Scenic and Recreational Rivers; and Travel Corridors. (A584.) Under the Master Plan, motor vehicles are permitted in Wilderness areas only for emergency use by appropriate officials. (A592.) And areas in the Adirondack Park designated as Wild River areas under the Rivers Act are to be managed as Wilderness areas. (A614.)

As previously explained, however, the Rivers Act governs designated river areas on state land in the Adirondack Park; indeed, the Rivers Act gives the Department “*exclusive* jurisdiction” over such areas. ECL § 15-2705 (emphasis added). The Master Plan recognizes that exclusive authority by providing that the Department’s authority under the Rivers Act is “independent of” the Master Plan. (A574.)⁷ And the APA, which drafted the Master Plan and is tasked with interpreting its provisions, agrees that

⁷ The Master Plan states: “The Department of Environmental Conservation 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.” (A574.) Staff of the APA informs us that this language was added to the Master Plan in 1987.

development of Wild River areas in the Adirondack Park is subject to the existing-use exception in the Rivers Act, notwithstanding any otherwise applicable more restrictive provisions in the Master Plan. (A237-238.)

While the Master Plan establishes general guidelines and criteria for the management of state land in the Park (A581-582), the Department develops, in consultation with the APA, individual management plans for units of land classified in the Master Plan, Executive Law § 816(1). The unit management plans are intended more specifically to guide the Department's development, use, and management of state land in the Park; they describe land use goals and existing natural and man-made resources, including roads and snowmobile trails. (*See* A277, 281.) Unit management plans must "conform to the general guidelines and criteria set forth in the [M]aster [P]lan." Executive Law § 816(1). The APA is responsible for determining whether a proposed unit management plan complies with the general guidelines and criteria set forth in the Master Plan. (A582.)

STATEMENT OF THE CASE

A. State Acquisition of the Subject Land

In late 2012 and early 2013, the State acquired two tracts of land totaling approximately 19,000 acres in Essex and Hamilton Counties. (A43, 119.) Once acquired by the State, the tracts became part of the Adirondack Forest Preserve. (A119, 241, 513.) In 2014, the APA classified the land on which most of Chain Lakes Road (South) is located (including the one-mile segment at issue here) as Wild Forest, where motor vehicle use is permitted. (A60.)

B. Development of the Unit Management Plan for the Subject Land

The Department developed a unit management plan for the newly acquired land entitled the Essex Chain Lakes Management Complex Plan (the “Complex Plan”). In the plan, the Department sought to “facilitate appropriate public access and natural resource protection.” (A514, 515.) The Department also acted as lead agency for purposes of environmental review of the Complex Plan and thereafter adopted a final environmental impact statement. (A514-515.) A goal of the Complex Plan is to “complement historical uses

within the [Essex Chain Lakes Management] Complex Area,⁸ while managing access in a way that protects the natural resources.”

(A535 [statement of findings].)

1. The Schachner Report Details Continuous and Regular Motor Vehicle Use of the Roads in the Complex Area.

The Complex Plan recognizes that much of the Complex Area was historically accessible to the public for recreational purposes and was also used extensively by Finch Pruyn & Company (“Finch”) for its commercial operations in timber production. (A302.) As part of its planning for the Complex Area, the Department wanted to limit the use of motor vehicles to the historical road network. (A302.) It therefore commissioned an independent law firm to conduct a study of the history of such use in the Complex Area. (A139; RA55).

The resulting report—the Schachner Report—provides a detailed, factual history of motor vehicle use on roads in the

⁸ The Essex Chain Lakes Management Complex Area (“Complex Area”) is comprised of the acquired tracts and some neighboring areas. (A277-278.)

Complex Area.⁹ (A139.) The report includes 19 affidavits¹⁰ from individuals familiar with the history of the Complex Area. These individuals include former Finch employees, a former contract logger, a retired Department forest ranger, members of private recreational clubs, and local descendants of families who operated hunting lodges in the area. (A139; *see also* RA53-313 [Schachner Report and supporting affidavits and materials].)

The Schachner Report and affidavits show that Chain Lakes Road (South) existed as a road when Finch purchased much of the property in the 1890s and began engaging in commercial timber operations, including logging. (RA57.) Beginning in the 1920s, Finch employees and contractors routinely drove jeeps, trucks, and cars on the road in furtherance of those operations. (RA59-60, 61, 62, 73, 193.) By the 1950s, Finch's operations included extensive use of heavy log trucks on Chain Lakes Road (South) and other

⁹ The Schachner report is summarized in the Naughton affidavit at A139-145. The full report and the supporting affidavits are found at RA53-313.

¹⁰ The Appellate Division mistakenly counted 17 affidavits. (A12.)

roadways. (RA61, 63, 64, 67.) The trucks could weigh up to 50 tons when loaded. (RA68-69.) Indeed, for a period in the 1950s, Finch and its contractors trucked out pulp and timber logs from the property exclusively through Chain Lakes Road (South). (RA61.) By the 1970s, Finch was using even heavier vehicles on Chain Lakes Road (South), including ten-wheel tractor-trailers and pulp trucks carrying up to six cords of pulp timber. (RA67, 68.)

Beginning in the 1950s and 1960s, Finch employees were also using snowmobiles and snow machines on the property during the winter, both as a means of travel for work and also to maintain snowmobile trails used by others. (RA65, 146.)

In 2007, Finch sold the property to The Nature Conservancy in anticipation of the State's ultimate acquisition. (A242.) Finch nonetheless continued to use portions of the property for logging and timber harvesting purposes until 2012, when the State began acquiring the property. (RA73.)

The Schachner Report and affidavits also show that, in addition to this heavy motor vehicle use for commercial operations, the roads in the Complex Area, including Chain Lakes Road

(South), were “regularly” (RA127; *see* RA65) and “consistently” used (RA225) over the years by snowmobilers and operators of other motor vehicles for recreational purposes. As far back as the mid-1800s—before Finch purchased the property—members of the public used the portion of Chain Lakes Road (South) at issue here to access hunting camps in the area, including what is now known as the Outer Gooley Club area, which is where the one-mile segment is located. (A140; RA192.) When Finch purchased the property in the 1890s, it leased large portions of the land for recreational purposes. (A140-141; RA60-61, 62, 146, 192-193, 220.) By the 1940s, Finch was leasing the property to recreational clubs, whose members, families and guests regularly used motor vehicles on Chain Lakes Road (South) to access the area for hunting and snowmobiling. (RA144-145, 146.) There were eventually four different recreational clubs using the property that included Chain Lakes Road (South), and their membership grew in the 1990s. (RA64-65, 72). Indeed, use of the roads by these clubs became so extensive that, by the 1980s and 1990s, club members borrowed excavation equipment to repair the roads themselves. (RA71.) And

although Finch employees and recreational club members were the primary motor vehicle users of Chain Lakes Road (South), their families and guests used it as well, along with some members of the public. (*See, e.g.*, RA222, 230, 247.)

The Schachner Report thus demonstrates a history of regular and consistent motor vehicle use, including snowmobile use, on the roads in the Complex Area, including Chain Lakes Road (South). (RA125, 126-127, 222, 230-231, 247.)

2. The Complex Plan Incorporates Historical Motor Vehicle Use.

Mindful of the need to limit disturbance of the natural environment, the Department determined to limit motor vehicle use in the Complex Area to the existing historical road network.¹¹ (A302.) Because the Schachner Report demonstrated consistent and regular motor vehicle use on Chain Lakes Road (South) to the Outer Gooley parking area (A304), the Department authorized in

¹¹ Indeed, of the 53 miles of roads throughout the Complex Area, the Department determined to retain only a total of 10 miles of those roads for public use. (A306.)

the Complex Plan a continuation of limited motor vehicle use on that road, namely motorized access for hunting from October 1 until the first Sunday in December (A320-321) and motorized access for snowmobiling in the winter (A304, 330, 538).

The snowmobile use authorized on Chain Lakes Road (South) is part of a broader plan to develop a class II multi-use community connector trail between the towns of Indian Lake and Minerva (A113) primarily utilizing existing roads and trails (A538). The development of the connector trail on the newly acquired land is consistent with the snowmobile guidelines developed by the Department and the APA in the 2009 Snowmobile Guidance,¹² which requires trail development using site-specific determinations about environmental considerations and seeks to maintain the wild forest character of the Forest Preserve land. (A188.) The use of existing roads and trails to develop the connector trail avoids the construction of new trails, as well as tree-cutting and other

¹² The document is officially entitled the Management Guidance for Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park.

environmental impacts associated with construction. (A539.) The 2009 Snowmobile Guidance builds on the goal established in an earlier plan to create a system of snowmobile trails between communities in the Adirondack Park. (A832.) Developing class II community connector trails as the primary snowmobile travel routes connecting communities within the Park will also result in the redesignation of trails in the interior of the Park for non-motorized use, or even the abandonment of such trails, which will enable them to return to their natural state. (A188, 832.)

The connector trail is in a portion of the Park that the APA has classified as Wild Forest, and snowmobile use is permitted in Wild Forest land. (A112, 123, 334, 603-605.) However, the connector trail includes a one-mile segment of Chain Lakes Road (South) that traverses a Wild River area.¹³ (A304.) As previously explained, *see*

¹³ The map reproduced at page A60 of appellants' appendix shows the outline of the Complex Area and the location of Chain Lakes Road (South). The disputed one-mile segment can be clearly seen on the map reproduced at RA51. The segment is located near the Outer Gooley Parking Area, just north of the confluence of the Indian and Hudson Rivers. The subject one-mile segment is within one-half mile of the Hudson River at a point where the River is designated a Wild River under the Rivers Act. (A236, 237). The

supra, at 5, the Rivers Act generally prohibits motor vehicle use, including snowmobile use, in Wild River areas, but allows for the continuation, without alteration or expansion, of an existing land use. ECL § 15-2709(2). The Department determined that this existing-use exception authorized seasonal motor vehicle use by the public for snowmobiling and hunting on the one-mile segment at issue, because (1) the evidence before it established a history of regular and consistent motor vehicle use, including snowmobile use, on Chain Lakes Road (South), (2) approval of limited public motor vehicle use would not materially alter the nature of that use, and (3) the Department did not believe that the authorized public use would necessarily expand the extent of that motor vehicle use. (A145, 330, 538-39.)

designation was made in 1972, when the Rivers Act was enacted. *See* L. 1972, ch. 869, § 1 (enacting Conservation Law § 429-q(a)(1); ECL § 15-2713(1)(c). The section designated as Wild River is a 10.5 mile corridor, ECL § 15-2713(1)(c), depicted on the map at A485.

3. The APA Determines the Complex Plan Conforms to the Master Plan and the Department Adopts the Complex Plan.

The APA thereafter reviewed the proposed Complex Plan and found that it conformed to the Master Plan. (A123, 561-564.) The APA considered the fact that continued use of Chain Lakes Road (South) would eliminate the need to cut trees and disturb resources in the Forest Preserve that would otherwise be necessary to create a new trail. (A237.) And recognizing the Department’s authority in the Master Plan to regulate waters and Wild River areas “independent of the [M]aster [P]lan,” the APA relied on the Department’s finding that motor vehicle use, including snowmobile use, on a mile of Chain Lakes Road (South) that traversed a Wild Rivers area constituted the continuation of an existing land use. (A238.)

Following the APA’s conformance determination, the Department adopted the final Complex Plan on March 31, 2016.

C. This Article 78 Proceeding

Petitioners challenge as arbitrary and capricious, among other things, the determination to authorize motor vehicle use on

the one-mile segment of Chain Lakes Road (South) located within a Wild River area. (A53.)¹⁴ Their article 78 petition¹⁵ includes affidavits from two individuals who state that, to their knowledge, the subject area was not generally open to the public in the past.

Respondents' answer to the petition annexes eight affidavits from APA and Department officials describing the process by which the Complex Plan was developed. Respondents' answer also annexes a voluminous administrative record containing among other things the Schachner Report, the Complex Plan, the Master Plan, and the Department's SEQRA findings.

After a careful review, Supreme Court, Albany County (Ceresia, J.), dismissed the petition and denied the requested relief.

¹⁴ Petitioners originally raised three other challenges to various aspects of the multi-use connector trail provided for in the Complex Plan. After the Supreme Court and a unanimous Appellate Division rejected those other challenges, petitioners abandoned them by not raising them in their brief to this Court. *See Matter of Garner v. New York State Dept. of Correctional Servs.*, 10 N.Y.3d 358, 361 (2008).

¹⁵ The petition was styled as an article 78 proceeding/declaratory judgment action, but Supreme Court converted it to an Article 78 proceeding. (A30.)

(A22-31.) Petitioners appealed to the Appellate Division, Third Department.

D. The Appellate Division Decision

In a thorough opinion and order, the Appellate Division affirmed the dismissal. The court held unanimously that the Department’s authority to approve snowmobile use on the one-mile segment at issue was governed by the existing-use exception in the Rivers Act, notwithstanding any otherwise applicable more restrictive provision in the Master Plan. The court noted the language in the Master Plan recognizing the Department’s exclusive jurisdiction to regulate the use of River areas “independent of the [M]aster [P]lan,” language the court read to mean that the Department was authorized to approve snowmobile use under the existing-use exception in the Rivers Act, notwithstanding any more restrictive provision in the Master Plan.

(A11.)

The Appellate Division also found, albeit over a two-judge dissent, a rational basis in the record for the Department’s determination that public motor vehicle use of the one-mile

segment of Chain Lakes Road (South) in the Wild Rivers area constituted a continuation of an existing use, without alteration or expansion, within the meaning of the Rivers Act. (A11-13.) Focusing especially on snowmobile use, as petitioners had in their Appellate Division briefs, the court noted the numerous affidavits referenced in—and annexed to—the Schachner Report from individuals who averred on the basis of personal knowledge that employees, lessees, their guests, and even some members of the public had used snowmobiles on the road during the winter season continuously since the 1950s. (A12). While the court did not indicate the extent to which existing use by members of the public affected its decision, it rejected as overly conclusory petitioners’ evidence that the roads were closed to the public, and thus that, to the extent members of the public accessed them, they did so illegally. (A13.)

Two members of the court disagreed that the Department had a rational basis for concluding that the contemplated motor vehicle use qualified as a continuation of an existing use. (A14.) They credited petitioners’ evidence that members of the general public who previously used the Chain Lakes Road (South) segment for

snowmobiling did so illegally, and reasoned that any such public use should thus be discounted in the analysis. And relying on the Department's speculation about possible increased use in the future, they concluded that the existing public use did not constitute a use "in a density commensurate with that which will result from opening it to public use." (A15-16.)

This appeal as of right followed.

ARGUMENT

POINT I

THE MASTER PLAN DID NOT PRECLUDE THE DEPARTMENT FROM EXERCISING ITS AUTHORITY UNDER THE RIVERS ACT TO APPROVE MOTOR VEHICLE USE ON THE DISPUTED SEGMENT

The Appellate Division correctly held that the Department's authority to approve motor vehicle use in a designated Wild River area under the existing-use exception in the Rivers Act is not precluded by any provision of the Master Plan. As we previously explained, the disputed one-mile segment of Chain Lakes Road (South) at issue is in a Wild River area because it is within one-half mile of a portion of the Hudson River designated as Wild under the

Rivers Act. (A304.) While the Rivers Act generally prohibits the use of motor vehicles—defined to include snowmobiles, *see* ECL § 15-2703(7)—it permits the continuation of “existing land uses,” if not “altered or expanded.” ECL § 15-2709(2). And notwithstanding any otherwise applicable and more restrictive provision in the Master Plan, both the Rivers Act and the Master Plan retain the Department’s exclusive authority to approve a qualifying continuation of an existing land use.

To be sure, the Rivers Act recognizes that areas of the Rivers System that are located in state parks are also administered under other “laws and constitutional provisions,” and it further provides that in case of a conflict, the more restrictive provisions govern. ECL § 15-2721. Moreover, and as petitioners note (Br. at 26-28), the Master Plan provides that motor vehicles are permitted in Wilderness areas only for emergency use by appropriate officials (A592), and that Wild River areas are to be managed as Wilderness areas (A614), even if they are not themselves Wilderness areas.

The Master Plan’s more restrictive limitation on motor vehicles in Wilderness areas nonetheless does not govern here.

Even if the fact that the Master Plan has the effect of legislation means that it is a “law” within the meaning of the conflict provision of the Rivers Act—an issue this Court need not address—the conflicts provision in the Rivers Act does not inhibit the Department’s authority to approve the continuation of an existing use under the Rivers Act for either of two reasons, including the reason the Appellate Division gave.

First, the language of the existing-use exception resolves any conflict that would otherwise trigger applicability of the Master Plan’s more restrictive provisions. Under the Rivers Act, the exception applies “[n]otwithstanding anything contained herein to the contrary.” ECL § 15-2709(2). The existing-use exception therefore authorizes the continuation of an existing use, without alteration or expansion, notwithstanding any other provision of the Rivers Act, *including the conflicts provision*. The conflicts provision thus does not inhibit the Department’s authority to approve the continuation of an existing use, notwithstanding any otherwise applicable more restrictive provision in the Master Plan.

Second, and as the Appellate Division found, the Master Plan itself resolves any conflict that would otherwise trigger applicability of the Master Plan's more restrictive provisions. The Master Plan expressly states that the Department "has the authority *independent of the [M]aster [P]lan*" to regulate uses of waters and uses of Wild, Scenic and Recreation River areas on state land in the Adirondack Park. (A574 [emphasis added].) Properly read, this language eliminates any conflict between its provisions and those of the Rivers Act.

Indeed, the APA interprets the Master Plan to mean that the Department retains its full authority under the Rivers Act. In finding that the Complex Plan conformed to the Master Plan, the APA recognized that the Department's independent authority under the Rivers Act eliminated any conflict between the River Act's existing-use exception and any more restrictive provision in the Master Plan. (A238.) That reasonable interpretation is entitled to deference. Not only did the APA draft the Master Plan, but it included a provision (A582) expressly preserving its authority and responsibility to interpret the plan's provisions. *See generally*

Gaines v. New York State Div. of Hous. & Community Renewal, 90 N.Y.2d 545, 548-49 (1997) (“the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable”).

In fact, the APA did not classify Chain Lakes Road (South) as a Wilderness area under the Master Plan; it classified it as a Wild Forest area where motor vehicle use, including snowmobile use, would be permitted. (A112, 123, 334, 603-605.) The Master Plan directs that the area be managed as Wilderness area—and thus subject to the motor vehicle ban—solely because of its designation as a Wild River area under the Rivers Act. By expressly referring to the Rivers Act (A614), this section of the Master Plan in effect incorporates the existing-use exception in the Rivers Act.

Petitioners’ contrary arguments gain no force from their reliance, for the first time in this litigation, on a different provision of the Master Plan. Petitioners now argue (Br. at 31-34) that the Master Plan’s requirement for a phase out of non-conforming uses in Wilderness areas (A592-593) also conflicts with the Rivers Act

and therefore should govern. The subject requirement does not govern here for the same reason that the Master Plan's limitation on motor vehicles in Wilderness areas does not govern. For either of the two reasons set forth above, the existing-use exception applies, notwithstanding what the conflict provision in the Rivers Act would otherwise require. The Master Plan's provision requiring a phase out of non-conforming uses is therefore subject to the Department's exercise of authority to approve the continuation of an existing use under the Rivers Act.

It is irrelevant to the legal issue presented that the Department has phased out non-conforming uses in other areas of the Park actually classified by the APA as Wilderness areas. (*See* Br. at 33-34.) The areas cited by petitioners are not designated as Wild River areas under the Rivers Act and, thus, were not subject to the existing-use exception in the Rivers Act. And *Matter of Helms v. Diamond*, 76 Misc. 2d 253 (Sup. Ct. Schenectady County 1973), on which petitioners rely (Br. at 34-35), is inapposite. In authorizing seasonal motor vehicle use on part of Chain Lake Road (South), the Department did not grant motor vehicle users "vested

rights in the forest preserve by means of adverse possession, long use, or a prescriptive right.” 76 Misc. 2d at 257-58. Rather, the Department properly exercised its express authority under the Rivers Act to allow the continuation of an existing use.

Accordingly, the Department properly looked to the existing-use exception in the Rivers Act when deciding whether to authorize public motor vehicle use on the one-mile segment of Chain Lakes Road (South) at issue here. The only remaining question is whether that use constitutes a continuation of an existing land use without alteration or expansion. As we demonstrate below, the Department rationally answered “yes.”

POINT II

THE DEPARTMENT RATIONALLY APPROVED MOTOR VEHICLE USE ON THE ONE-MILE SEGMENT AT ISSUE UNDER THE EXISTING-USE EXCEPTION IN THE RIVERS ACT

The Department rationally approved seasonal motor vehicle use on the disputed segment of Chain Lakes Road (South) as a continuation of existing motor vehicle use, without alteration or expansion. Contrary to petitioners’ argument (Br. at 36-39), and the

view of the Appellate Division dissenters (A15-16), the fact that the connector trail will now be legally open to the general public does not determine the outcome here. The existing-use exception focuses on the use to which the land is put, not the identity of the user. Thus, the exception applies when a proposed land use (1) will not alter the nature of the existing use, and (2) will not expand the extent of that use. And these qualifications are properly read to require *material* alterations and expansions, not de minimis ones. On this record, including the extensive historical information and personal accounts of numerous people familiar with the area, the Department rationally concluded that the nature and extent of the existing motor vehicle use in the disputed area would not materially change. The potential for more than a de minimis expansion in motor vehicle use is at this time at most a theoretical possibility.

Under well-settled principles of administrative law, the Department's determination must be upheld if it is supported by a rational basis, "even if the court concludes that it would have reached a different result than the one reached by the agency." *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009). The issue

is whether the agency's determination reflects *a* reasonable approach, even if another result would also be reasonable. *Matter of Ward v. City of Long Beach*, 20 N.Y.3d 1042, 1043 (2013). To be arbitrary and capricious, the determination must be made without regard to the facts. *Id.* And "where, as here, the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." *Flacke v. Onondaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 363 (1987).

Applying these principles here, the Appellate Division correctly sustained as rational the Department's determination that snowmobile use on Chain Lakes Road (South) could continue as an "existing land use," within the meaning of the Rivers Act.

A. The Record Demonstrated a History of Regular and Consistent Motor Vehicle Use, Including Snowmobile Use, of the Road.

As noted, before final development of the Complex Plan, the Department commissioned a study to determine how the roads in the Complex Area were historically used. The resulting extensive

Schachner Report¹⁶ demonstrates that, motor vehicles were regularly and consistently used on the portion of Chain Lakes Road (South) at issue.

The report detailed the heavy motor vehicle use of roads in the Complex Area, including Chain Lakes Road (South), for commercial logging operations by Finch employees and contractors that began with the advent of automobiles in the 1920s. (RA59-60, 61, 62, 73, 193.) Employees and contractors used the roadways, not only in cars, but in heavy logging trucks (weighing up to 50 tons fully loaded), ten-wheel tractor-trailers, bulldozers, and pick-up trucks. (RA61, 63, 64, 67, 68-69.)

In addition, roads in the Complex Area, including Chain Lakes Road (South), were “regularly” (RA127; *see* RA65) and “consistently” used (RA225) over the years by snowmobilers and operators of other motor vehicles for recreational purposes. (A140-141; RA192.) Recreational use increased in the 1940s, when Finch

¹⁶ The Schachner report is summarized in the Naughton affidavit at A139-145. The full report with supporting affidavits are found at RA53-313.

began leasing large tracts of the property to recreational clubs for hunting and fishing, and later, snowmobiling. (RA144-146.) Members of four clubs and their guests engaged in continuous and consistent motor vehicle use, including in the Outer Gooley Club area at issue. (RA64-65, 144-145, 146.)

The report thus confirmed that, at the time the area that includes the one-mile segment of Chain Lakes Road (South) at issue was designated as Wild River in 1972, and continuing thereafter, there was regular and consistent use of motor vehicles, including snowmobiles, on the road.

Indeed, even after the property was acquired by The Nature Conservancy in 2007, Finch continued to engage in logging activities pursuant to a lease, and recreational clubs continued to engage in seasonal motor vehicle use. (A223-224.) Then, upon the State's acquisition of the land, the Department began permitting public access to the property under interim access plans and a Stewardship Plan prior to the development of the Complex Plan. (A513; *see* RA1 [Stewardship Plan Amendment].)

Based on this extensive record of regular and continuous use of the property roads, including Chain Lakes Road (South) (*e.g.*, RA127, 139, 146, 185, 189, 211-212, 222, 226, 231, 241, 247, 285), the Department rationally concluded that the contemplated seasonal motor vehicle use on the one-mile segment of Chain Lakes Road (South) at issue here constituted a continuation of an existing motor vehicle use without material alteration or expansion.

Petitioners do not dispute the history of extensive motor vehicle use of Chain Lakes Road (South). Rather, they argue (Br. at 36-39) that the record is insufficient to establish existing public, as opposed to private, motor vehicle use of Chain Lakes Road (South). And from there they make two arguments, namely that allowing public motor vehicle use will impermissibly alter the existing use, and necessarily expand the existing use. Even assuming the record does not sufficiently document a history of public motor vehicle use, however, petitioners' alteration argument is doomed by a plain reading of the Rivers Act, and petitioners' expansion argument is overly speculative.

B. Opening the Road to Public Motor Vehicle Will Not Alter the Nature of the Existing Land Use.

Allowing members of the public to use land in the same manner as the previous private owner used it does not constitute an alteration in use, within the meaning of the Rivers Act. The Rivers Act expressly provides that “existing land uses within the respective classified river areas may continue, but may not be altered or expanded.” ECL § 15-2709(2). The word “altered” is properly read to mean an alteration in the *nature* of the use, not simply a change in the identity of the user like a change from private to public use.

After all, the statute does not differentiate between private and public “existing land uses.” Nor do other provisions of the Rivers Act, which describe permitted “land uses” more generally. For example, the definition of “stream improvement structures for fishery management purposes,” as well as the terms “improvement,” “structure,” and “road,” make no reference to whether these uses are public or private. *See* ECL § 15-2703(6), (10), (11), (12).

Reading the term “altered” to mean an alteration in the nature of the use furthers the purpose of the Rivers Act to protect designated River areas for the benefit and enjoyment of present and future generations. *See* ECL § 15-2701. While a change in the nature of use may harm such areas, there is no reason to assume that a mere change in the identity of the user will do so. The Court should in any event defer to the Department’s rational interpretation of the term “altered,” which “involves knowledge and understanding of underlying operational practices” of the Department. *See Matter of Lighthouse Pointe Prop. Assoc. LLC v. New York State Dept. of Env’tl. Conservation*, 14 N.Y.3d 161, 176 (2010) (internal quotation omitted). Reading the statute as petitioners suggest, in contrast, would preclude the continuation of *any* existing use on land that the State acquired from a private owner. And there is no evidence that the Legislature intended to do so.

C. It Would Be Speculative to Conclude that Opening the Road to Public Snowmobile Use Will Impermissibly Expand the Extent of the Existing Land Use.

The Department was not required to conclude that opening Chain Lakes Road (South) to the public for seasonal motor vehicle use will impermissibly expand the “frequent, consistent or constant” (A13) motor vehicle use to which that road has long been subject, especially because the record evidence did not establish any such expansion.

In speculating that allowing public access will impermissibly expand the motor vehicle use of the road, petitioners and the Appellate Division dissenters on this issue overlook the reduction in motor vehicle use that has resulted from the transfer of the property to the State and phasing out of leases of the property to various recreational clubs.

For years, Finch employees and contractors drove heavy logging trucks, tractor-trailers, jeeps, pick-up trucks, and cars on the road in furtherance of the company’s timber production. (RA59-60, 61, 62, 73, 193.) The road was still being used for that purpose when the area was designated as a Wild River area in 1972. *See*

ECL § 15-2713(1)(c). And Finch continued to use portions of the property for logging and timber harvesting as recently as 2012, when the State began acquiring the property.¹⁷ (RA73.)

Additionally, and as previously explained, Finch had for years leased portions of the property to four recreational clubs, whose members and guests used motor vehicles on the road for hunting and snowmobiling. One of those clubs had 25 to 50 members. (RA134, 139.) If that level of membership is at all representative of the membership in the other three clubs, the road would have been used on a regular basis by as many as 200 club members and their immediate family members (A731) and, assuming two guests per member (*see, e.g.*, A724, 731), an additional 400 guests. There is no record basis to conclude that the number of public users will exceed that level of prior club use.

Moreover, Finch employees and the recreational clubs used the road on a year-round basis, whereas the segment of the road at

¹⁷ Although Finch sold the property to The Nature Conservancy in 2007, it continued to engage in logging pursuant to a contract with The Nature Conservancy until 2012, when the State began acquiring the property. (RA73.)

issue will only be used by snowmobilers in the limited snow-season and by hunters in other motor vehicles during a short hunting season (October 1 until the first Sunday in December).

The elimination of these prior private uses along with the fact that the subject road is just a one-mile stretch of what ultimately will be an approximately 20-mile-long multi-use connector trail makes it speculative to assume that opening the road to the public will result in a material expansion in use. The Department could therefore rationally decline to make that assumption.

It is true that the Department's environmental assessment notes the "potential" increase in visitors and the possibility that snowmobile use "may" result in impacts on greenhouse gas emissions. (A543.) Contrary to the conclusion of the Appellate Division dissenters on this issue, however (A18-19), the Department's recognition that snowmobile use *might* increase once the public is granted access is not a concession that an existing use *will* be improperly "expanded." The Department's environmental assessment under SEQRA appropriately considered potential, and

thus hypothetical, impacts.¹⁸ *See, e.g., Matter of Vil. of Ballston Spa v. City of Saratoga Springs*, 163 A.D.3d 1220, 1225 (3d Dep’t 2018) (SEQRA review appropriately considered areas of potential environmental concern). The Department’s application of the existing-use exception in the Rivers Act, on the other hand, relied on evidence that snowmobile use was already consistent and regular. Indeed, because the Complex Plan requires the Department to monitor snowmobile use on the connector trail (A335), the Department will be able to determine whether there is an increase in that use that could amount to an improper expansion, with the potential ability to take appropriate action to limit use at that time.

* * *

In sum, the Department rationally relied on the record evidence of regular and consistent motor vehicle use when it determined that allowing public snowmobile use on a one-mile

¹⁸ Indeed, the Department concluded that from an environmental perspective, the continued use of Chain Lakes Road (South) would produce positive benefits because it would “mitigate the need for new trail construction.” (A538.)

segment of the road would not materially alter the nature or expand the extent of motor vehicle use of that road.

CONCLUSION

This Court should affirm the judgment dismissing the petition.

Dated: Albany, New York
November 14, 2018

Respectfully submitted,

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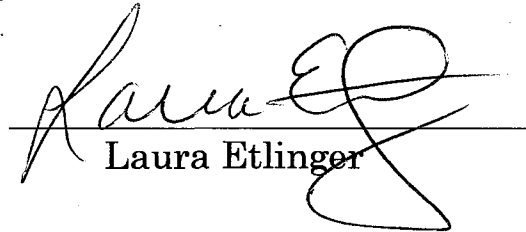
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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Laura Etlinger, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 7,459 words, which complies with the limitations stated in § 500.13(c)(1).


Laura Etlinger

State of New York
Court of Appeals

IN THE MATTER OF THE APPLICATION OF
ADIRONDACK WILD: FRIENDS OF THE FOREST
PRESERVE AND PROTECT THE ADIRONDACKS! INC.,

Petitioners-Appellants,

-against-

NEW YORK STATE ADIRONDACK PARK AGENCY, ET AL.,

Respondents-Respondents.

COURT #APL 2018-00112 – AD #525165 – OAG #16-200964

STATE OF NEW YORK
COUNTY OF ALBANY ss:
CITY OF ALBANY

ANDREA GILLIGAN being duly sworn says:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the Respondents, herein.

On 14th day of November, 2018 I served the annexed Brief and Appendix For Respondents upon the individual named below, by depositing 3 copies of each thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Postal Service, directed to the said individual at the address within the State respectively theretofore designated by them for that purpose as follows:

Hannah Chang, Esq.
Earthjustice
48 Wall Street, 15th Floor
New York, NY 10005

Andrea Gilligan

Sworn to before me this
14th day of November, 2018


NOTARY PUBLIC

KENNETH KRUEGER
Notary Public, State of New York
Reg. No. 01KR6271239
Qualified in Albany County
Commission Expires October 29, 2020