Matter of Protect The Adirondacks! Inc. v New York State Dept. of Envtl. Conservation
2014 NY Slip Op 32762(U)
October 15, 2014
Supreme Court, Albany County
Docket Number: 2137-13
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT   COUNTY OF ALBANY

In The Matter of the Application of
PROTECT THE ADIRONDACKS! INC.,

Plaintiff-Petitioner,

For A Judgment Pursuant to Section 5 of Article 14 of the New York State Constitution and CPLR Article 78,

-against-

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

Defendants-Respondents.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-13-ST4541 Index No. 2137-13

Appearances:

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DECISION/ORDER

George B. Ceresia, Jr., Justice

The plaintiff-petitioner (hereinafter "plaintiff") is a not-for-profit corporation

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dedicated to the protection and preservation of the lands of the Adirondack Forest Preserve. It has commenced the above-captioned combined action/proceeding to halt construction and development of new snowmobile trails within the Forest Preserve (referred to as Class II Community Connector Snowmobile Trails). The complaint-petition contains three causes of action. The first, in the form of a plenary action, alleges (in general terms) that construction and development of Class II Community Connector Snowmobile Trails violates New York Constitution article XIV, § 1, which precludes the removal of trees within the Forest Preserve, and requires that the Forest Preserve remain forever wild. The petitioner seeks a declaratory judgment and a permanent injunction to prevent damage to, and illegal use of the Forest Preserve. The second and third causes of action seek relief pursuant to CPLR Article 78 with regard to the grooming of such trails with large motorized vehicles known as snowcats, which plaintiff claims is illegal. Accordingly, the instant motion and cross-motion are applicable only to the first cause of action.

On October 31, 2013 the Court "so-ordered" a discovery stipulation of the parties which called for initial discovery demands to be served by November 15, 2013; responses to such demands to be served by December 15, 2013; all discovery to be completed by February 28, 2014; and a note of issue to be filed on or before March 7, 2014. On November 15, 2013 the parties served their respective discovery demands. The plaintiff served a combined discovery demand, which included a request for production of documents. The defendants served a demand for documents and witnesses, and interrogatories. Both parties took the position that their adversary's discovery demands were overly broad. On December 4, 2013 the plaintiff served a revised combined discovery demand which, defendants claim,

actually expanded the scope of discovery with respect to certain items.

The defendants have made a motion pursuant to CPLR 3103 for a protective order. In brief, the defendants argue that plaintiff's demands are overly broad, burdensome and vague, seeking documents not material or necessary to the action, particularly with regard to the period of time for which documents are sought. They indicate that the plaintiff has served a number of demands for documents pursuant to the New York State Freedom of Information Law or "FOIL" (see Public Officers Law Article 6), which seek the same documents demanded here, and argue that they should not be required to produce such documents a second time. They maintain that plaintiff's demands for production of email are particularly burdensome. They further maintain that the plaintiff has demanded production of documents from non-parties. They argue that the document demands go far beyond the issues raised in plaintiff's first cause of action, with regard to the subject matter of the demand and the period of time for which documents are sought.

The plaintiff opposes the motion and has made a cross-motion pursuant to CPLR 3124 to require the defendants to comply with its revised combined discovery demand. As part of the cross-motion, plaintiff seeks a protective order striking certain portions of defendants' document and witness demand and interrogatories dated November 15, 2013, as well as a request for reimbursement of its costs and disbursements.

DEFENDANT'S MOTION FOR A PROTECTIVE ORDER AND PLAINTIFF'S MOTION TO COMPEL

The CPLR directs that there be "full disclosure of all matter material and necessary

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in the prosecution or defense of an action" (CPLR 3101 [a]; Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406; Kavanagh v Ogden Allied Maintenance Corp., 92 NY2d 952, 954, [1998]) Davis v Cornerstone Telephone Company, LLC, 78 AD3d 1263, 1264 [3rd Dept., 2010]). "This statute embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (Spectrum Sys. v Chemical Bank, 78 NY2d 371, 376 [1991]). The information requested need not be shown to be indispensable, but rather must only be "needful" and sufficiently related to the subject matter of the action to be reasonable (see, Allen v Crowell-Collier Publ. Co. supra, pp. 406, 407; Goldberg v. Blue Cross of Northeastern New York, 81 AD2d 995, 996 [3d Dept., 1981]). "The test is one of usefulness and reason" (Andon v 302-304 Mott St. Assocs., 94 NY2d 740, 746 [2000], citing Allen v Crowell-Collier Publ. Co., supra, at 406). The party resisting disclosure has the burden of establishing that the information sought is privileged or not otherwise subject to disclosure (see CPLR 3103 [b]); see also Bloss v. Ford Motor Co., 126 AD2d 804, 805; Zimmerman v. Nassau Hosp., 76 AD2d 921; Brahm v. Hatch, 169 AD2d 263 [3d Dept., 1991]).

"While CPLR article 31 mandates "full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a]), the party seeking disclosure must demonstrate how the requested materials are relevant to issues in the matter" (Matter of the People of the State of New York v Pharmacia Corporation, 39 AD3d 1117, 1118 [3rd Dept., 2007], citing Allen v Crowell-Collier Publ. Co., supra; Vyas v Campbell, 4 AD3d 417, 418 [2004]). Moreover, in reviewing a motion for a protective order, "competing interests concerning the need for such discovery must be balanced '"against any special burden to be

borne by the opposing party"'"" (American Association of Bioanalysts v New York State Department of Health, 12 AD3d 868, 869 [3rd Dept., 2004], quoting Kavanagh v Ogden Allied Maintenance Corp., 92 NY2d 952 954, quoting O'Neill v Oakgrove Constr., 71 NY2d 521, 529 [1988]).

In determining what documents are material and necessary to plaintiff's first cause of action and defendant's defense thereof the Court, in evaluating each side's demands, has limited discovery to that which it deems to be proportionate to the needs of the case, focusing on the issues in controversy and considering the relative burdens that are placed upon each party.

Document Production Look-Back Period

Plaintiff's revised combined discovery demands requests production of documents for various periods of time: from January 1, 2001 to date (demand items 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 42; from January 1, 1972 to date (demand items 20, 21); from January 1, 2006 to date (demand items 12, 14, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 47, 48 and 49; from January 1, 2009 to date (demand item 10); and from January 1, 1894 to date (demand items 15, 16, 43, 44, 45, 46).

Defendants, in their original notice of motion, requested that document production be limited to the period from November 12, 2006 (the date of the Snowmobile Plan for the Adirondack Park/Final Generic Environmental Impact Statement, hereinafter "Snowmobile Plan") to the present. In their reply papers, the defendants amended this request to limit document production to 2012, the year when construction of the Class II Community

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Connector Snowmobile Trails commenced; and to impose additional limitations on discovery of email. By way of an explanation for their change in position, the defendants indicated that the November 12, 2006 date had been proffered as a compromise to the much longer search periods proposed by the plaintiff, a compromise which plaintiff rejected. They argue that 2012 is a reasonable starting point by virtue of the fact that this is the year when construction of the Class II Community Connector Snowmobile Trails commenced. With regard to production of email, the defendant's requested that it be limited to four DEC employees who were the construction supervisors of the Seventh Lake Mountain Trail, Wilmington Trail and Gilmantown Trail.

Because the defendants had changed their position with regard to the document production look-back period, and with respect to extent of discovery of email, the Court granted the plaintiff an additional opportunity to be heard. The plaintiff submitted a sur-reply.

The plaintiff maintains that the time frames in plaintiff's demands were carefully crafted to produce relevant facts bearing on the issues in the first cause of action. January 1, 1894 is the approximate date when New York Constitutional Article 14 was adopted (as NY Const. art. 7). January 1, 1972 is the approximate date of creation of the Adirondack Park Authority (hereinafter "APA). January 1, 2001 is the approximate date that development of the 2006 Adirondack Park Snow Mobile Plan commenced. January 1, 2006 is said to be the approximate date of adoption of the 2006 Snowmobile Plan.[1] January 1,

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[1]It appears from the record that the Snowmobile Plan was completed in October or November 2006.

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2009 is said to be the approximate date of approval of the 2009 Management Guidance for Snowmobile Trail Siting.[2] The plaintiff asserts: "[t]hrough its Article 14 action, Plaintiff 'seek[s] more than just a review of a single determination' of the defendants. [] Plaintiff seeks a 'review of the legality' of the defendants' 'illegal activities', and a declaration of the unconstitutionality of these activities.[]." (Plaintiff's Memorandum of Law Dated January 6, 2014, p. 15, citations omitted). It is argued that the documents demanded "are material and necessary to Plaintiff's proof that the construction of these trails destroys the 'wild forest nature of the Forest Preserve' and that the Defendants are creating an 'artificial, man-made setting' in the Forest Preserve." (id., at 18). Plaintiff also maintains that any limitation of disclosure time frames would bar disclosure with regard to additional trails yet to be constructed, and preclude discovery with regard to the future destruction of thousands of trees.

As previously indicated, discovery is confined to the allegations of the plaintiff's first cause of action, that the Class II Community Connector Trails violate Article 14, § 1 of the New York State Constitution because: "(a) a substantial amount of timber will be cut and destroyed in the construction of these trails; (b) these trails are not consistent with the wild forest nature of the Forest Preserve; and (c) the construction of these trails will result in the creation of a man-made setting in the Forest Preserve" (plaintiff's complaint/petition, ¶ 82).

As pointed out by the plaintiff, the Final Snowmobile Plan adopted in November 2006, is a conceptual document "and it does not designate specific routes for the new trails

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[2]The 2009 Guidance was approved on December 21, 2009.

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described therein" (petition/complaint ¶ 64). The 2009 Guidance was intended to provide "new standards and guidelines for snowmobile trail siting, construction and maintenance" (2009 Guidance, p. 2). It was the 2009 Guidance which established the current standards for Class II Community Connector Snowmobile Trail Community Connector Trails, several of which are specifically mentioned in plaintiff's complaint. In the Court's view, the administrative review process which underlies and pre-dates adoption of the 2006 Snowmobile Plan and the 2009 Guidance is a collateral matter, not sufficiently relevant to the issues raised in plaintiff's first cause of action to warrant discovery. Similarly, the review process leading up to the development and adoption of final plans for construction of completed Class II Community Connector Snowmobile Trail Community Connector Snowmobile Trails is, again, collateral to the main issues here. The Court finds that discovery should be limited to physical destruction of the Forest Preserve which has occurred in the past, and which will occur in the future, in connection with construction and maintenance of Class II Community Connector Snowmobile Trails. With regard to those Class II Community Connector Snowmobile Trails for which construction has either been completed or is currently under way, the Court will limit document discovery to final plans, approvals, and policies in effect as of January 1, 2012 and going forward, together with those records and reports which document actual construction and/or maintenance of the trails. With regard to future Class II Community Connector Snowmobile Trail Community Connector Snowmobile Trails, discovery will be limited to plans, policies and approvals as they exist as of the date of this decision-order, including plans with regard to the scheduling of trail work.

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Communications, Including Email

Many of plaintiff's demand items seek copies of communications of Department of Environmental Conservation ("DEC") and APA employees going as far back as January 1, 2001. As noted, both defendants maintain that this is extremely burdensome, particularly with regard to email, which would require retrieval and review of tens of thousands of such documents.

On balance, in weighing the burdensome nature of the demands, and mindful that the plaintiff is simultaneously availing itself of other disclosure devices under CPLR Article 31 to gather evidence more directly related its claim of destruction of the Forest Preserve, the Court finds that the plaintiff has failed to demonstrate, at this time, how such broad document discovery would produce information relevant or material to plaintiff's first cause of action. For this reason, plaintiff's demands for communications are denied.[3]

Documents Previously Produced Pursuant to FOIL

Defendants maintain that many of the documents demanded in the instant action have already been produced pursuant to various demands submitted by plaintiff's Executive Director, Peter Bauer, pursuant to FOIL. As an example, it is indicated that defendant Adirondack Park Agency has produced some 13,000 documents pursuant to FOIL. The Court understands the argument, however the underlying purposes served by FOIL (public

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[3]To be clear, the Court is well aware that discovery of electronically stored information is a recognized form of disclosure under CPLR 3101 (see 22 NYCRR 202.12 [b], [c]). Uniform Rule 202.12, however, does not supplant well established judicial precedent (cited above), which requires that such documents be shown to be material and relevant.

access to government records) are entirely different than those served by pre-trial discovery in an action. The Court observes that the plaintiff indicates that it is willing to accept defendants' response if defendants inform plaintiff where in the defendants' FOIL responses the documents are located.

The defendants, in the Court's view, have two options. They may withhold production of documents previously produced pursuant to FOIL, so long as the defendants indicate where in the FOIL responses the documents are located. In the alternative, they must furnish the documents a second time.

Demand For Documents of Non-Parties

Plaintiff has clarified that it is not demanding documents from non-parties to the action. Accordingly, if the documents are not in the possession of either defendant, they need not be produced.

Documents Not Subject To Disclosure

In the event that the parties take the position that documents are not subject to disclosure under the rules of pre-trial discovery (for example, documents subject to the attorney-client privilege or material prepared for litigation) the parties must prepare and serve a privilege log of the documents withheld, which should describe the document, and indicate the specific reason why it is not subject to disclosure.

Plaintiff's Specific Document Demands

The Court will now proceed to review plaintiff's individual document demands,

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keeping in mind the rules for disclosure cited above. Paramount to all of such rules is that "[t]he test is one of usefulness and reason" (Andon v 302-304 Mott St. Assocs., 94 NY2d 740, 746 [2000], supra, citing Allen v Crowell-Collier Publ. Co., supra, at 406). The Court will re-state the demand, and render a determination.

Demand No. 1: Policies, memoranda, plans or other documents or communications within or between any entity, officer, employee or agent of the State regarding the location, routes, or mileage of future snowmobile trails to be constructed or designated as the Remaining Class II Trails in the Adirondack Forest Preserve, from January 1, 2001 to date.

The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that: the plaintiff is entitled to plans, policies, approvals, and written documents with regard to scheduling, in effect as of the date hereof, as they pertain to future Class II Community Connector Snowmobile Trails.

Demand No. 2: Plans or other documents, or communications within or between any entity, officer, employee or agent of the State regarding the schedule, order, or prioritization of future snowmobile trails to be constructed or designated as the Remaining Class II Trails, from January 1, 2001.

The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that: the plaintiff is entitled to plans, policies, approvals, and written documents with regard to scheduling, in effect as of the date hereof, as they pertain to future Class II Community Connector Snowmobile Trails.

Demand No. 3: Plans or other documents regarding the phasing or segmentation of the

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construction of the snowmobile trails to be constructed or designated as the Remaining Class II Trails, from January 1, 2001.

The Court upholds the defendants' objection to the use of the term "segmentation" because of its specific meaning under the rules of the Department of Environmental Conservation (see 6 NYCRR 617.2 [ag]; 6 NYCRR 617.3 [g]). The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that: the plaintiff is entitled to plans, policies, approvals, and written documents with regard to scheduling, in effect as of the date hereof, as they pertain to future Class II Community Connector Snowmobile Trails.

Demand No. 4: **Plans or other documents, or communications within or between any entity, officer, employee or agent of the State regarding the concept of, or goals for, a system of community connector snowmobile Trails, as discussed in the 2006 Final Snowmobile Plan and the 2009 Management Guidance, from January 1, 2001 to date.**

The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that: (1) the plaintiff is entitled to plans, policies and approvals and reports in effect from January 1, 2012 going forward for Class II Community Connector Snowmobile Trails already completed or currently under construction; (2) the plaintiff is entitled to plans, policies, approvals, and written documents with regard to scheduling, in effect as of the date hereof, as they pertain to future Class II Community Connector Snowmobile Trails.

Demand No. 5: **Policies, memorandum, plans or other documents, or communications within or between any entity, officer, employee or agent of the State regarding how much of the system of Class II Community Connector Snowmobile Trails is, will be, or**

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should be located on private land versus being located on Adirondack Forest Preserve land, from January 1, 2001 to date.

Defendants' objection is sustained, as the material demanded is not relevant to plaintiff's first cause of action. Defendants need not comply.

<u>Demand No. 6</u>: Policies, memorandum, plans or other documents, or communications within or between any entity, officer, employee or agent of the State regarding how much of the Remaining Class II Trails are, were, or will be proposed to be on existing roads, through existing forest, or on existing trails which will require widening, from January 1, 2001 to date.

The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that: the plaintiff is entitled to plans, policies, approvals, in effect as of the date hereof, as they pertain to future Class II Community Connector Snowmobile Trail Community Connector Snowmobile Trails.

<u>Demand No. 7</u>: Policies, memorandum, plans or other documents, or communications within or between any entity, officer, employee or agent of the State regarding the preference for proposed routes of the Class II Community Connector Snowmobile Trails to use old roads, to follow the contouring of existing trails, or to wind between trees for the construction of Class II Community Connector Snowmobile Trails, from January 1, 2001 to date.

The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that: (1) the plaintiff is entitled to plans, policies and approvals and reports in effect from January 1, 2012 going forward for Class II Community Connector Snowmobile Trails already completed or currently under construction; (2) the plaintiff is entitled to plans, policies, approvals in effect as of the date hereof, as they pertain to future Class II Community Connector Snowmobile

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Trails.

<u>Demand No. 8</u>: From January 1, 2001 to date, documents containing data regarding:

(a) how much of the mileage of the Remaining Class II Community Connector Snowmobile Trail Trails is, was, or will be located on private land versus on Adirondack Forest Preserve Land; and

(b) how much of mileage of the Remaining Class II Community Connector Snowmobile Trail Trails is, was, or will be located on existing roads, through existing forest, or on existing trails which will require widening.

Defendants' objection is sustained as irrelevant with regard to subdivision (a). Defendants need not comply. With regard to paragraph (b), the Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that the plaintiff is entitled to plans, policies, approvals, in effect as of the date hereof, as they pertain to future Class II Community Connector Snowmobile Trails.

<u>Demand No. 9</u>: Maps of all proposed or potential routes for the remaining Class II Trails, from January 1, 2001 to date.

The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that plaintiff is entitled to maps of proposed or potential routes for the remaining Class II Community Connector Snowmobile Trails limited to trail planning as of the date hereof.

<u>Demand No. 10</u>: Documents regarding DEC's schedule or plans for the preparation of Unit Management Plans and Unit Management Plan amendments for any unit of the Adirondack Forest Preserve which does, or would, include a Class II Community Connector Snowmobile Trail, from January 1, 2009 to date.

The Court finds that the demand is irrelevant and immaterial to plaintiff's first cause

of action. The demand is denied. Defendants need not comply.

Demand No. 11: Documents regarding the so-called "Northern snowmobile trail network", as referred to in the September 24, 2013 affidavit of Daniel M. Levy at ¶ 5, from January 1, 2001.

The Court sustains defendants' objection because the demand is overly broad and burdensome, vague, and any relevant discovery within this demand will be provided by the discovery allowed pursuant to plaintiff's other demands.

Demand No. 12: Documents regarding the number of trees and amount of vegetation estimated to be cut, amount of land estimated to be cleared, number of drainage structures estimated to be built, number of bench cuts estimated to be made, and amount of excavation estimated to be done for the construction of each of the Remaining Class II Trails, and for the system of Class II Community Connector Snowmobile Trails as a whole.

The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that: (1) the plaintiff is entitled to the documents requested from January 1, 2012 going forward for Class II Community Connector Snowmobile Trails already completed or currently under construction; (2) the plaintiff is entitled to the documents requested, in effect as of the date hereof, as they pertain to future Class II Community Connector Snowmobile Trails.

Demand No. 13: Reports from APA staff to the APA or the APA State Land Committee regarding construction, maintenance and/or grooming of snow on the snowmobile trails in the Adirondack Forest Preserve from January 1, 2001.

The Court finds that the demand is overly broad and vague, and the documents

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requested have not been shown to be material and necessary, except that the plaintiff is entitled to reports from APA staff to the APA or the APA State Land Committee regarding construction, maintenance and/or grooming of snow on snowmobile trails dated January 1, 2012 going forward for those Class II Community Connector Snowmobile Trails already completed; however, with respect to trail grooming, this shall only apply where such grooming resulted in removal of trees.

<u>Demand No. 14</u>: Reports, studies, notes or other documents regarding the status of the land, wildlife habitat, and/or wildlife at, near or on any Class II Community Connector Snowmobile Trails prior to, during, and/or after the construction of such Class II Community Connector Snowmobile Trails.

The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that: (1) the plaintiff is entitled to studies and reports in effect from January 1, 2012 going forward for Class II Community Connector Snowmobile Trails already completed or currently under construction; (2) the plaintiff is entitled to studies and reports as of the date hereof, as they pertain to future Class II Community Connector Snowmobile Trails.

<u>Demand No. 15</u>: From January 1, 1894 to date, documents defining or discussing the concepts of "substantial extent", "material degree", "man-made setting", "wild forest lands" or "reasonable use", as those terms are used in Association for the Protect of the Adirondacks v MacDonald, 253 NY 234 (1930), that were used in preparing: (a)the 2009 Management Guidance; (b) the 2006 Final Snowmobile Plan; (c) any Unit Management Plan including a Class II Community Connector Snowmobile Trail , and (d) any work plan for a Class II Community Connector Snowmobile Trail.

The Court sustains the defendants' objection as being overly broad, burdensome, vague, irrelevant and seeking legal conclusions and/or theory.

Demand No. 16: From January 1, 1894 to date, documents defining or discussing the concept of "wild forest" as that term is used in Article 14, § 1 of the Constitution, that were used in preparing: (a)the 2009 Management Guidance; (b) the 2006 Final Snowmobile Plan; (c) any Unit Management Plan including a Class II Community Connector Snowmobile Trail, and (d) any work plan for a Class II Community Connector Snowmobile Trail.

The Court sustains the defendants' objection as being overly broad, burdensome, vague, irrelevant and seeking legal conclusions and/or theory.

Demand No. 17: Work plans for any of the Class II Community Connector Snowmobile Trails.

The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that: (1) the plaintiff is entitled to production of work plans in effect from January 1, 2012 going forward for Class II Community Connector Snowmobile Trails already completed or currently under construction; and (2) the plaintiff is entitled to production of work plans in effect as of the date hereof, as they pertain to future Class II Community Connector Snowmobile Trails.

Demand No. 18: For the construction of the snowmobile trail known as the so-called "showcase trail" located north of Minerva, Essex County, any work plans for that trail, and any records or other documents showing the location of where, and/or to what extent, motor vehicles and/or motorized equipment were used to construct that trail, the number of trees cut for said trail, and the area of land or vegetation cleared for said trail.

The Court finds that the demand is overly broad and vague, and the documents requested have not been shown to be material and necessary, except that the Court will grant the demand in accordance with, and to the extent of, the defendants' responses.

Demand No. 19: Documents showing the location of where, and/or to what extent, motor vehicles and/or motorized equipment were used to construct any of the Class II Community Connector Snowmobile Trails.

The Court finds that the documents demanded are immaterial, unnecessary and irrelevant to plaintiff's first cause of action.

Demand No. 20: Policies, memoranda, or communications within or between any entity, officer, employee or agent of the State regarding the use of motor vehicles and/or motorized equipment, to construct snowmobile trails in the Adirondack Forest Preserve, from January 1, 1972 to date.

The Court finds that demand is overly broad, and the documents demanded are immaterial, unnecessary and irrelevant to plaintiff's first cause of action.

Demand No. 21: Policies, memoranda, or communications within or between any entity, officer, employee or agent of the State regarding the use of motor vehicles, and/or motorized equipment, to groom snow on or maintain snowmobile trails in the Adirondack Forest Preserve from January 1, 1894 to date.

The Court finds that the demand is overly broad and that the documents demanded are immaterial, unnecessary and irrelevant to plaintiff's first cause of action.

Demand No. 22: Documents Showing the location of, or containing data on the number of trees that were cut during construction of any existing Class II Community Connector Snowmobile Trail.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 23</u>: Documents showing the location of, or containing data on, the width of any existing Class II Community Connector Snowmobile Trail.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 24</u>: Documents showing the location of, or containing data on, the condition of the ground surface of any existing Class II Community Connector Snowmobile Trail.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 25</u>: Documents showing the extent of revegetation of any existing Class II Community Connector Snowmobile Trail.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 26</u>: Documents depicting any bridges on any existing Class II Community Connector Snowmobile Trail.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 27</u>: Documents depicting the clean-up and remediation of the trail surface and trail-side of any existing Class II Community Connector Snowmobile Trail.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 28</u>: Documents demonstrating that the ground surface of a remediated and revegetated Class II Community Connector Snowmobile Trail has the same appearance as the ground surface of a natural "wild forest", as that term is used in Article 14, § 1 of the Constitution.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 29</u>: Documents demonstrating that the ground surface of a remediated and revegetated Class II Community Connector Snowmobile Trail has the same appearance as the ground surface of a "foot trail", as that term is defined in the APSLMP.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 30</u>: Documents demonstrating that a Class II Community Connector Snowmobile Trail "will look no different than a hiking trail" as alleged in ¶ 48 of the affidavit of Karyn B. Richards, sworn to September 25, 2013, and filed in this matter.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 31</u>: With respect to the construction of the Class II Community Connector Snowmobile Trails, documents showing the sizes and locations of bench cuts dug along the side slopes of the trails, the locations of where protruding rocks were removed or "armored", the locations of ledge rock that was fractured, split apart and/or removed, and the locations of where crushed gravel was used.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 32</u>: Documents showing the locations of, and materials used in, the construction of bridges on the Class II Community Connector Snowmobile Trails.

The Court finds that this item should be limited to documents pertaining to Class II Community Connector Snowmobile Trails from January 1, 2012 to the present.

<u>Demand No. 33</u>: Reports or other documents including but not limited to snowmobile trail maintenance logs and "Interior Facilities Maintenance Reports," regarding maintenance activities undertaken for any of the Class II Community Connector Snowmobile Trails.

The Court finds that this item should be limited to those documents the defendants have agreed to produce. Defendants' response is satisfactory.

Demand No. 34: Reports or other documents regarding whether or not trail conditions were suitable for maintenance and/or grooming of snow on the Class II Community Connector Snowmobile Trails by motor vehicles or motorized equipment.

The Court sustains the objection of the defendants in that the documents requested are irrelevant, immaterial and unnecessary.

<u>Demand No. 35.</u> Reports or other documents, including but not limited to, on-site inspection reports, regarding whether or not construction or maintenance activities, or grooming of snow, on the Class II Community Connector Snowmobile Trails were accomplished in compliance with applicable laws, rules, regulations, standards, and maintenance agreements (e.g., Temporary Revocable Permits, or Adopt-A-Natural Resource Agreement or Volunteer Stewardship Agreement).

The Court sustains the objection of the defendants by reason that the demand is overly broad and vague, and requests documents which are irrelevant, immaterial and unnecessary

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to plaintiff's first cause of action.

<u>Demand No. 36</u>: Reports or other documents regarding unsafe trail conditions or bridges on any of the existing or planned Class II Community Connector Snowmobile Trails.

The Court sustains the objection of the defendants by reason that the demand requests documents which are irrelevant, immaterial and unnecessary to plaintiff's first cause of action.

<u>Demand No. 37</u>: Reports or other documents, including but not limited to, notices of violation or other enforcement-related documents, regarding illegal activities on Class II Community Connector Snowmobile Trails, such as unauthorized or unapproved cutting or removal of trees, or unauthorized or unapproved use of motor vehicles or motorized equipment.

The Court sustains the objection of the defendants by reason that the demand requests documents which are irrelevant, immaterial and unnecessary to plaintiff's first cause of action.

<u>Demand No. 38</u>: Documents summarizing, in whole or in part, the costs incurred by the Defendants for the construction of any of the Class II Community Connector Snowmobile Trails in the Adirondack Forest Preserve.

The Court sustains the objection of the defendants by reason that the demand requests documents which are irrelevant, immaterial and unnecessary to plaintiff's first cause of action, and further that the plaintiff indicates that the issue is now moot.

<u>Demand No. 39</u>: Documents summarizing, in whole or in part, the amount of fuel, stone, fill, lumber and other materials used for the construction of any of the Class II Community Connector Snowmobile Trails in the Adirondack Forrest Preserve.

The Court sustains defendants' objection with regard to documents related to the

amount of fuel used for construction of Class II Community Connector Snowmobile Trails, but finds that the plaintiff is entitled to work and/or construction plans effective January 1, 2012 which show the amount of stone, lumber or other materials used in construction of trails.

Demand No. 40: Documents summarizing, in whole or in part, the costs incurred by the Defendants for the purchase, maintenance, and repair of tracked motor vehicles, and motorized equipment, used for grooming of snow on any of the Class II Community Connector Snowmobile Trails in the Adirondack Forest Preserve.

The Court sustains the objection of the defendants by reason that the demand requests documents which are irrelevant, immaterial and unnecessary to plaintiff's first cause of action, and further that the plaintiff indicates that the issue is now moot.

Demand No. 41: Plans or other documents, requests for funding or resources, or communications within or between any entity, officer, employee or agent of the State, regarding funding or budgeting for the construction of snowmobile trails in the years 2014 and 2015.

The Court sustains the objection of the defendants by reason that the demand requests documents which are irrelevant, immaterial and unnecessary to plaintiff's first cause of action.

Demand No. 42: Formal Opinions or Informal Opinions of the Attorney General regarding the construction of Class II Community Connector Snowmobile Trails and/or the cutting of trees or timber related thereto, from January 1, 2001 to date.

The Court finds that defendants' response is satisfactory.

Demand No. 43: Laws, regulations, policies, manuals, guidance, opinions, declaratory rulings, decisions, memoranda, letters, and other documents defining a "tree" or "timber" as not including any vegetation less than three (3) inches in diameter at breast

height ("3" dbh"), or as otherwise differentiating such vegetation under 3" dbh from a "tree" or "timber", as was discussed in the Defendants' prior papers served in this matter, from January 1, 1894 to date.

The Court sustains the defendants' objection as being overly broad, burdensome, vague, irrelevant and seeking legal conclusions and/or theory.

Demand No. 44: Studies and other documents providing a scientific basis for excluding any vegetation less than 3" from definitions of "tree" or "timber" in the manner described in the previous Demand, from January 1, 1894 to date.

The Court sustains the defendants' objection as being overly broad, burdensome, vague, irrelevant and seeking legal conclusions and/or theory.

Demand No. 45: Documents demonstrating, or supporting Defendants' claim that, vegetation less than 3" dbh is not a "tree" or "timber" and is not "of constitutional concern", within the scope of Article 14, § 1 of the Constitution, as alleged in ¶ 92 of Defendant's Answer herein, from January 1, 1894 to date.

The Court sustains the defendants' objection as being overly broad, burdensome, vague, irrelevant and seeking legal conclusions and/or theory.

Demand No. 46: Documents demonstrating, or supporting Defendants' claim that Article 14, §1 of the Constitution, does not require that the Adirondack Forest Preserve "lands be preserved as wild forest lands", as alleged in ¶ 22 of Defendants' Answer herein, from January 1, 1894 to date.

The Court sustains defendants' objection as the demand is overly broad and burdensome, and requests documents which are irrelevant, immaterial and unnecessary.

Demand No. 47: Reports filed or issued pursuant to DEC Commissioner Policy DP-17 for all work done on or related to the planning, construction, maintenance and repair of Class II Community Connector Snowmobile Trails since adoption of said policy.

The Court finds that the demand is overly broad and vague, and the documents

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requested have not been shown to be material and necessary, except that the plaintiff is entitled to such reports, in effect from January 1, 2012 going forward for Class II Community Connector Snowmobile Trails already completed or currently under construction.

<u>Demand No. 48</u>: Requests for approval, applications, SEQR documents, decisions, approvals, work plans, regional logs, inspection reports, and related documents, submitted, filed or issued pursuant to DEC Organization and Delegation Memorandum #84-06, and the DEC Forest Preserve tree cutting policy, Memorandum LF-91-2 (dated April 10, 1991), for all work done on or related to the planning, approval, construction, maintenance and repair of Class II Community Connector Snowmobile Trails, since adoption of said Memorandum and said Policy.

The Court finds that defendant's response is satisfactory, except that the APA may not rely upon FOIL exemptions to withhold production of documents. The demand is limited to those documents effective as of January 1, 2012 to present.

<u>Demand No. 49</u>: Contracts or agreements for the construction of existing or planned Class II Community Connector Snowmobile Trails.

The Court finds that defendants' response is satisfactory.

Plaintiff's Demand for Disclosure of Experts

The Court does not discern any specific objection to this demand on the part of the defendants. As such the Court does not address the issue at this time.

Plaintiff's Demand For Names and Addresses Witnesses

The Court does not discern any specific objection to this demand on the part of the defendants. As such the Court does not address the issue at this time.

Plaintiff's Demand For Statements

The defendants indicate to the extent that statements exist, they will be produced. It does not appear there is any reason or need to address this demand item.

PLAINTIFF'S CROSS-MOTION FOR A PROTECTIVE ORDER

Defendants have served a demand for documents, demand for witnesses and a demand for responses to interrogatories. As part of the relief requested in the cross-motion, the plaintiff seeks an order pursuant to CPLR 3103, striking defendants' document and witness demands, and interrogatories, and awarding the plaintiff costs and disbursements on the motion and cross-motion. Plaintiff maintains that the demands are overly broad, onerous, unduly burdensome and outside the scope of CPLR Article 31. The Court will proceed to review the various demand items.

Defendants' Demand For Production of Documents and Demand For Photographs, Videotapes, Images

The "scope" of the defendants' document demand is defined as follows (paraphrasing):

> (a) occurrences alleged in the first cause of action in paragraph 81 through 118 of plaintiff's petition/complaint;
>
> (b) occurrences and or site visits referred to in the July 15, 2013 affidavit of Peter Bauer, and any additional site visits of Peter Bauer;
>
> (c) any site visits between October 1, 2008 and the date of the response to this demand, by plaintiff's agents, representatives, members, employees or any persons accompanying plaintiff or its members, representatives or employees, relating to

occurrences, trails or sites at issue in the first cause of action, other than the site visits of Peter Bauer.

The defendants request the following information with respect to each document produced: (a) the name and address of the author or signer of the document; (b) the date on which the document was created; (c) the subject matter of the document; (d) the document character; (e) the name address of the present custodian of the document; (f) any other means of identifying the document under the CPLR; (f) if the document is no longer in plaintiff's possession and control, how the document was disposed of, and the date and reason of disposal. Plaintiff's primary objection to the demand is that it is overly broad, onerous, unduly burdensome and outside the scope of CPLR Article 31, particularly with respect to the additional identification information requested for each document; and that the plaintiff should not be required to produce documents in the possession of its members or other persons.

The Court finds that the demand should be limited to documents in the possession of the plaintiff, its officers, directors, agents and employees. With respect to identification information, plaintiff need only indicate the following: the name and address of the author, creator or signer of the document; the date the document was created, and the present name and address of the custodian of the document. If a post office box is given as an address, the plaintiff must also provide the street address of the individual's place of employment or residence. Plaintiff need not provide the foregoing if such information is evident on the face of the document. Nor must plaintiff provide disposition information with regard to documents not in the possession of the plaintiff, its officers, directors, agents or employees.

Defendant's Demand For Witnesses

The Court finds, that defendants' demand for witnesses should be limited to the names and addresses of those fact witnesses which plaintiff intends to call at trial. If a post office box is given, plaintiff must also provide the street address of the individual's place of employment or residence. Plaintiff need not provide information regarding its members, unless they will be called to testify at trial. Nor must plaintiff provide the subject matter on which any such witnesses would be expected to testify.

Defendant's Demand For Expert Witness Disclosure

Plaintiff is required to disclose all information set forth in CPLR 3101 (d) (1) (i).

Defendant's Demand For Responses To Interrogatories

The Court will proceed to review each interrogatory.

<u>Interrogatory 1</u>. **State in detail each site visit made by plaintiff, as plaintiff is defined above, to any and all trails and or sites within the scope of this demand and /or as referred to in the first cause of action, paragraphs 81 through 118 of the combined petition and complaint:**

(a) state the date and time of each visit
(b) identify each person in attendance
(c) state the name of the trail or site visited
(d) identify the location visited on the trail or site
(e) state the length of time the visit lasted
(f) state the weather conditions at the time of the visit
(g) state whether observations made at the site visit were recorded, in what form or format they were recorded, and who recorded the observations, including images and/or written observations.

The Court finds that this item should be limited to (a), (b), (c), (d) & (g). With regard to item (b), plaintiff need only provide information if the person present was an officer,

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director, employee or agent of the plaintiff, or if such person will be called as a witness on behalf of the plaintiff at trial. With regard to the address of such witness, if a post office box is given, plaintiff must provide the street address of the individual's place of employment or residence.

Interrogatory 2. Identify any person(s), not affiliated with plaintiff, who provided information and or documents to plaintiff regarding trails and/or sites within the scope of this demand, identify the type of information provided, and provide the information set forth in Interrogatory 1 (a) through (g), for each site or trail visited.

The Court finds that this item should be stricken. Plaintiff need not comply.

Interrogatory 3. Identify all person(s), including the identity of any entities they represent, in attendance at the visits of Peter Bauer to the Seventh Lake Mountain snowmobile trail on October 18 and November 12, 2012 and January 21 and June 28, 2013.

The Court finds that this item should be limited to officers, directors, agents or employees of the plaintiff, or a person plaintiff intends to call as a witness at trial. The Court finds that the non-party entities such persons represent is irrelevant.

Item 4. If not provided in Interrogatory 1 above, state in detail, all the information requested in Interrogatory 1 above, for Peter Bauer's visits to the Seventh Lake Mountain snowmobile trail on October 18 and November 12, 2012 and January 21, and June 28, 2013.

The Court finds that this item should be limited to paragraphs (a), (b), (c), (d) & (g) of Interrogatory 1. With regard to item (b), plaintiff need only provide identification information if the person present was an officer, director, agent or employee of the plaintiff, or if plaintiff intends to call such person as a witness at trial. If a post office box is given as the individual's address, plaintiff must also provide the street address of the individual's

place of employment or residence.

Item 5. Identify any person(s), including defendants present at or during any of the site visits referenced in Interrogatories 1, 2 and 3.

This item is denied as duplicative of prior interrogatories, except as to employees of the defendants.

Item 6. Identify any person(s) who: (1) serve(d) on the Board of Directors of plaintiff and/or (2) are or were employees of plaintiff; and /or (3) are or were shareholders, officers or directors or agents of plaintiff from October 1, 2008 to the present.

This item is denied as irrelevant.

Item 7. State in detail the nature, cause, and extent of the request set forth in "Whereas" clause paragraphs (E) and (F) of plaintiff's combined petition and complaint, including professional services fees and attorneys fees, costs and expenses sought.

The Court finds that plaintiff need only indicate the lump sum amount, to date, of all attorneys fees, professional fees and disbursements. In the event that the plaintiff prevails in this action/proceeding, the plaintiff will be required to present to the defendants evidence in support of its claim, which will likely require a hearing.

OTHER RELIEF

Plaintiff's Notices To Take Oral Depositions

Assistant Attorney General Loretta Simon, in her reply affirmation dated January 13, 2014, indicates that on January 8, 2014 (during the pendency of the instant motion and cross-motion) the plaintiff served a notice to take the examinations before trial of twenty-one

officers and/or employees of the defendants.[4] She maintains that pre-trial depositions should have been suspended during the pendency of the instant motions. She further argues that the notices should be stricken by reason that the proposed depositions would be of persons who did not participate in the construction of Class II Community Connector Snowmobile Trails, and therefore such depositions would be outside the scope of plaintiff's first cause of action. She points out that the documents that plaintiff demands to be produced at the examinations before trial are identical to plaintiff's forty-nine document demands. Plaintiff's counsel indicates in his sur-reply that the parties had informally agreed to put the depositions on hold pending the determination of the instant motions, and argues that the issue is therefore moot.

With regard to the individuals listed in plaintiff's notices to take depositions, it is well settled that governmental defendants (and employers, generally) have the right to produce an officer or employee of their choice (albeit someone having knowledge of the facts) in response to a notice for a pre-trial deposition (see CPLR 3106 [d]; Hurrell-Harring v State of New York, 112 AD3d 1217, 1219-1220 [3d Dept., 2013]; Schiavone v Keyspan Energy Delivery NYC, 89 AD3d 916, 917 [2d Dept., 2011]; Carlucci v City of New York, 89 AD3d 489, 490 [1st Dept., 2011]; Ewadi v City of New York, 66 AD3d 583, 583-584 [1st Dept., 2009]; Barry v State, 44 Misc2d 568 [Ct. of Claims, 1965]). The Court will direct the parties to re-notice their pre-trial depositions. CPLR 3106 (d) sets forth the procedure to be followed where a party elects to produce for deposition someone other than the person identified in the notice.

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[4]The notices include the Commissioner of DEC and the Chairperson of the APA.

REVISION OF DISCOVERY SCHEDULE

In view of all of the foregoing, it is necessary to revise the deadlines for preparing the action for trial, as the existing schedule is outdated. The Court adopts the following schedule:

December 1, 2014:	Both parties to comply with all document demands, witness requests, interrogatories
March 2, 2015:	Deadline for completion of all discovery including all depositions
March 10, 2015:	Deadline for Plaintiff to File A Note of Issue

Lastly, upon all of the foregoing, the Court discerns no basis upon which to make an award of costs and disbursements to plaintiff on the motion and cross-motion. That portion of plaintiff's cross-motion is denied.

Accordingly, it is

ORDERED, that defendant's motion for a protective order is granted in part and denied in part, in keeping with this decision; and it is further

ORDERED, that plaintiff's cross-motion to compel and for a protective order is granted in part and denied in part, in keeping with this decision; and it is further

ORDERED, that the parties' preliminary conference schedule is amended as set forth above; and it is

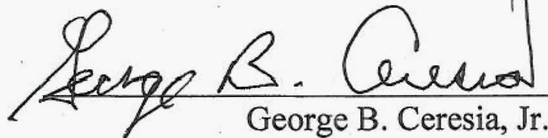
ORDERED, that plaintiff's motion for an award of costs and disbursements on the motion and cross-motion is denied.

This shall constitute the decision and order of the Court. The original decision/order is returned to the attorney for the defendants. All papers are being delivered by the Court to

the County Clerk for filing. The signing of this decision/order and delivery of this decision/order does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: October 15, 2014
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Defendant's Notice of Motion dated December 23, 2013, Supporting Papers and Exhibits
2. Plaintiff's Notice of Cross-Motion, Supporting Papers and Exhibits
3. Reply Affirmation of Loretta Simon, Assistant Attorney General, dated January 13, 2014, and Exhibits
4. Sur-Reply Affidavit of John W. Caffry, Esq., sworn to May 19, 2014