No. APL-2019-00166

To be argued by:
JENNIFER L. CLARK
15 minutes requested

State of New York
Court of Appeals

PROTECT THE ADIRONDACKS! INC.,

Respondent-Appellant,

v.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION AND ADIRONDACK PARK AGENCY,

Appellants-Respondents.

BRIEF FOR APPELLANTS-RESPONDENTS

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants-Respondents
The Capitol
Albany, New York 12224
(518) 776-2024
jennifer.clark@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
JULIE M. SHERIDAN
Senior Assistant Solicitor General
JENNIFER L. CLARK
Assistant Solicitor General
of Counsel

Dated: June 10, 2020

Supreme Court, Albany County, Index No. 2137-13
Third Department No. 527256

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (Cont'd)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

New York Constitution

TABLE OF AUTHORITIES (Cont'd)

Page(s)

Laws

Regulations

TABLE OF AUTHORITIES (Cont'd)

Page(s)

Miscellaneous Authorities

Constitutional Conventions

Miscellaneous Authorities **Page(s)**

Constitutional Conventions

Annual Reports

PRELIMINARY STATEMENT

From January 2012 to October 2014, the State constructed 11 trails on Forest Preserve land in the Adirondack Park to provide hikers, cyclists, snowmobilers, and other members of the public with year-round opportunities to enjoy the Preserve's wild forest nature. The trails are non-contiguous, 9- to 12-foot-wide pathways of various lengths that do not disrupt the forest canopy above and are located largely on the periphery of Forest Preserve areas, near public highways. Although construction of the trails required the cutting of trees, most of what was cut consisted of seedlings, saplings, and trees smaller than three inches diameter at breast height[1]—many of which would never mature into large trees, and none of which constituted merchantable timber under forestry standards.

The question in this appeal is whether construction of the trails is consistent with article XIV, § 1 of the New York State

---

[1] A stipulated-to list of trails and trail segments, mileage, and number of trees approved to be cut measuring at least three inches diameter at breast height can be found at pages xi-xii of the Record on Appeal.

Constitution, also known as the "forever wild" provision. The first sentence of that provision states that the Forest Preserve "shall be forever kept as wild forest lands." The second sentence states that Forest Preserve lands may not be sold, leased, or exchanged and that the "timber" on those lands may not be "sold, removed or destroyed." This Court held nearly a century ago in *Association for Protection of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930), that the cutting of "timber" in the Forest Preserve is prohibited only if it occurs "to a substantial extent" or "to any material degree." *Id.* at 238.

The Appellate Division, Third Department, held here that the construction of the trails at issue was unconstitutional because it required cutting too much "timber." *Protect the Adirondacks! Inc. v. New York State Dept. of Envtl. Conservation*, 175 A.D.3d 24 (3d Dep't 2019). But the court's holding turned on two analytical mistakes. First, the Third Department mistakenly counted as "timber" all seedlings, saplings, and trees smaller than three inches diameter at breast height that were or would be cut to construct the trails. The court's overbroad interpretation of the term "timber"

ignores the history of the forever wild provision, as well as longstanding DEC practice and other New York statutes and regulations addressing tree cutting.

Second, the Third Department mistakenly failed to analyze the number of trees cut in the context of the project as a whole to determine whether the cutting in such context served the purpose of the constitutional provision—to maintain the wild forest nature of the Preserve while improving recreational access to the Preserve for visitors of all interests and abilities. The structure of the forever wild provision itself, the drafters' intent, and this Court's precedent all support the use of that contextual analysis. And applying that analysis here compels the conclusion that the tree cutting required to construct the trails at issue is not sufficiently substantial or material to violate the forever wild provision. To the contrary, that cutting was carefully planned to minimize adverse ecological impacts, while facilitating year-round recreational access to the Preserve. Indeed, even if this Court decides that seedlings, saplings, and trees smaller than three inches diameter at breast height constitute "timber" within the meaning of the forever wild

provision, it should find that the tree cutting required to construct these trails survives constitutional scrutiny.

Accordingly, this Court should reverse and declare that construction of the trails at issue does not violate the forever wild provision.

QUESTION PRESENTED

Whether the tree cutting at issue in this case, authorized by state agencies for the purpose of creating recreational trails on Forest Preserve land in the Adirondack Park, constitutes a destruction of timber sufficiently substantial or material to violate article XIV, § 1 of the New York State Constitution.

STATEMENT OF THE CASE

A. Legal Background

1. History of the Forever Wild Provision[2]

The Adirondack "Forest Preserve" was created by statute in 1885. The Legislature described the Forest Preserve as "[a]ll the lands now owned or which may hereafter be acquired by the state of New York" within certain counties, and mandated that those lands "be forever kept as wild forest lands." L. 1885, ch. 283, §§ 7, 8. The Legislature simultaneously created a State Forest Commission and tasked it with maintaining and protecting the existing forests in the Forest Preserve and promoting further growth. *Id.* §§ 1, 9.

---

[2] This following historical discussion is based on original source materials and discussion of those materials in *Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack Park Agency*, 34 N.Y.3d 184 (2019); *Association for Protection of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930); *Association for Protection of Adirondacks v. MacDonald*, 228 A.D. 73 (3d Dep't 1930); and *People v. Adirondack Railway Co.*, 160 N.Y. 225 (1899).

In 1892, the Legislature created the Adirondack Park (Park) within certain Forest Preserve counties and placed it under the control of the Forest Commission. L. 1892, ch. 707.[3] The Legislature declared that the Park shall be "forever reserved, maintained and cared for as ground open for the free use of all the people for their health or pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state, and a future timber supply." *Id.* § 1.

Meanwhile, acting pursuant to legislative authority, the Forest Commission had been arranging for sales or leases of Forest Preserve lands, at times to commercial logging operations. *See* L. 1887, ch. 475 (amending L. 1885, ch. 283, § 8); L. 1892, ch. 707, § 9. In 1893, the Legislature revised and consolidated these existing

---

[3] The terms "Adirondack Park" and Adirondack "Forest Preserve" are not synonymous. The "Adirondack Park" currently encompasses approximately six million acres of lands—public and private—located in various counties in northern New York and within certain boundaries designated by law. Environmental Conservation Law (ECL) § 9-0101(1). The Adirondack "Forest Preserve" currently encompasses approximately 2.5 million acres of State-owned land within the Park. ECL 9-0101(6). (Record on Appeal (R.) at 542-543, 2400, 4158-4160.)

laws and thereby authorized the Forest Commission to, among other things: sell certain standing timber in the Forest Preserve; sell, lease, clear, and cultivate Forest Preserve lands that were not needed; and lay out paths and roads in the Park. L. 1893, ch. 332, §§ 103, 121.

The 1894 Constitutional Convention assembled against this backdrop. The record of the convention reveals that the delegates were determined to maintain the wild forest nature of the Preserve, both because of its value as a watershed and also its status "as a great resort for the people of this State." 4 Rev. Rec., 1894 N.Y. Constitutional Convention at 130-134; *see also id.* at 133 (recognizing the Adirondacks as "a symbol of sport, of recreation and pleasure-seeking"); *id.* at 149 (forest to be preserved "for the benefit of all our people"); *id.* at 156 (preservation important so the land may "be enjoyed by the people of the State of New York"). These preservation concerns were animated by ongoing commercial exploitation of timber in the Forest Preserve, particularly the fact that the Forest Commission had been "selling to lumbermen" who were "cutting the woods," as well as the need to "prevent the lands

being taken by corporations." *Id*. at 139. Because the drafters' aim was preventing commercial logging or the sale of land for such purposes, their discussion centered around curtailing the cutting of trees for commercial purposes; they did not—as plaintiff's expert (Dr. Phillip Terrie) acknowledged at the trial in this case—express concern over tree cutting intended to facilitate public access to and recreational use of the Preserve. (Record on Appeal (R.) at 3270-3271.)

In an effort to protect the Forest Preserve from future depredation, the delegates adopted what is now article XIV, § 1 of the New York State Constitution,[4] which is often referred to as the "forever wild" provision. The provision begins with two sentences that have not changed since the original enactment:

> The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private,

[4] The provision was originally codified as article VII, § 7.

> nor shall the timber thereon be sold, removed or destroyed.

The forever wild provision took effect on January 1, 1895.[5]

At the Constitutional Convention of 1915, delegates revisited the forever wild provision. One proposed amendment would have changed the language "timber thereon" to "trees and timber thereon." 2 Rev. Rec., 1915 N.Y. Constitutional Convention at 1448. Although this amendment would presumably have broadened the protections afforded by article XIV, the delegates did not adopt it. Their comments demonstrated that their primary concern remained the commercial destruction of merchantable timber. *See id.* at 1469 ("I don't believe it is a possible thing to control a lumberman if he once takes an axe into a forest"); *id.* at 1511 ("No cutting should be done which has for its purpose the making of money, the security of revenue, the satisfying of the craving of any industry.").

---

[5] As originally enacted, those two sentences constituted the entire provision. Subsequent amendments to the provision have added exceptions for specific highways, downhill ski runs, and land exchanges.

The delegates to the Convention of 1915, like those to the 1894 Convention, also discussed at length the benefits of public access. They did not wish to prevent the construction of roads and campsites needed to facilitate greater public access to the Forest Preserve. As one of the delegates stated: "It is said that the presence of roads and camps would mar the scenic beauty of the natural forest. . . . Is it not better that *a large number* of our people should be able to visit and enjoy a forest of even slightly marred scenic beauty, than that only *a privileged few* should be able to enjoy an unmarred forest?" *Id.* at 1505 (emphasis in original).

2. State Agency Management of the Forest Preserve

The New York State Department of Environmental Conservation (DEC) is empowered to "[p]rovide for the care, custody, and control of the forest preserve." Environmental Conservation Law (ECL) § 3-0301(1)(d); *see also* ECL 9-0105(1) (granting DEC similar authority—and duty—over preserves, parks, and other state lands). Pursuant to that statutory authority, DEC has

custody and control over State-owned land in the Park, and it designs, constructs, and maintains all trails in the Forest Preserve.

The Adirondack Park Agency (APA) is responsible for the development and implementation of long-range planning on both public and private lands in the Park. Executive Law § 801. APA and DEC work collaboratively on many aspects of land use in the Park. (R.2402-2503, 4078-4079, 4083-4084, 4156-4163.) APA is responsible for drafting and updating the Adirondack Park State Land Master Plan, which provides the general framework for resource protection and management of public recreation opportunities on Forest Preserve lands in the Park, as well as classifying lands based on capacity to withstand use. *See* Executive Law § 816. The Master Plan's "unifying theme" is "that the protection and preservation of the natural resources of the state lands within the Park must be paramount." (R.2275.) The Master Plan counsels that "[h]uman use and enjoyment of those lands should be permitted and encouraged, so long as the resources in their physical and biological context as well as their social or psychological aspects are not degraded." (R.2275.)

B. The 2009 Guidance Document

In 2006, DEC and the New York State Office of Parks, Recreation and Historic Preservation prepared a conceptual plan to develop a system of trails to connect communities located within the Park. (R.881-1252.) Under the plan, the trails are open year-round for recreational use by hikers, cyclists, snowmobilers, and cross-country skiers. (R.1255; *see also* R.177, 188, 1477, 1501.) The plan aims to create multi-season public access to the Park while simultaneously minimizing environmental impacts. To accomplish the latter goal, the plan largely places trail segments allowing multiple recreational uses at the periphery of Forest Preserve areas near existing automobile roads and other high-traffic areas, and the plan closes altogether or closes to motorized use multiple preexisting snowmobile trails located in sensitive interior areas of the Forest Preserve. (R.889; *see also* R.4069-4070.)

To implement the concepts outlined in the plan, DEC and APA developed a guidance document in 2009 entitled "Management Guidance: Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park." (R.1253-1270;

see also R.543, 4074-4078.) Under this 2009 guidance, trails in the Park that are open to snowmobiles are classified as either Class II "community connector" trails or Class I "secondary" trails. (R.1256-1257.) Class II trails are open year-round; they serve as winter snowmobile, cross-country skiing, and snowshoeing trails and also as recreational trails for hikers and cyclists. (R.1255; *see also* R.177, 188, 1477, 1501.) The trails cannot exceed 9 feet in width, except on sharp curves, steep slopes, and bridges, where a 12-foot width is allowed. (R.543, 1263, 4076.) The trails must be "carefully sited, constructed and maintained to preserve the most essential characteristics of foot trails" (R.1255) and "with an objective to avoid areas considered environmentally sensitive" (R.1261).

The 2009 guidance establishes standards for constructing sustainable trails with minimal environmental impacts on the surrounding forest. (R.1260-1261.) Overall tree cutting is minimized, old growth and large trees are protected, and the cutting of "overstory" trees is avoided to maintain a closed forest

canopy.[6] (R.1263, 4135, 4243-4244.) And any tree cutting that is necessary must be preceded by a count, by species and size, of every tree that will be cut that is at least three inches diameter at breast height (dbh).[7] (R.1263, 1271-1282, 4085-4090.)

The 2009 guidance also sets standards for trail-route design and construction aimed at preserving the ecological integrity of the surrounding lands while ensuring public safety. The standards include: use of preexisting trails where possible; placement of new trails along the periphery of the forest to the extent possible, to preserve the wild forest nature of the interior; alignment with natural contours to minimize removal of rocks and boulders; use of slope management and drainage control features to prevent erosion, washouts, and wetland impacts; and design and construction of bridges to protect waterways and wetlands. (R.1260-1266, 2442-2448.)

---

[6] The crowns of "overstory" trees make up the "forest canopy," which is the highest-growth layer of trees with leaves that block sunlight to the forest below. (R.4458-4459.)

[7] "Breast height" is four and a half feet above the ground. (R.4090.)

To preserve "balance" and "provide a net benefit to the Forest Preserve," the 2009 guidance anticipates the complete closure, or re-designation for non-motorized use only, of miles of preexisting snowmobile trails located in or near the interior areas of Forest Preserve units. (R.1258-1259.)

C. The Planning and Construction of the Trails at Issue

Before commencing construction of any trails under the 2009 guidance, DEC included each proposed trail segment in a Unit Management Plan (UMP). (*See, e.g.*, R.1290-1905 (Moose River Plains UMP).) Each UMP included the results of the review conducted under the State Environmental Quality Review Act, ECL §§ 8-0101 through -0117, *see also* 6 N.Y.C.R.R. pt. 617, and was reviewed by APA to confirm conformance with the Master Plan. (R.1296, 4148-4149, 4162.) The State Land Master Plan requires consideration of natural communities, physical characteristics of the land, topography, remoteness, ruggedness, and other factors. (R.4151.) As required by Executive Law § 816(2), the UMPs were made available for public review and comment before their final

adoption. (R.1294.) Thereafter, DEC foresters, in consultation with APA, developed workplans to identify specific trail routes, trees to cut, bridges to build, and terrain modifications required in accordance with the 2009 guidance. (R.4089-4090, 4156-4157, 4687-4688.)

After nearly a decade of planning and in conformance with the 2009 guidance, DEC began constructing several individual Class II trails in the Forest Preserve. (*See* R.3119 (map of trail segments).) Before cutting any trees or installing any trail features on the first trail—the Seventh Lake Mountain Trail—DEC forester Tate Connor drafted work plans in consultation with APA to (1) route the trail as close to the periphery or highway as possible, (2) identify trees at least three inches dbh to be cut in accordance with DEC policy (which requires minimizing tree cutting overall and prioritizes avoidance of old growth, large, and overstory trees), and (3) outline erosion control features to be used. (R.155-156, 2508-2720 (workplans) 4240-4241, 4253-4259, 4264.) The planned trail route was later reexamined and modified to further minimize the number of larger, more mature trees to be cut and to create a

maximally sustainable trail. (*See* R.159-161, 2531-2607.) DEC forester Connor then marked each tree to be cut. Even after construction commenced, however, he and his crew continued to reevaluate the plan to minimize tree cutting on the trail as much as possible. (*See* R.160-161, 4258-4259.) After tree cutting was complete, DEC trail crews installed multiple erosion control features such as water bars,[8] bench cuts,[9] and turnpiking,[10] and constructed bridges across large streams. (R.161-168, 4196-4198,

---

[8] "Water bars" are erosion control features used to direct water off of trails. They consist of depressions or barriers placed into the trail at an angle so as to direct water off of the trail. (R.151, 4197-4198.)

[9] "Bench cuts" are erosion control features used when constructing a trail across the side slope of a hill. Cutting into the slope and removing the cut material creates a stable "bench" upon which a trail can be placed. Proper bench cutting prevents the trail tread from "sloughing off" down the hill. (R.152, 4196-4197, 2735 (photograph of a bench cut).)

[10] "Turnpiking" is an erosion control measure used in trail construction where drainage is poor and the topography does not allow for bench cutting. It raises the trail tread higher than the adjacent area, usually utilizing rocks, so that water will drain off the trail and provide a durable surface for trail users. (R.4197-4198, 2736-2737 (photographs of turnpiking).)

4259-4260.) Construction on the 11.9-mile-long Seventh Lake Mountain Trail finished in December 2013. (R.544.)

DEC continued construction of the other trails at issue in this case in the same manner, and in compliance with the procedures and standards established in the 2009 guidance. (R.178-185, 186-192, 4678-4679.) Between January 1, 2012, and October 15, 2014, DEC constructed or commenced construction of 11 non-contiguous trails or trail segments totaling 27 miles in length at various points in the 2.5-million-acre Forest Preserve in the Adirondack Park. (R.543-544; *see also* R.3119 for a map of trail segments.) In all, DEC authorized the cutting of 6,184 trees measuring at least three inches dbh. (R.544.)

D. The Instant Action

Meanwhile, in April 2013, plaintiff Protect the Adirondacks! commenced this combined declaratory judgment action/article 78 proceeding alleging, in relevant part, that construction of the new Class II trails described in the 2009 guidance violated article XIV, § 1 of the New York State Constitution. (R.34.) Plaintiff alleged that the total number of trees to be cut constituted an unconstitutional

"amount of destruction of timber" (R.37 ¶ 97) and that "[t]he type of construction required for construction of the [Class II trails] is inconsistent with preserving the wild forest nature of the Forest Preserve." (R.37-38 ¶ 99.) Plaintiff also claimed that "[t]he tree-cutting, clearcutting, removal of rocks, destruction of bedrock ledges, grading, bench cutting and tapering, and the overall building of road-like trails . . . results in an artificial, man-made setting that is not permitted in the Forest Preserve by [article XIV, § 1]." (R.39-40 ¶ 112.)

Supreme Court, Albany County (Ceresia, Jr., J.), subsequently limited the scope of this case to Class II trails constructed or under construction between January 1, 2012, and October 15, 2014. (*See* R.354, 431-432.)[11] The court (Connolly, J.) restated this limitation in its January 25, 2017, order denying the parties' motions for summary judgment and delineating the scope of the trial. (R.492.) And after correctly observing that plaintiff specifically did not challenge snowmobiling as an unconstitutional

[11] Justice Ceresia Jr. also dismissed plaintiff's causes of action under C.P.L.R. article 78, a dismissal that is not at issue on appeal.

activity within the Forest Preserve, the court limited the scope of discovery and the trial to questions concerning the construction of the trails themselves. (R.3496-3509.)

1. Trial Evidence

In March and April 2017, a 13-day bench trial proceeded before Justice Gerald W. Connolly. At the outset of the trial, the parties stipulated (1) that approximately 27 total miles of non-contiguous Class II trails were constructed or under construction during the timeframe at issue in the case, and (2) that 6,184 trees at least three inches dbh were cut or approved to be cut to facilitate construction of those trails. (R.xi-xii, 542-546.)

As Supreme Court noted in its decision after trial, the evidence at the trial was "largely undisputed with regard to the substantive facts, that is, the method and parameters of the tree cutting and trail creation in the affected areas." (R.xiii.) Based on the evidence, Supreme Court made several material factual findings concerning trail construction techniques and ecological impacts, and the amount, circumstances, and effect of the tree cutting that occurred during construction.

Specifically, the court found: that DEC faithfully followed the 2009 guidance during trail construction (R.ix-x, xv); that old growth trees were not adversely impacted (R.xv); that there was no clearcutting and the tree canopy was not substantially breached (R.xv-xvi, xxii-xxiii); that the newly constructed trails are more like hiking trails than roads (R.xix-xxi, xxiv); that the use of bench cutting and turnpiking techniques during construction minimized adverse environmental impacts (R.xxv); and that construction did not result in the infiltration of invasive species (R.xxiv-xxv). The court generally credited the testimony of plaintiff's witnesses that approximately 17,517 trees smaller than three inches dbh—including seedlings and saplings—would be cut to construct 32.45 miles of trail, which is more than the 27 miles of trails at issue in this case. (R.xiv, 3462-3463.)

In the following subsections, we summarize the record evidence supporting each of these factual findings and note any material disputes between the parties. The Third Department affirmed the vast majority of Supreme Court's factual findings,

explicitly stating that it "defer[red] to Supreme Court's credibility and factual findings." (R.5014.)

a. Cutting of Old Growth Trees

Although plaintiff alleged that construction of the trails had a negative impact on old growth trees in the Forest Preserve, the State demonstrated that the sole tree along the Seventh Lake Mountain Trail that plaintiff alleged was old growth had died and fallen onto the trail. (R.x n.1; *see also* R.3100-3106 (photographs), 4638-4646.) DEC forester Robert Ripp cast significant doubt on the claims of plaintiff's expert, forest ecologist Stephen Signell (R.3723, 3388-3389, 3422), that the Newcomb to Minerva Trail passed through old growth forest; Forester Ripp testified that at least some portions of that forest had likely been disturbed during the 20th century. (*Compare* R.684-689, 3719-3728, *with* R.876-880, R.4701-4707.) Forester Ripp also testified that the trail route was specifically sited to avoid old growth forest. (R.4679-4685, 4701-4706.) And Mr. Signell acknowledged that he did not measure old growth by conducting an official census, in accordance with accepted practice in the field. (R.3715-3716, 3721, 3723.)

Supreme Court ultimately credited the testimony of the State's witnesses and found that there was "little, if any, evidence presented of [old growth] trees being cut." (R.x n.1.) Accordingly, the court held that plaintiff "did not prove that more than a *de minimus* number of 'old growth' trees had been cut in the construction" of the trails. (R.xv.)

b. Effect on the Forest Canopy and Clearcutting

Dr. Timothy Howard, an ecologist and the Director of Science at the New York State Natural Heritage Program, testified as an expert for the State about the ecological integrity of the forests through which the trails at issue were constructed. (R.4444-4567.) He described the forest canopy over the portions of trail he studied as a "closed canopy throughout." (R.4477, 4485; *see also* R.4470-4474, 4484.) He reviewed aerial photos of two trails at issue in this case and noted that, whether the trees were in "leaf off" or "leaf on" condition, the trails were not visible from above. (R.4467-4474, 4479-4484; *see also* R.3117, 3140, 3116, 3146 (aerial photographs)).

Although plaintiff's expert Dr. Ronald Sutherland, a conservation scientist with the Wildlands Network, testified that the forest canopy along some portion of the trails "had been opened up by the trail construction process," he acknowledged that he had previously stated, in a sworn affidavit, that these same trails "retained a closed canopy for much of their length." (R.3669-3675.)

Based on the testimony and the aerial photographs, Supreme Court held that the construction of the trails "did not have a substantial effect on the canopy of the Preserve in the specific construction areas and accordingly that the potential detrimental effects testified to regarding such canopy openings has not been demonstrated." (R.xv-xvi.)

Dr. Howard also defined and described the ecological effects of clearcutting, which he characterized as "tak[ing] out all the trees" to entirely remove the forest canopy. He explained that clearcutting creates a new "forest edge," and can affect the light penetration, temperature, and vegetative growth in the affected forest area. (R.4456-4458.) However, he confirmed that the portions of trail he studied had no evidence of clearcutting. (R.4462-4485, 4538-4539.)

Supreme Court credited Dr. Howard's testimony in this regard and noted that plaintiff had conceded that construction of the trails did not involve a clearcut. (R.xvi.)

c. Number of Trees Cut

The parties disputed the number of trees that trail construction required, both because they disagreed over what size tree (or seedling or sapling) was relevant to that count and because they presented differing testimony over the proper methods for accurately counting smaller forms of vegetation.

Testifying for the State, DEC forester Tate Connor testified that DEC inventories all trees measuring at least three inches dbh before undertaking a work plan that involves any tree cutting, and also that DEC avoids cutting large trees. (R.4240-4244.) Forester Ripp confirmed that the trails he worked on were sited to go through areas already affected by beech-bark infestation, to minimize tree cutting in healthier areas, and to minimize cutting of older trees by going through areas that had previously been heavily logged. (R.4679-4685, 4701-4706.) Forester Ripp, who has degrees in professional forestry and forest management and

previously worked in the private forestry industry for eight years, further testified that foresters define "timber" as trees that are at least *eight inches* dbh; thus, trees smaller than three inches dbh are not "timber." He testified that when he worked as a private forester, he never harvested any trees smaller than eight inches dbh. (R.4670-4678.) Thus, in his professional opinion, the timber cutting required to construct the trails at issue equaled no more than the stipulated-to amount of 6,184 trees at least three inches dbh. Forester Ripp added, however, that as a DEC forester he considers "[a]ll impacts" on vegetation of all manner and size when he plans and constructs trails. (R.4686.)

The State's expert Dr. Howard testified that in forests with closed canopies (like those at issue here), the survival rate for seedlings and saplings is low, because the canopy does not allow them to receive the sunlight they need to mature. Dr. Howard explained that a tree would produce "tens of thousands, perhaps hundreds of thousands of seeds and only a few of those seeds will germinate to seedlings. And only a few of those seedlings will grow

tall enough to be saplings. And only a few of those saplings will then grow up to be trees." (R.4526.)

Plaintiff did not dispute the State's evidence that trees smaller than three inches dbh, or indeed smaller than eight inches dbh, are not considered "timber" by modern forestry standards. Plaintiff nonetheless presented evidence of the total number of trees of all sizes, including even seedlings and saplings, that their witnesses estimated would be cut as a result of the trails' construction.

In particular, Mr. Signell personally conducted tree counts on some of the trail segments at issue on plaintiff's behalf. He testified that he believed a large number of trees smaller than three inches dbh had been or would be cut on the portions of trail he surveyed, and his tree count included trees, seedlings, and saplings of all sizes. (R.3384-3385, 3395-3397, 3413-3417, 3431-3433, 3440-3441, 3448, 3452, 3461-3462.) In areas where trees had not yet been cut, Mr. Signell surveyed the trees by observing markings on them and using his "wingspan" to eyeball eventual trail width. (R.3389-3392.) In areas where trees had already been cut, he used an application

on his cell phone called "Fulcrum" to photograph all tree stumps and seedling and sapling stems between one to three inches tall. (R.3348, 3352, 3360-3363, 3384-3385.) Using these techniques, Mr. Signell estimated that construction of the trails would require cutting approximately 17,517 seedlings, saplings, and trees smaller than three inches dbh over 32.45 miles of trail. (R.3462.) Plaintiff never revised that count at trial to reflect the 27 miles of trails stipulated to be at issue in this litigation. Nor did plaintiff revise it to reflect the fact that, after construction commenced, DEC forester Connor and his crew, which had marked trees for cutting, reevaluated the plan on an ongoing basis to reduce tree cutting further. (R.160-161, 4258-4259.)

Dr. Howard took issue with Mr. Signell's technique of using stump and stem measurements at ground level to predict tree diameter-at-breast-height measurements—a technique that he would not have utilized because it does not meet peer-review standards in the field. (R.4528-4530.) Dr. Howard also explained that it would be very difficult to determine—as Mr. Signell purported to—based solely on a photograph of a one-inch diameter

stump or stem, whether that stump or stem was from a tree as opposed to one of the forms of non-tree vegetation common in the Forest Preserve. (R.4531-4533.)

Supreme Court nevertheless credited the testimony of plaintiff's witnesses regarding their counting methods and the use of the Fulcrum application, and generally accepted plaintiff's tree counts, which included trees smaller than three inches dbh. (R.xiv.)

d. Character of the Trails and Construction Techniques

As Forester Connor explained at trial, a variety of trails currently exist on Forest Preserve lands, including 8-foot-wide horse trails, 6- to 8-foot-wide ski trails, and 6-foot-wide trunk trails. (R.4250, 4284-4285; *see also* R.1692-1693.) Typical hiking trails in the Forest Preserve range in width from 3 to 8 feet, while typical roads in the Forest Preserve range from 12 to 20 feet or wider. (R.4211-4212, 4245-4246.) The trails at issue here are generally 9 feet in width and are therefore suitable for use by snowmobilers. (R.1263.) Under the State Land Master Plan, a trail suitable for snowmobile use is "of essentially the same character as a foot trail"

and "may double as a foot trail at other times of the year." (R.4156, 2292.)

Forester Connor explained that Class II trails—like the ones at issue here—differ from roads in travel design, drainage features, and surfacing. (*See* R.4244-4246, 4252.) Class II trails—unlike roads—are not "improved" along their entire length but have irregularities that would not be suitable for motor vehicle travel. (R.4244-4245.) Additionally, Class II trails are built to sustainably shed water without regular maintenance and, unlike roads, are not crowned or regraded on a regular basis. (R.4244-4245, 4252.) Forester Connor also noted that large portions of the Seventh Lake Mountain Trail—the first trail built—have since re-naturalized in a manner inconsistent with roads. (R.769 (photograph), 4280, 4288-4290, 4295.)

Forester Connor also offered his expert opinion on the construction techniques that were utilized to build the trails at issue. He testified that, on foot trails and Class II trails alike, DEC foresters routinely use modern trail construction methods, including bench cuts, turnpiking, and water bars, to create

sustainable trails that will shed water, prevent erosion of the surrounding forest, and keep users on trails and off sensitive surrounding areas. (R.4195-4198, 4225-4233, 4289-4292; *see also* R.2735-2741.) Forester Connor confirmed that these techniques were used in constructing the trails at issue in the case (R.4225-4239, 4289-4295), and that the trails at issue in this case "have the same general features in construction practices" as do foot trails in the Preserve (R.4295).

The State's characterization of the trails at issue as akin to hiking trails was disputed by plaintiff's witnesses: Dr. Sutherland (R.3473-3682); William Amadon, a stewardship coordinator for a trail network that is not located in the Forest Preserve (R.3874-3948); and Peter Bauer, plaintiff's executive director (R.3948-4041). They opined that the trails were more like forest roads and would therefore have a greater ecological impact than a foot trail, due to their width, significant degree of grading, routing through rather than around obstacles, degree of bench cutting and resultant effects on vegetation, the presence of bridges, and the perceived effect on the tree canopy. (R.3527-3547, 3605-3606, 3924-3942, 4008.) But

Dr. Sutherland admitted that, unlike the Class II trails at issue here, forest roads typically are wide enough to allow two cars to pass each other, and he acknowledged that his analysis had focused on gravel roads designed to sustain car and truck traffic, not on dirt paths like Class II trails that are closed to cars and trucks. (R.3495, 3669-3670.) Mr. Amadon admitted that foot trails in the Forest Preserve are not of uniform size and some are as wide as eight feet. (R.3946.) And Mr. Bauer acknowledged that "[t]here had not been much grading" done on some of the trails he observed. (R.3966.)

Supreme Court credited the DEC foresters' testimony regarding trail construction, found that the 2009 guidance had been faithfully followed, and concluded that the construction techniques that were utilized to build the trails were "proper erosion control or other trail protection and maintenance methods which will have the overall sustainability effect of minimizing the environmental impact of the creation of the trails, and, thus, preserving the use of the Preserve for the future." (R.xxv.) The court credited plaintiff's experts' testimony that the trails were somewhat wider, generally straighter, and more groomed and graded than foot trails. But the

court nevertheless found that the trails "were and are more akin to hiking trails" or "cross-country ski trails" than "forest roads." (R.xx.)

e. Infiltration of Invasive Species

Plaintiff sought to prove that trails of any type can be a vector for spreading invasive species and proffered photographs demonstrating that two allegedly invasive species—Japanese knotweed and ragweed—were found in the area of the trails at issue here after their construction. (*See* R.727, 780, 3591-3593.) The State countered with the testimony of Dr. Howard that ragweed is a native, not invasive, plant in the Park, and that Japanese knotweed has been present in one of the Forest Preserve areas at issue since at least 2004—a decade before any of the subject trails were constructed. (R.4534-4535.) The State also presented the testimony of Kathleen Regan, the deputy director of regional planning at APA, who concurred with Dr. Howard that Japanese knotweed was present in the vicinity of one of the subject trails a decade before the trails' construction commenced. (R.2498-2499, 4163-4165.) Additionally, the State demonstrated that extensive steps were

taken during construction of the trails to avoid the spread of invasive species in the Forest Preserve. (*See, e.g.*, R.1909-1910, 1964, 1966-1967, 2465-2503, 2815, 2912.)

Supreme Court credited the State's testimony and found that plaintiff had not demonstrated infiltration of invasive species as a result of construction of the trails. (R.xxiv-xxv.)

f. Fragmentation

At trial, Dr. Howard discussed the deleterious effects of "forest fragmentation"—breaking a large forest up into smaller pieces—and testified that DEC's decision to shift several existing snowmobile trails to the periphery of Forest Preserve areas and close previously used interior trails had *decreased* forest fragmentation. (R.4485-4495, 4501-4525.) DEC forester Jonathan DeSantis confirmed that, a result of the project, 46 miles of preexisting trails running through interior areas of the forest had been closed to snowmobile use. (R.4614-4638, 4648-4657, 4665; *see also* R.1480-1481 (list of trail closures).) Joshua Clague, a natural resource planner at DEC, testified to writing UMPs and developing resulting maps for Class II trails reflecting miles of trails in the

forest interior that have since been closed by DEC to snowmobile use as a result of the project. (R.4412-4442.)

Plaintiff's expert Mr. Signell acknowledged that these closures decreased forest fragmentation. (R.3860-3861.) Nevertheless, based on the absence of evidence establishing that vegetation on the closed interior trials had since regrown, Supreme Court found that the "effect on forest fragmentation of the trail closures, was not in and of itself significant," and was "at worst neutral." (R.xxvi, xxiii.)

2. Supreme Court's Decision and Order

Supreme Court held that construction of the trails at issue did not violate the forever wild provision. (R.iv-xxviii.) Its decision draws heavily on the decisions of this Court in *Association for Protection of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930), and the Third Department in *Matter of Balsam Lake Anglers Club v. Department of Envtl. Conservation*, 199 A.D.2d 852 (3d Dep't 1993). The court found that the tree cutting necessary to construct the trails had not occurred "to a substantial extent or material degree"—the standard this Court enunciated in *MacDonald*—and

thus did not violate the forever wild provision. (R.xvii.) The court also rejected plaintiff's contention that construction of the trails otherwise impaired the wild forest nature of the Forest Preserve to an unconstitutional extent. (R.xxvi.)

3. The Appellate Division's Opinion and Order

The Appellate Division, Third Department, by a vote of 4-1, reversed the judgment and declared that "construction in the Forest Preserve of the Class II Community Connector trails that were planned and approved as of October 15, 2014 violates N.Y. Constitution, article XIV, § 1." (R.5020.)

The Third Department reasoned that the word "timber" in that constitutional provision "is not limited to marketable logs or wood products, but refers to all trees, regardless of size," thus declining to look to the drafters' intent or to adopt professional foresters' definition. (R.5017.) The Third Department further noted that Supreme Court had generally accepted the tree counts proffered by plaintiff, which included all trees. (R.5017-5018.) Accepting Supreme Court's factual findings—indeed, the court stated that it was "defer[ring] to Supreme Court's credibility and

factual findings" (R.5014)—the Third Department estimated that some 25,000 trees either had been cut or would be cut to construct the trails (R.5017-5018).[12]

The Third Department acknowledged that construction of the trails required cutting only narrow corridors of trees, unlike the project rejected in *MacDonald*, which required clearcutting and the removal of large swaths of trees. (R.5018.) The court also acknowledged that tree size and maturity are properly considered in determining whether the amount of tree cutting is "substantial or material" under this Court's decision in *MacDonald*. (R.5017.) In the court's view, however, the destruction of 25,000 trees, albeit "spread out along one or more portions of the Forest Preserve," violated article XIV, § 1. (R.5018.)

---

[12] The Court's approximation of 25,000 trees of all sizes appears to be an overestimate. It appears to include the 6,184 trees of at least three inches dbh to which the parties stipulated prior to trial, as well as Mr. Signell's 17,517 count of trees smaller than three inches dbh, which would total 23,701 trees. However, Mr. Signell's count was made over 32.45 miles of possible trails, as opposed to the 27 miles of trails at issue in this case, and counted all marked trees, even though crews continued to reduce tree cutting further as the work progressed.

At the same time, the Third Department held that no other aspect of the trails' construction impaired the wild forest nature of the Preserve. It recognized that the trails minimized environmental impacts by shifting existing snowmobile trails to the periphery of the Preserve and away from interior and "sensitive" areas. (R.5015.) It further affirmed Supreme Court's factual findings that old growth trees were not adversely impacted, that there was no clearcutting, that the trails retained a closed canopy throughout, that the newly constructed trails are more like hiking or ski trails than roads, that the use of bench cutting and turnpiking techniques during construction minimized adverse environmental impacts, and that construction did not result in the infiltration of invasive species. (R.5014-5015.) Indeed, based on those determinations, the Court held, unanimously, "that construction of the Class II trails did not violate the 'forever wild' clause" of the Constitution, a reference to the first sentence of article XIV, § 1. (R.5014.)

Justice Lynch dissented and would have held that plaintiff failed to establish any constitutional violation. He agreed with Supreme Court's assessment that the amount of tree cutting

required to construct the trails, when appropriately considered in context, was neither substantial nor material. Justice Lynch noted that DEC had carefully inventoried the trees before construction and avoided cutting large trees, and he credited the State's expert's testimony regarding the low survival rate of seedlings and other small trees that grow under a closed forest canopy—factors that, in his view, "lessen[] the impact of the tree removal." (R.5019.) Justice Lynch also disagreed with the majority's apparent disregard for the fact that the trails would facilitate multi-use year-round public access to the Forest Preserve, and noted this Court's language from *MacDonald*, 253 N.Y. at 238-39, that "[w]hatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for every one within the State and for the use of the people of the State." (R.5019.) In Justice Lynch's view, the trails "effect a reasoned balance between protecting the Forest Preserve and allowing year-round public access." (R.5019.)

The State appealed as of right. (R.5006.) Although the final judgment was favorable to plaintiff, plaintiff nonetheless filed a

cross appeal as of right. (R.5009.) Following a jurisdictional inquiry, this Court retained both the appeal and cross appeal.

SUMMARY OF ARGUMENT

Article XIV, § 1 of the Constitution requires that Forest Preserve lands be "forever kept as wild forest lands." And in service of that requirement, the provision prohibits specifically enumerated activities, including the destruction of "timber." In *Association for Protection of Adirondacks v. MacDonald*, 253 N.Y. 234 (1930), the Court explained that the timber-cutting prohibition is not absolute, however, but rather must be given a reasonable construction. Accordingly, a destruction of "timber" is prohibited only if it occurs to such a "substantial extent" or "material degree," *id.* at 238, that it impairs the wild forest nature of the Preserve.

Here, the Third Department correctly affirmed Supreme Court's findings, based on ample trial evidence, that construction of the trails would not impair the wild forest nature of the Forest Preserve. However, the Third Department incongruously held that the tree cutting required to construct the trails was nonetheless unconstitutional. That was error.

As discussed in Point I below, the Third Department first erred by ignoring the history of the forever wild provision, as well as longstanding DEC practice and other New York statutes and regulations addressing tree cutting, when it found that seedlings, saplings, and trees smaller than three inches dbh constitute "timber" within the meaning of the forever wild provision. While the destruction of seedlings, saplings, and smaller trees factors into the general analysis of whether a project impairs the wild forest nature of the Preserve, the more specific question whether "timber" has been destroyed to a substantial extent or material degree considers only trees of merchantable size.

As discussed in Point II below, the Third Department further erred by failing adequately to consider the number of trees cut for the trails' construction in the context of the project as a whole. As evidenced by the text and history of the forever wild provision, as well as this Court's guidance in *MacDonald*, the second sentence of the forever wild provision, which among other things prohibits the destruction of timber, is intended to serve the provision's overarching purpose—to maintain the wild forest nature of the

Preserve. Arguably, the tree cutting prohibition in that second sentence simply makes explicit what would otherwise be implicitly prohibited by the provision's first sentence, which requires that the Forest Preserve "shall be forever kept as wild forest lands." At the very least, however, the prohibition on destruction of timber should be construed in a manner that serves the general purpose of the forever wild provision, which is to maintain the Preserve's wild forest nature. Here, properly counting only trees of merchantable size, and considering the cutting of those trees in the context of the project as a whole, the Court should find that the subject cutting is not sufficiently substantial or material to impair the wild forest nature of the Preserve, and is thus constitutional.

Accordingly, the Court should reverse the Third Department's decision and order and declare that the trails at issue do not violate article XIV, § 1 of the New York Constitution.

ARGUMENT

POINT I

"TIMBER" AS USED IN THE FOREVER WILD PROVISION DOES NOT INCLUDE SEEDLINGS, SAPLINGS, AND TREES SMALLER THAN THREE INCHES DIAMETER AT BREAST HEIGHT

The historical context surrounding enactment of the forever wild provision, DEC's long-accepted use of the three inches dbh standard, and other New York statutes and regulations addressing tree cutting demonstrate that the term "timber" in the forever wild provision is properly interpreted to refer to merchantable trees—not seedlings, saplings, or trees smaller than three inches dbh. Accordingly, the Third Department erred in basing its analysis of the constitutional challenge to the tree cutting authorized here on a tree count that included trees of any size, even seedlings and saplings.

It is undisputed that the construction of the trails at issue involved the cutting of 6,184 trees of at least three inches dbh to create 27 miles of non-contiguous multi-use trails. That is the relevant tree count to determine whether the cutting is sufficiently

substantial or material so as to impair the wild forest nature of the Preserve.

A. The Drafters of the Forever Wild Provision Intended to Distinguish between Timber and Smaller Trees.

The forever wild provision was added to the New York State Constitution following the 1894 Constitutional Convention. As discussed above, the constitutional history demonstrates that the drafters sought to halt commercial logging and, at the same time, maintain the Forest Preserve for recreational use and enjoyment by the public.

As noted earlier, the provision begins with the two sentences relevant here: "The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, *nor shall the timber thereon be sold, removed or destroyed*." (Emphasis added.)

As plaintiff's expert testified at trial, this provision was animated by the "[w]idespread belief that commercial logging was

destroying the Adirondacks." (R.3201.) Delegates at the convention expressed concern over "selling to lumbermen" and the "lumbermen cutting the woods," as well as the need to "prevent the lands being taken by corporations." 4 Rev. Rec., 1894 N.Y. Constitutional Convention at 139. Their deliberate choice of the word "timber"—rather than trees more generally—reflects this concern. And the convention delegates explained that the Forest Preserve merited protection so that it may "be enjoyed by the people of the State of New York." *Id.* at 156; *see also id.* at 133 (recognizing the Adirondacks as "a symbol of sport, of recreation and pleasure-seeking"); *id.* at 149 (forest to be preserved "for the benefit of all our people").

Other contemporaneous documents evinced an understanding of the term "timber" as a distinct category of trees apt for merchantable logging. For example, the Fisheries, Game and Forest Law in effect at the time distinguished between trees and timber in its prohibition on trespass on Forest Preserve lands "for cutting or carrying away or causing to be cut or assisting to cut or carry away, any *tree, bark or timber* within the forest preserve." *See*

Former Fisheries, Game and Forest Law § 280 (emphasis added). And in its Annual Reports to the Legislature throughout the 1890s and into the early 1900s, the Forest Commission consistently used the term "timber" to refer to a volume of marketable wood product. *See* Third Annual Report of the Commission of Fisheries, Game and Forests, N.Y. Assembly Documents of 1898, Doc. No. 74, at 270 (distinguishing "sawing timber" from "pulpwood"), 274 (describing an area burned by wildfire as having "only a scant growth of trees and no merchantable timber"), and 301 (noting that the reforestation of the Forest Preserve would lead to a time "when the different species in our forest, both conifers and broad-leaved trees, will become merchantable timber"); Sixth Annual Report of the Forest, Fish and Game Commission, N.Y. Assembly Documents of 1901, Doc. No. 25, at 77 (differentiating in tree-count tables between "Timber Only, Down to 3 In. Diameter" and "Whole Tree Exclusive of Root Wood"); Eighth and Ninth Reports of the Forest, Fish and Game Commission, N.Y. Assembly Documents of 1907, Doc. No. 71, at 444 (noting that "the timber in the body of the tree is usually of the best quality") and 446 (stating that "log buyers and

dealers in pulpwood will offer some objections to removing the timber to as small a diameter as five inches, since when a tree is cut down to six inches in diameter in the tops there is usually but little timber having any commercial value remaining, even for pulpwood").

At the Constitutional Convention of 1915, when revisiting the language of the forever wild provision, the delegates specifically rejected an amendment that would have changed the language "timber thereon" to "trees and timber thereon." 2 Rev. Rec., 1915 N.Y. Constitutional Convention at 1448. And they did so, not because they believed the proposed amendment would be superfluous, but rather because the commercial destruction of merchantable timber remained their primary concern. *See id.* at 1469 ("I don't believe it is a possible thing to control a lumberman if he once takes an axe into a forest"); 1511 ("No cutting should be done which has for its purpose the making of money, the security of revenue, the satisfying of the craving of any industry"). Thus, as plaintiff's expert acknowledged at the trial in this case (R.3271-3272), the delegates to the 1915 Constitutional Convention rejected

the interpretation of the forever wild provision that plaintiff now advocates and the Third Department adopted—which would count trees of all sizes as "timber."

B. DEC's Longstanding Use of the Three Inches DBH Standard Is Consistent with the Drafters' Distinction between Timber and Smaller Trees.

The logging-industry-based concerns that animated the drafters of the forever wild provision, and the distinction between merchantable timber and smaller trees, have long been incorporated into DEC's tree-cutting policy. For decades, DEC has tallied and provided public notice of the number of trees to be cut during a construction or maintenance project in the Forest Preserve by utilizing a three inches dbh standard. Indeed, DEC employed that standard at the time of *MacDonald*, and this Court accepted that standard for purposes of its analysis. *MacDonald* Record on Appeal 12; *see also Association for Protection of Adirondacks v. MacDonald*, 228 A.D. 73, 82 (3d Dep't 1930) (noting that tree count at issue was "unquestionably" comprised of trees that were of "timber size"); *see also id.* at 81 (citing with approval 1927 Attorney

General Opinion stating that seedlings one-half inch in diameter at dbh are not timber).

DEC forester Ripp—who spent nearly a decade working in the private timber industry (R.4670-4773)—confirmed the size-based understanding of "timber" when he testified at trial that timber is "a salable, marketable forest product" (R.4676). In his professional opinion, a tree three inches dbh or smaller would "never" be considered timber under forestry standards. (R.4677-4678.) The timber companies he worked for considered trees as "timber" only if they were at least eight inches dbh. (R.4676-4678.) Yet, as DEC forester Connor explained at trial (R.4241), DEC has long utilized the more protective practice of counting as timber all trees at least three inches dbh.

Evidence at trial demonstrated the ecological rationale for DEC's three inches dbh standard. Each life stage of a tree has a different impact on the forest ecosystem: Dr. Howard testified that in a forest ecosystem, a tree may produce tens of thousands of seeds, but only a few germinate into seedlings, only a few seedlings grow into saplings, and only a few of those saplings will grow into trees.

(R.4526.) Accordingly, DEC excludes seedlings and saplings when it counts the number of "trees" that will be cut during a construction or maintenance project in the Forest Preserve, but counts the somewhat larger trees that have a more realistic chance of maturing into protected timber.

Including seedlings and saplings in such a count—which the Third Department's decision in this case requires—would not be practicable. DEC's work in the Forest Preserve involves not just building trails, but also tree cutting and trimming to: ensure the safety of existing trails and roadways; create parking lots; create and maintain campgrounds, primitive camping sites, and lean-tos; and provide safe water for public facilities. Completion of this essential work will be significantly hampered if DEC is required to undertake the arduous task of counting every seedling and sapling, in addition to more mature trees, before embarking on any project that requires tree cutting.[13]

---

[13] DEC has advised us that, since the issuance of the Third Department's decision in this case, it has ceased work on many projects, including: construction and relocation of foot trails,

C. Other New York Statutes and Regulations Reflect the Drafters' Distinction between Timber and Smaller Trees.

The ecological difference between trees at least three inches dbh and those smaller, including seedlings and saplings, is recognized in a variety of current New York statutes and regulations. The Executive Law defines "clearcutting" as "any cutting of all or substantially all trees over six inches in diameter at breast height over any ten-year cutting cycle." Executive Law § 802. On private lands in the Park, Executive Law § 806(1)(a)(3)(a) limits cutting trees in excess of six inches dbh near shorelines. *See also* 9 N.Y.C.R.R. § 575.1(e)(3)(i). APA regulations further define clearcutting as cutting trees over six inches dbh under certain circumstances. 9 N.Y.C.R.R. § 570.3(f). And trees measuring less

---

roadside primitive tent site construction, parking lot construction, boat launch construction, interpretative trail construction, construction of a new well and waterline to provide potable water to a campground, powerline maintenance, and old dam removal. Not only does the Third Department's decision require DEC to count trees of all sizes, including seedlings and saplings, but it also leaves DEC with no clear standard to apply for purposes of determining whether even modest tree-cutting activity would be deemed sufficiently material or substantial to rise to the level of a constitutional violation.

than 5.5 inches dbh are considered seedlings-saplings, not timber, for the purpose of taxing forest lands. 6 N.Y.C.R.R. § 199.1(k)(l).

POINT II

THE TIMBER CUT FOR THE TRAILS' CONSTRUCTION DID NOT IMPAIR THE WILD FOREST NATURE OF THE PRESERVE

This Court held in *MacDonald* that the forever wild provision prohibits cutting only to a "substantial extent" or "material degree." Because these are relative terms, it is imperative to consider not just the number of trees cut in isolation, but also the context in which the cutting occurs. Applying the proper contextual analysis to the 6,184 trees cut to construct the trails at issue here compels the conclusion that the timber cutting necessary for the trails' construction did not violate the forever wild provision because it did not impair the wild forest nature of the Preserve.

The first sentence of the forever wild provision states that the "lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands." The second sentence states that those lands "shall not be leased, sold or exchanged, or be taken by any corporation, public

or private, nor shall the timber thereon be sold, removed or destroyed." Article XIV, § 1. As evidenced by historical documents, the drafters of the forever wild provision were animated by specific threats to the wild forest lands of the Preserve—namely, commercial logging and the sale of Preserve land by the State. Because these threats were so fundamental to the passage of the provision, the drafters prohibited them—explicitly—in the second sentence.

Arguably, the tree cutting prohibition in that second sentence simply states in explicit terms what would otherwise be only implicitly prohibited by the provision's first sentence, which requires that the Forest Preserve "shall be forever kept as wild forest lands." On that view, the Third Department's holding that the tree cutting required to construct the trails violates the second sentence of the forever wild provision is inconsistent with its holding that the trails' construction did not violate the first sentence.

At the very least, however, the second sentence of the forever wild provision must be read in light of the overarching purpose of the provision—to maintain the wild forest nature of the Preserve.

The Court should therefore read that sentence to prohibit any destruction of timber that would impair the wild forest nature of the Preserve. This Court's decision in *MacDonald* strongly supports that reading.

In *MacDonald,* this Court clarified that the prohibition on timber cutting in the provision's second sentence is not absolute. The Court explained that although the forever wild provision might appear, on first reading, to prohibit the cutting of even a single tree, the words of the Constitution "must receive a reasonable interpretation, considering the purpose and the object in view." 253 N.Y. at 238 (citing *State of Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 [1930]). Relying on the records of the Constitutional Convention of 1894, the Court rejected the notion that the forever wild provision imposes an absolute restriction on cutting trees in the Forest Preserve. Rather, the Court found that the framers intended to prohibit the cutting of trees to a "substantial extent" and to allow "the erection and maintenance of proper facilities for the use by the public which did not call for the removal of the timber to any material degree." *MacDonald*, 253 N.Y. at 238. Further, the

Court's analysis makes clear that determinations of substantiality and materiality turn not on a simple tree count, but rather on whether the number of trees cut in the context of a project as a whole impairs the wild forest nature of the Preserve.

The project at issue in *MacDonald* was a bobsled run that would have been constructed on Forest Preserve land in preparation for the 1932 Winter Olympics. Construction of the 16- to 20-foot-wide bobsled run and the accompanying 8-foot-wide return roadway or 6-foot-wide motor-powered cable pull line would have required blasting 50 cubic yards of rock ledge. It also would have required the cutting of approximately 2,500 trees at least three inches dbh. *MacDonald* Record on Appeal at 10-13.

The Court's opinion, as well as the record in that case, demonstrate that factors other than the number of trees to be cut weighed heavily in the decision to invalidate the project. The 2,500 trees would have been cut from only four and a half acres on a single mountainside—an amount that undeniably constituted a clear-cutting of trees, with the attendant ecological harms discussed by the drafters at the 1894 Constitutional Convention. *MacDonald*,

253 N.Y. at 236; *MacDonald* Record on Appeal at 11-14. The bobsled run with requisite return would have required the installation of man-made mechanical equipment, including an electric- or gas-powered motorized pull line—unnatural additions inconsistent with the wild forest nature of the Preserve. *MacDonald* Record on Appeal at 10. And the purpose of the project was not to "open [Forest Preserve lands] up for the use of the public," but rather to provide facilities for the Olympic games. 253 N.Y. at 240. In light of the ecological impact of the proposed project and the character and purpose of the project itself, there seems little question that the project would have impaired the wild forest nature of the Preserve.

In *Matter of Balsam Lake Anglers Club v. Department of Envtl. Conservation*, 199 A.D.2d 852 (3d Dep't 1993), the Third Department similarly considered proposed tree cutting in context to determine whether that cutting impaired the wild forest nature of the Preserve. The project at issue in *Balsam Lake* was DEC's plan to construct five new parking lots, construct a new hiking trail, construct a new cross-country ski trail loop, and relocate existing trails. 199 A.D.2d at 852. It was unknown at the time of the

litigation how many trees would be cut to construct the new parking lots, the new ski trail loop, and the new hiking trail. *Id.* at 854. The trail relocations, however, required cutting 350 trees at least three inches dbh, as well as 312 saplings "that DEC does not classify as trees," *id.* at 853-54, on a trail more than two miles long and approximately six feet wide. (R.4916.) Even though the total number of trees to be cut for the project was unknown, the Third Department properly considered the project in context and held that "the amount of cutting necessary [was] not constitutionally prohibited" *because* the proposed construction plan was "compatible with *the use of* forest preserve land." *Balsam Lake*, 199 A.D.2d at 853-54 (emphasis added).

Thus, in both *MacDonald* and *Balsam Lake,* the courts analyzed the constitutionality of tree cutting in context in order to assess whether that cutting was sufficiently substantial or material to impair the wild forest nature of the Preserve. In this case, the Third Department failed to adhere to that analytical approach by focusing on the number of trees cut without considering that number in the context of the project as a whole.

This Court should correct that error and hold that the tree cutting necessary to construct the trails was constitutional because, when considered in context, it was not sufficiently substantial or material to impair the wild forest nature of the Preserve. And it should so hold, even if, notwithstanding our argument in Point I, the Court defines "timber" to include trees of all sizes, including seedlings and saplings.[14]

The context of the project as a whole is no longer a matter of dispute. The Third Department expressly affirmed Supreme Court's factual findings that old growth trees were not adversely impacted, that there was no clearcutting, that the trails retained a

---

[14] The State has never argued that smaller trees are irrelevant to the analysis and does not do so here. While smaller trees are not "timber" within the meaning of the forever wild provision's second sentence, a project's effect on all vegetation—including seedlings, saplings, and trees smaller than three inches dbh—is part of the context properly considered when determining a project's effects on the wild forest nature of the Preserve. As trial evidence demonstrated here, DEC foresters considered the impact on *all vegetation* when planning and routing the trails. Even if smaller trees were not officially tallied under DEC policy, their ecological value was not ignored. (R.4686; *see also* R.160-161, 1263.)

closed canopy throughout, that the newly constructed trails are more like hiking trails than roads, that the use of bench cutting and turnpiking techniques during construction minimized adverse environmental impacts, and that construction did not result in the infiltration of invasive species. These findings are not reviewable by this Court because they are supported—indeed, amply so—by record evidence.[15] (R.5014-5015.)

Additionally, the Third Department properly recognized (R.5015) that relocating trails to the periphery of Forest Preserve areas served to protect more sensitive interior areas; as a result of the trails' construction, the State has already closed to motorized use at least 46 miles of preexisting snowmobile trails located in or near sensitive interior areas, thereby decreasing forest fragmentation.

---

[15] In a case with affirmed findings of fact, this Court's scope of review is narrow. "This court is without power to review findings of fact if such findings are supported by evidence in the record." *Humphrey v. State of New York,* 60 N.Y.2d 742, 743 (1983).

Indeed, based on these contextual factors, the Third Department determined that construction of the trails did not "impair[] the wild forest qualities of the Forest Preserve" (R.5015), a conclusion that should in itself have ended the constitutional inquiry.[16] At the very least, however, the Third Department erred by failing adequately to weigh these contextual factors for purposes of deciding whether the tree count was constitutional.

Finally, the Third Department mistakenly found that it could not consider whether construction of the trails constituted a "beneficial use of the Forest Preserve for the public good." (R.5013.) In the court's view, it was therefore irrelevant that the construction serves a fundamental purpose of the forever wild provision—to

---

[16] Plaintiff's purported cross-appeal, which the Court retained following a jurisdictional inquiry, does not lie because plaintiff was not aggrieved by the judgment below. To the contrary, plaintiff was granted all the relief it sought in this litigation—a declaration that construction of the trails was unconstitutional. It thus "has no need and, in fact, no right to appeal." *Parochial Bus Sys. v. Board of Educ. of City of N.Y.*, 60 N.Y.2d 539, 544 (1983); *see also T.D. v. New York State Off. of Mental Health*, 91 N.Y.2d 860, 862 (1997) (explaining this principle). That plaintiff may disagree with one aspect of the Third Department's *reasoning,* as opposed to its *judgment,* does not render plaintiff an aggrieved party. *Parochial Bus Sys.*, 60 N.Y.2d at 545.

enable visitors of all interests and abilities to enjoy the wild forest nature of the Preserve.

To the contrary, the public purpose served by the trails' construction is of great import. Central to the passage of the constitutional provision was the drafters' determination that the Preserve should "be enjoyed by the people of the State of New York." 4 Rev. Rec., 1894 N.Y. Constitutional Convention at 156. In *MacDonald*, this Court recognized the primary importance of the public's right to access and enjoy the Forest Preserve, noting that "[w]hatever the advantages may be of having wild forest lands preserved in their natural state, the advantages are for every one within the State and *for the use of the people* of the State." *McDonald*, 253 N.Y. at 238-39 (emphasis added); *see also id*. at 241 ("a very considerable use may be made by campers and others without in any way interfering with this purpose of preserving them as wild forest lands"); *Balsam Lake*, 199 A.D.2d at 853-54 (construction plan constitutional because "compatible with the use of forest preserve land"). This Court's decision in *MacDonald* in fact turns on its determination that "the construction of a toboggan

slide" was not a reasonable use of Forest Preserve lands, in large part because it would not "open them up for the use of the public." 253 N.Y. at 240-41. And as recently as last year, this Court confirmed that agencies like DEC and APA "must balance, within applicable constitutional, statutory and regulatory constraints, the preeminent interest in maintaining the character of pristine vistas with ensuring appropriate access to remote areas for visitors of varied interests and physical abilities." *Matter of Adirondack Wild: Friends of the Forest Preserve v. New York State Adirondack Park Agency*, 34 N.Y.3d 184, 187 (2019).

In this case, the public benefit of the trails weighs heavily in their favor. It is unassailable that the trail segments at issue in this litigation enable members of the public of varying physical capabilities to access and enjoy the wild forest nature of the Preserve year-round. (*See, e.g.*, R.148, 177, 188, 1255, 1501, 2225, 2240, 2868.) They consist of several non-contiguous trails (*see* R.3119 for a map of trail segments) that are readily accessible from towns in the North Country. They are year-round trails designed to facilitate multiple kinds of recreational use (including cycling,

hiking, snowmobiling, and cross-country skiing). And they facilitate public access to the Forest Preserve while simultaneously protecting the habitat through ecologically sound trail-building techniques designed to keep people on the official trails and off surrounding areas and non-official alternate routes. That the trails enable members of the public to enjoy the wild forest nature of the Preserve through these multiple recreational uses provides an important reason—improperly overlooked by the Third Department—to uphold their constitutionality.

CONCLUSION

This Court should reverse the Third Department's decision and order and declare that the construction of the trails at issue does not violate article XIV, § 1 of the New York Constitution.

Dated: Albany, New York
June 10, 2020

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants-Respondents

By: Jennifer L Clark
JENNIFER L. CLARK
Assistant Solicitor General

The Capitol
Albany, New York 12224
(518) 776-2024
Jennifer.Clark@ag.ny.gov

BARBARA UNDERWOOD
Solicitor General
ANDREA OSER
Deputy Solicitor General
JULIE M. SHERIDAN
Senior Assistant Solicitor General
JENNIFER L. CLARK
Assistant Solicitor General
of Counsel

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), Jennifer L. Clark, 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 **11,473** words, which complies with the limitations stated in § 500.13(c)(1).

Jennifer L. Clark

Jennifer L. Clark