

**Matter of Protect the Adirondacks! Inc. v New York  
State Dept. of Env'tl. Conservation**

2016 NY Slip Op 33213(U)

August 10, 2016

Supreme Court, Albany County

Docket Number: Index No. 2137-13

Judge: Gerald W. Connolly

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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,

**DECISION AND ORDER**  
Index No. 2137-13

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.

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(Supreme Court, Albany County)

APPEARANCES: Claudia K. Braymer, Esq.  
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Connolly, J.:

Plaintiff<sup>1</sup> seeks an order: (i) enjoining defendants from cutting or otherwise destroying trees in the Adirondack Forest Preserve for the construction of Class II Community Connector snowmobile trails, and specifically for the construction of the Newcomb-Minerva-North Hudson Class II Community Connector Trail ("NMNH"), an approximately 40-mile long Class II

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<sup>1</sup>The plaintiff-petitioner is a not-for-profit corporation dedicated to the protection and preservation of the lands of the Adirondack Forest Preserve. It has commenced the above-captioned action to halt construction and development of new snowmobile trails within the Forest Preserve (known as "Class Two" and/or "Community Connector" Trails).

Community Connector snowmobile trail that would begin in Minerva, New York and head north, where it will split into two branches, with one going west towards Newcomb, New York and the other heading east towards North Hudson, New York, of which approximately 15 miles of such 40 mile-long trail is being located on Preserve lands; and other trails having similar characteristics, and from otherwise clearing, grading, scraping, excavating or filling the land for such trails or otherwise changing the terrain of the land on Class II Community Connector snowmobile trails, until the resolution of this action and (ii) awarding plaintiff-petitioner the costs and disbursements of the motion. Defendants oppose the application.<sup>2</sup>

In this action, plaintiff seeks to enjoin defendants from constructing certain new snowmobile trails in the Adirondack Forest Preserve (“Preserve”) and to obtain a declaratory ruling that the creation of certain new snowmobile trails in the Preserve, sometimes known as “Class II” and “Community Connector” trails, is a violation of Section 1 of Article 14 of the New York State Constitution. Plaintiff asserts that defendant New York State Department of Economic Conservation (“DEC”) proposes to construct a community connector snowmobile trail network for the entire Adirondack Park. Plaintiff argues that the construction of such network requires the destruction of trees in the Preserve which they allege would violate Article 14, §1 of the New York State Constitution. Plaintiff acknowledges that three prior motions by plaintiff to enjoin the Defendants’ actions have been denied (*see Protect the Adirondacks! Inc. v. NYS Dept. of Envtl. Conservation*, Decision and Order, Alb. Cty, September 4, 2015 (Connolly, J.); *Protect the Adirondacks! Inc. v. NYS Dept. of Envtl. Conservation*, 42 Misc3d 1227(A) [Alb Cty., Nov. 19, 2013] (Ceresia, J.);

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<sup>2</sup>The Court (O’Connor, J.) denied plaintiff’s request for a temporary restraining order via an Order to Show Cause dated July 8, 2016, however the Appellate Division, Third Department granted such request on July 15, 2016.

*Protect the Adirondacks! Inc. v NYS Dept of Env'tl. Conservation*, 2013 NY Misc LEXIS 3979 [Alb. Cty., Aug. 22, 2013] (Ceresia, J.).

Plaintiff's contentions

With respect to the instant application for injunctive relief, plaintiff asserts that defendant DEC published, on June 8, 2016, two notices in the Environmental Notice Bulletin ("ENB") regarding the next stage of the construction of the NMNH, which notices indicated that DEC was planning and preparing to remove 1,676 large trees (identified by DEC as trees 3" in diameter at breast height ("dbh")<sup>3</sup> or larger) from two segments of the NMNH that run between the Boreas River and Stony Pond ("Segment 9"), and between Stony Pond and Minerva ("Segment 11"). Plaintiff argues that DEC has underestimated the number of large trees to be cut and completely ignored the number of small trees. Plaintiff contends that DEC's ENB notices, approved work plans and their expert's on-site observations show that there is a risk that during the pendency of this action defendants will continue to conduct more construction activities, including the cutting of trees, removal of rocks, leveling of land, installing bench cuts, and building bridges to construct the NMNH.

Plaintiff has submitted the affidavit of Steve Signell, a forest ecologist retained by plaintiff to provide expert advice and opinions about the degree of tree cutting and destruction of timber that has and will take place during the construction of the Class II Community Connector snowmobile trails in the Adirondack Forest Preserve. Mr. Signell avers that defendants reporting of the tree-cutting activities does not accurately reflect the tree-cutting that is occurring as trees that are less than 3" dbh are not included in defendants' tally of trees to be cut. In his affidavit, Mr. Signell discusses

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<sup>3</sup>As ultimately agreed upon by the parties, dbh is 4½ feet from the ground surface.

portions of the NMNH upon which work has already been performed and asserts that, in such portions, more trees have been cut by DEC than were noticed to be cut. Such opinion is based, however, upon the fact that he has included in his count of cut trees trees/vegetation that are less than 3" dbh.<sup>4</sup> Mr. Signell also includes a discussion of anticipated construction of another segment of the NMNH for which DEC has not yet listed tree-cutting action in the ENB. He discusses the anticipated construction of the Roosevelt Truck Trail segment<sup>5</sup> (in Section 2 of the NMNH), asserting that DEC has flagged the 1.95 mile route with painted trees. He estimates that along the flagged route approximately 3,821 trees will be cut for such segment, with 3,106 being less than 3" dbh and 715 being 3" dbh or larger. He asserts that he "believes" a portion of the route travels through "old growth forest" but does not demonstrate his basis for such opinion.

With respect to the anticipated construction of Segment 9 in Section 2 of the NMNH (the Boreas River to Stony Pond 4.8 mile segment), Mr. Signell asserts that on June 8, 2016, DEC listed an action in the ENB for the removal of 1,253 trees. He acknowledges that such DEC estimate references trees measuring 3" dbh or greater. He asserts that, based upon his review of DEC's work plan, his field work counting the number of trees cut on *other portions* of the NMNH, and "an

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<sup>4</sup> Mr. Signell attempts to challenge DEC's notifications of trees to be cut on other portions of the NMNH (i.e. the Santanoni to Harris Lake Segment [of which only 1.5 miles of the 2.9 mile segment traverses current Forest Preserve Roads, former roads in the Forest Preserve and paved roads in the Harris Lake Campground] and the Hyslop segment). He notes that with respect to the Santanoni to Harris Lake segment DEC asserted that 366 trees would be cut, however, based upon a review of photographs of 559 tree stumps, trees of varying sizes were cut. As to the Hyslop segment, he asserts that DEC noticed in the Environmental Notice Bulletin that it would be removing 1,148 trees on such 3-mile segment, and while acknowledging that DEC's removal count only consists of trees 3" dbh and greater, and that his count of such 3" dbh trees that were removed was even less than the number noticed by DEC, a number of smaller trees were cut down which he estimated to be at approximately 3,251.

<sup>5</sup> Referred to as the Roosevelt Truck Trail to the Boreas River portion of the NMNH.

assessment of the various forest habitats where this segment of the new trail is going to be routed” that 1,554 trees 3" dbh and greater will be cut and 4,135 trees less than 3" dbh will be cut. He asserts that such 4.8 mile segment of the NMNH covers 5.24 acres if the trail width is 9 feet, and 6.98 acres if the trail width is 12 feet, and, dividing his estimate of trees to be cut by such acreage, an average of 1,085 trees per acre will be removed assuming a total area of 5.24 acres and 815 trees per acre will be removed assuming a total area of 6.98 acres.

With respect to the anticipated construction of segment 11 in Section 2 of the NMNH (the Stony Pond to Minerva segment), Mr. Signell asserts that on June 8, 2016 DEC listed an action in the ENB for the removal of 423 trees on such 2.9 mile segment. Mr. Signell estimates that based upon his review of DEC's work plan for such segment and his field work with respect to, again, *other portions* of trail, and from a computer-based assessment, that 974 trees over 3" dbh and greater and 2,594 trees less than 3" dbh will be cut on such trail segment. He asserts that the 2.9 mile segment covers 3.16 acres if the trail width is 9 feet, or 4.22 acres if the trail width is 12 feet, and, dividing his estimate of trees to be cut by such acreage, an average of 1,129 per acre will be removed assuming a total area of 3.16 acres, and 845 trees per acre will be removed assuming a total area of 4.22 acres. He argues that, accepting his estimates, the average trees cut per acre for both sections 9 and 11 would exceed the 555 trees per acre that were found to be unconstitutional in *Association for Protection of Adirondacks v MacDonald*, 253 NY 234 [1930]). Mr. Signell defines a “tree” for purpose of his analysis as a “woody perennial plant, having a single stem or trunk, capable (emphasis added) of growing to a considerable height and bearing lateral branches at some distance (emphasis added) from the ground.” (Signell Affidavit, Exhibit G, page 1).

Overall, based upon his analysis of trails that have been constructed and his estimation of future work to be done (which has not been noticed by DEC) and the work to be performed on Segments 9 and 11, Mr. Signell has estimated that 4,565 trees 3" dbh or greater have been or will be

cut and 13,344 trees less than 3" dbh have been or will be cut.

### Defendants' Opposition

Initially, defendants contend that plaintiff's motion should be denied because the trails at issue are outside of the scope of this proceeding. Based upon the record, discovery was authorized with respect 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, ..." (Decision/Order of October 15, 2014 (Ceresia, Jr., J.)). As this application concerns additional segments of the NMNH, and the NMNH existed or was under construction prior to the Court's discovery deadline as at least one portion of the NMNH was "approved for construction" prior to October 15, 2014, such contention by defendants is without merit.

As to the merits, DEC asserts that the Constitution prohibits only tree-cutting in the Forest Preserve to a "substantial extent" or "material degree" (*Association for the Protection of Adirondacks v MacDonald*, 253 NY 234, 238 [1930]), and that the tree-cutting that has been noticed to occur with respect to trail segments 9 and 11 is insubstantial under existing precedent (*Matter of Balsam Lake Anglers Club v Dept of Env't'l Conservation*, 199 AD2d 852 [3d 1993]).

In support of their arguments, the defendants have submitted numerous affidavits, including that of DEC employee Ms. Richards (Special Assistant, Forest Preserve Coordinator) who avers, *inter alia*, that in 2009 DEC and the Adirondack Park Agency ("APA") separately approved a guidance document on snowmobile trails which divides snowmobile trails into two types: community connector trails (also referred to as Class II trails) and, Class I trails, which are secondary trails. She notes that Class II trails, including the NMNH at issue herein, constitute the main snowmobile travel routes connecting communities and that the trails are designed to be located on the periphery of the Forest Preserve, as close as possible to transportation corridors, and are rarely

located more than one mile away from such corridors. She avers that pursuant to such 2009 Guidance, DEC is eliminating snowmobile trails that, *inter alia*, do not provide safe snowmobiling, penetrate the more remote areas of the Forest Preserve, cross an existing undeveloped forest corridor connecting two or more remote interior areas in the Forest Preserve, are located near Wilderness area boundaries or are redundant. She asserts that the 2009 Guidance contains extensive snowmobile route design, construction, and maintenance standards intended to both create safer snowmobile conditions and minimize any negative impacts on the Forest Preserve.

Defendants have also submitted the affidavit of DEC employee Mr. Frank (titled Forester 4 assigned as Chief of the Bureau of Forest Preserve Management of DEC), who avers, *inter alia*, that the Adirondack Forest Preserve is comprised of 2.6 million acres of state land within the six million-acre Adirondack Park and that Class II Community Connector snowmobile trails are multiple use trails<sup>6</sup> that enable travel between communities with the Adirondack Park over Forest Preserve lands. He avers that DEC is responsible for the construction and maintenance of trails in the Adirondack Park, including Class II trails and such trails are constructed and maintained to a nine-foot wide trail tread and a 12-foot trail tread width on curves and bridges. He avers that the planning process for the development of trails is lengthy and as part of such process, DEC establishes "Unit Management Plans" ("UMP") for the Class II trails which are, *inter alia*, subject to public comment periods and reviewed by the APA for conformance with the State Land Master Plan. After a UMP is approved and determined to conform to the Master Plan, DEC prepares work plans containing detailed information for each trail, setting forth the number of trees to be cut, bridges to be constructed and other construction issues which must be reviewed and approved by DEC and the APA. Prior to such

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<sup>6</sup> Defendants have also submitted the affidavit of DEC employee Kasza (Forester III), who avers, *inter alia*, that the NMNH trail is a multiple use trail, meaning that it is intended to be used for year-round use, including for mountain biking, hiking, cross-country skiing, as well as snowmobiles.

trees being cut, further notice is provided in the Environmental Notice Bulletin (“ENB”). He avers that pursuant to its tree-cutting policy, DEC may only cut up to the number of trees noticed in the ENB.

Mr. Frank avers that the APA determined by resolution in July of 2015 that the Community Connector Trail Plan for the Towns of Newcomb, Minerva and North Hudson conformed to the State Land Master Plan, and thereafter DEC’s Acting Commissioner approved such plan. Such 2015 Connector Plan provides for multi-use recreational trails and amends the UMPs for the Vanderhacker Mountain Wild Forest, the Camp Santanoni Historic Area and the Lake Harris Campground. Last summer DEC constructed the Santanoni to Lake Harris and Hyslop to Roosevelt Truck Trail segments of the NMNH trail which was authorized in the 2005 Vanderhacker Mountain Wild Forest UMP. The remaining portions of the NMNH trail were authorized by the 2015 Connector Trail Plan (including the segments from Boreas River to Stony Pond (Segment 9) and from Stony Pond to Minerva Woods (Segment 11)).

Mr. Frank avers that of the 1676 trees over 3" dbh that must be cut to construct Segments 9 and 11 of the NMNH trail, only 236 were deemed healthy, and the rest are in poor health, distressed, diseased or already dead. Defendants argue that under existing precedent from the Appellate Division (*Balsam Lake, supra*), the cutting of 236 healthy trees does not constitute a violation of Article XIV, §1 of the New York State Constitution.

Defendants further contend that while Mr. Signell estimates that more than 17,000 trees will be cut to construct the NMNH trail corridor, such estimates are based on flawed methodology and are grossly overstated, as: (i) Mr. Signell counted “flagged” trees as trees that will be cut, though DEC has demonstrated that such trees are only flagged to identify the trail route, with only painted trees being cut; (ii) Mr. Signell’s tree count includes trees under 3” dbh though long-standing DEC policy (Policy LF91-2) and forestry standards consider these to be saplings or brush, not trees or

timber; (iii) Mr. Signell calculated tree diameter at breast height by extrapolating from his measurements of tree stump diameter at ground level; and, (iv) Mr. Signell's estimates of the number of trees to be cut based on computer models and aerial photographs is flawed, speculative and inconsistent with the actual-on-the-ground tree count conducted by DEC.

Specifically with respect to Mr. Signell's affidavit, Mr. Frank contends that Mr. Signell's estimates or extrapolations of trees to be cut are not valid because there is no evidence that he followed proper forest sampling and inventory methods and may have introduced bias into the sampling. He contends that estimates for the numbers of trees in one section of the forest cannot be based on *other sections* of trail because each forest stand is unique. He avers that Mr. Signell's estimates based upon stumps cut at or below ground level make it difficult to distinguish between saplings, shrubs and trees, or to determine the plant species and whether such vegetation was alive or dead when cut. He avers that Mr. Signell's "dbh" estimates are not derived from statistically based models or tables for estimating "stem dbh" from stump diameters. He asserts that estimates based on stump measurements at ground level, which measurements may include the plants root flare, are not accurate diameter measurements and that stump diameters are usually measured between six inches and one foot above the ground to eliminate over-estimation from swelling or root flare at the base of the tree.

Mr. Frank further asserts that trees 3 inches dbh are just below the merchantable size for pulpwood, that the minimum usable diameter for timber for conifer trees is 4 inches in diameter at the small end of the log if they are harvested for pulpwood, and for hardwoods the minimum merchantable timber diameter for saw logs is 8 inches diameter at the small end of the log. Finally, he contends that segments 9 and 11 are the only portions of the NMNH trail for which DEC has completed work plans and notices in the ENB for tree-cutting in 2016 and that trails may be constructed, including tree-cutting, only with an approved segment-specific work plan and following the publication of an ENB notice.

Additionally, defendants have submitted the affidavit of Robert Ripp, a DEC Forester I, who avers, *inter alia*, that he personally laid out the route for Segments 9 and 11 by tying flagging on trees to help mark the route and then painted trees to be cut on such segments. He avers that “flagged” trees that are not also painted, are **not** to be cut. As to Segment 9, he asserts that of the 1,253 trees to be cut, 129 are healthy trees, 208 are standing dead trees, and 916 are diseased or in poor health. He asserts that more than half of the trees are under five inches dbh and approximately 500 have already been cut. As to Segment 11, he avers that 423 trees are scheduled to be cut, of which 107 are healthy and 316 are dead or diseased. He asserts that more than half of these trees are five inches dbh or smaller.

Mr. Ripp further contends that while Mr. Signell lists DEC trees to be cut as estimates, the DEC tree estimates are actual counts of trees to be cut after having been inventoried and marked for cutting by DEC foresters during the work planning process. He avers that he personally painted and counted each tree to be cut on Segments 9 and 11.

#### Reply

In reply, Mr. Signell corrected his earlier affidavit and indicated that “dbh” means the diameter of a tree at the height of 4.5 feet, though his earlier affidavit had a typo stating the diameter was at 3.5 feet. He notes that he counted stumps on the partially cut Segment 9, noting that he counted 1,731 stumps on 3 miles of the 4.8 mile trail. Again, this figure includes trees smaller and greater than 3" dbh. He notes that he undertook a .33 mile sample of a section of the 1.8 remainder of such trail and counted 407 painted trees, and estimated “[b]ased on forest habitat” and his count of trees on .33 miles, that 2,198 trees will be cut in the 1.8 mile section. He further contends that based upon his field work on July 21-22, 2016, he revised his estimates of the overall number of trees to be cut based on actual counts of stumps of trees, of trees flagged and painted and on trail routes based on forest habitat. He notes that he revised his overall count downwards.

He also contends that the State's defense of cutting mostly diseased trees is a red herring as many trees he observed were afflicted with beech bark disease, which afflicts almost all beech trees across the Adirondacks, and with which beech trees can live for decades. He contended, based upon his analysis of three tree stumps, that some trees that are 3" dbh may not be saplings.

Finally, Mr. Signell contends that while DEC has stated that 1253 trees 3"dbh or greater would be cut on Segment 9, he estimated that, including both large and small trees, approximately 3,928 trees would be cut and, with respect to Segment 11, he estimated that while DEC has stated that 423 trees that are 3"dbh or greater would be cut, including both large and small trees, approximately 1,540 trees would be cut.

#### Preliminary Injunction

"Preliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant" (*Peterson v. Corbin*, 275 AD2d 35, 37 [2<sup>nd</sup> Dept 2000]). In order to obtain a preliminary injunction, a party must show a likelihood of success on the merits, a balancing of the equities in its favor, and irreparable injury in the absence of the injunction (*Doe v. Axelrod*, 73 NY2d 748 [1988]). Further, "[p]roof establishing these [requirements] must be by affidavit and other competent proof with evidentiary detail" (*Scotto v Mei*, 219 AD2d 181, 182 [1<sup>st</sup> Dept 1996]). It is a drastic remedy, which should be used sparingly (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 715 [2d Dept 2011]). Based upon the record before the Court, plaintiff has not met its burden with respect to the instant application.

Initially, while plaintiff is seeking broad injunctive relief prohibiting defendants from "cutting or otherwise destroying trees in the Adirondack Forest Preserve for the construction of Class II Community Connector snowmobile trails ... and other trails having similar characteristics, and from otherwise clearing, grading, scraping, excavating or filling the land for

such trails or otherwise changing the terrain of the land on Class II Community Connector snowmobile trails, until the resolution of this action” (Order to Show Cause ¶A), plaintiff has failed to demonstrate a likelihood of success on the merits with respect to such broad general requests. The New York State Constitution, Article XIV, §1 provides, in relevant part, 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. 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”. The Court of Appeals has held that, rather than prohibiting *any* cutting or removal of timber from the forest preserve, this provision must receive a reasonable interpretation, and accordingly such provision has been construed as “prohibiting [the] cutting or [the] removal of \*\*\* trees and timber to a substantial extent” (*Assoc. for the Protection of Adirondacks v MacDonald*, 253 NY 234 [1930]; *see also Balsam Lake Anglers Club v Dept of Environmental Cons.*, 199 AD2d 852 [3d Dept 1993]). To the extent plaintiff broadly seeks relief concerning the construction of all “Class II Community Connector snowmobile trails and other trails having similar characteristics” and the “clearing, grading, scraping, excavating or filling” of the land for such trails or “otherwise changing the terrain of the land on Class II Community Connector snowmobile trails”, such request must be denied. The Court does not find that there is any showing of a necessity to issue a broad preliminary injunction with respect to proposed snowmobile trails that have not yet been fully assessed and may never be constructed or actions/activities that may never be taken by defendants. Further, plaintiff has failed to demonstrate with any objective evidence that there is a likelihood of success on the merits that any and all such “generalized” construction or grooming and maintenance activities that may be taken will affect the forest preserve to a substantial extent, and accordingly, the Court will not issue such a generalized injunction (*see Id.*).

Plaintiff’s particular allegations on the instant application address the construction of the

NMNH and most specifically address Segments 9 and 11 of such trail. Accordingly, the Court will restrict its analysis to such two portions and will not enjoin, upon this application, any other actions based upon plaintiff's general requests for relief with respect to Class II trails nor will it address portions of the NMNH for which DEC has not issued notification that action will be taken this year.<sup>7</sup>

As to Segments 9 and 11, Plaintiff must demonstrate, not only that trees will be cut down, but that there is a likelihood that plaintiff will prevail on the issue of whether the cutting or removal of the trees along such portion of the trail would occur to a substantial extent or to any material degree (*see Assoc. for the Protection of Adirondacks v MacDonald*, 253 NY 234 [1930]; *see also Balsam Lake Anglers Club v Dept of Environmental Cons.*, 199 AD2d 852 [3d Dept 1993]). While the Court of Appeals in *Association for Protection of Adirondacks v MacDonald*, *supra*, held that the cutting of 2500 trees (noted in the underlying Third Department, Appellate Division opinion as being of "timber" size" [*Association for Protection of Adirondacks v MacDonald*, 228 AD 73 [3d Dept 1930]) for a toboggan slide or "perhaps for any other purpose" is prohibited (barring a constitutional amendment) it also held that the New York State Constitution does not prohibit the taking of any action in the Preserve but "to prohibit any cutting or any removal of the trees and timber to a substantial extent" (*Id.* at 238). Further, the Third Department subsequently held in *Balsam Lake Anglers Club v Dept of Env'tl. Conservation*, *supra*, that the construction of five parking lots, relocation of two trails, construction of a new hiking trail and of a cross-country ski trail loop on lands within the Catskill Forest Preserve,

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<sup>7</sup> Plaintiff asserts that DEC is planning and preparing to remove 3,821 small and large trees for the construction of the segment of the NMNH that runs from the Roosevelt Truck Trail south to the Boreas River ("Roosevelt Truck Trail Segment"), though plaintiff acknowledges that DEC has not announced such cutting in the Environmental Notice Bulletin. Mr. Signell asserts that his estimated tree count must stand as it has not been controverted by DEC, however, as DEC has not announced any cutting, the Court will not issue at this juncture an advisory determination concerning such potential action.

which construction called for the removal of 350 trees to accommodate the trail relocation and the removal of an unknown number of additional trees for the proposed new trail and parking lots, appeared compatible with the use of the forest preserve land and was not constitutionally prohibited. Specifically, the Third Department provided in *Balsam Lake*, in reviewing New York Constitution, article XIV, § 1, as follows:

Although this provision would appear, as petitioner argues, to prohibit any cutting or removal of timber from the forest preserve, the Court of Appeals, noting that the words of the NY Constitution must receive a reasonable interpretation, has construed this provision as “prohibiting [the] cutting or [the] removal of \* \* \* trees and timber to a substantial extent” (*Association for Protection of Adirondacks v MacDonald*, 253 NY 234, 238, 170 N.E. 902 [emphasis supplied]). Thus, the court has indicated that only those activities involving the removal of timber “to any material degree” will run afoul of the constitutional provision (*id.*, at 238). Although petitioner may question the soundness of this interpretation, particularly in view of what it has characterized as the unambiguous and absolute prohibition contained in NY Constitution, article XIV, § 1, we elect, absent authority to the contrary, to follow the interpretation advanced by the Court of Appeals in *Association for Protection of Adirondacks v MacDonald (supra)*.

The Court in *Balsam Lake* then reviewed the project, as discussed above, and determined that “[t]hese proposed uses appear compatible with the use of forest preserve land, and the amount of cutting necessary is not constitutionally prohibited (*cf. Association for Protection of Adirondacks v MacDonald, supra*)” (*Balsam Lake, supra* at 854).

Based upon the record, plaintiff has failed to demonstrate a likelihood of success on the merit as the legal burden is whether it is likely that the cutting of such trees will occur to a substantial extent or in any material degree. DEC has set forth a specific number of trees that will be cut with respect to Segments 9 and 11 (i.e. 1676 trees of which approximately 500 have already been cut). They have submitted the affidavit of the employee who has personally marked such trees for cutting and represented that only the number of trees noticed to be cut may be cut. Further, DEC has asserted that long-standing DEC policy and forestry standards consider trees under 3" dbh to be saplings or brush, not trees or timber and accordingly, does not include such vegetation in its tree count.

With respect to Segment 9 and 11, one of plaintiff's main contentions is that such DEC policy grossly deflates the number of trees that are being cut on such segments. Plaintiff contends that such distinction between trees smaller than 3" dbh and those 3" dbh and larger is improper, however, it has failed to demonstrate sufficient basis for such contention. Mr. Signell, in reply, noted that he analyzed three small tree stumps (less than 3" dbh) that he opined should not be considered saplings. Plaintiff has not provided any analysis of whether the majority of trees/vegetation observed or analyzed on such segments that are smaller than 3" dbh consist mainly of seedlings, saplings, subordinate trees, shrubs or snags nor has plaintiff submitted an adequate explanation or basis for finding that DEC's internal policy that trees smaller than 3" dbh consist of vegetative growth that DEC need not classify as trees for purposes of cutting estimations (*see generally, Balsam Lake Anglers Club v Dept of Envtl. Conservation, supra* at 853-854).<sup>8</sup> In fact, while plaintiff cites the tree-cutting in *MacDonald, supra*, in support of its arguments, a review of the Appellate Division, Third Department determination in such case discusses the 2600 trees at issue as "unquestionably" being "regarded as of 'timber' size" (*Association for Protection of Adirondacks v MacDonald, 228 AD 73, 82 [3d Dept 1930]*).

As plaintiff has not provided sufficient reason for including trees that are smaller than 3" dbh in their estimates of trees to be cut nor controverted Mr. Frank's contentions that trees 3" dbh are just below the merchantable size for pulpwood, the minimum usable diameter for timber for conifer trees is 4 inches in diameter at the small end of the log if they are harvested for pulpwood, and, for hardwoods the minimum merchantable timber diameter for saw logs is 8 inches diameter at the small end of the log, the Court will accept DEC's tree count which does

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<sup>8</sup>Plaintiff has not refuted certain claims of defendants, particularly those of Mr. Frank in which he raises issues with Mr. Signell's estimates such as improper extrapolation of tree stump diameter to tree diameter at breast height and his assertions concerning the number of trees to be cut based upon methods other than physical examination of the specific segment of the trail at issue.

not include trees/vegetation smaller than 3" dbh. In determining whether plaintiff has demonstrated a likelihood that such tree cutting occurs or would occur "to a substantial extent" or "in any material degree".<sup>9</sup> Moreover, the Court finds and holds in light of existing law and Mr. Frank's affidavit, 3" dbh is a reasonable and necessary point from which to address the constitutionality of any tree removal. As noted, the State Constitution references "timber", and the acceptance of Mr. Signell's subjective and overly broad definition of "trees" would preclude the possibility of reliable counting and legal analysis.

As to the tree-cutting and trail creation proposed by DEC as to Segments 9 and 11 of the NMNH, plaintiff has failed to demonstrate that such activities constitute an unconstitutional amount of cutting or construction (*see generally, Balsam, supra*). The record indicates that approximately 1,253 trees will be cut with respect to segment 9, of which 208 are dead, leaving 1,045 or fewer remaining to be cut (according to DEC 500 of the 1,253 have already been cut prior to such application leaving 753 to be cut) and 423 trees will be cut with respect to segment 11. Initially, the proposed tree-cutting with respect to the segments at issue of the multi-use trail is less than that discussed in *MacDonald*, whether such segments are considered separately or together (i.e. 2500 trees for the construction of a toboggan slide). Further, even considering plaintiff's acreage analysis, with respect to Segment 9, Mr. Signell contends that such 4.8 mile segment conservatively constitutes 5.24 acres. Accordingly, dividing 1253 trees by 5.24 acres, approximately 239 trees will be cut per acre. With respect to Segment 11, Mr. Signell contends

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<sup>9</sup>Plaintiff also argues that while DEC contends that the vast majority of such trees are dead or diseased, defendants have failed to properly address the consequence of such alleged disease upon the trees to be cut. Mr. Signell avers that based upon his observation many trees are diseased but such disease would not require cutting. In analyzing Segment 9, DEC has contended that 208 are standing dead trees, 129 are healthy and 916 are diseased or in poor health. As to Segment 11 DEC contends that 107 are healthy and 316 are dead or diseased. Accordingly, lacking a proper analysis by DEC of the affect of such "diseases" upon the trees, with respect to Segment 9, the Court notes that 208 trees are standing dead trees and 1,045 are viable trees. As to Segment 11, all 423 will be considered viable.

that such 2.9 mile segment conservatively constitutes 3.16 acres. Accordingly, dividing 423 trees by 3.16 acres, approximately 134 trees will be cut per acre. To the extent plaintiff's assertion is accepted that the *MacDonald* case set a ceiling concerning how many trees per acre may be cut, whether such segments are considered separately or together, such tree-cutting falls below such ceiling of 555 trees per acre there considered unconstitutional.<sup>10</sup> Based upon the record, with regard to the alleged unconstitutionality of the removal of trees with respect to Segments 9 and 11, plaintiff has failed to satisfy its burden of demonstrating a probability of success on the merits and therefore, the Court need not reach the issue of balancing of the equities or irreparable harm.

As to plaintiff's contentions regarding, *inter alia*, rock removal, alteration of the forest floor, construction of bridges, and application of gravel and man-made tread for hardened trail surface, based upon the record, plaintiff has failed to demonstrate entitlement to a preliminary injunction. In support of such contention, plaintiff has submitted Mr. Signell's affidavit and point to the portion of such affidavit in which he provides that with respect to the 1.5 mile segment of the Santanoni to Harris Lake portion of the NMNH that is within the Forest Preserve, grading has been done on the trail which created bench cuts<sup>11</sup>, widened and flattened the trail and

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<sup>10</sup>The Court is not herein determining whether such acreage argument is proper. There has been no adequate demonstration that limiting the analysis of trees being cut to the dimensions of the trail segments, as opposed to the areas immediately within the surrounding vicinity of such segments or otherwise, demonstrates that the Forest Preserve is being affected to a substantial extent or material degree.

Particularly, in this case, such acreage argument is, to some degree, based on the premise that the narrow acreage of the trail constitutes the whole of the effected area(s). Mr. Signell fails to provide an analysis of the acreage of the effected area, or an analysis of the acreage of the Forest Preserve located within the segment of the MNNHC that he is analyzing. There is no analysis by Mr. Signell of the areas surrounding such trails and the amount of existing trees in such areas to provide evidence that the cutting or removal of trees and timber is occurring to a substantial extent and to a material degree within the Forest Preserve. Limiting the analysis of trees being cut to the trail dimensions does not seem to meet such burden.

<sup>11</sup>Bench cutting is the process of constructing a trail across the side slope of a hill.

removed and compressed top soil. Such affidavit also provides that rocks and boulders were removed. While Mr. Signell is an expert in forest ecology, and has made such observations, such conclusory assertions in ¶14 of his affidavit fail to sufficiently demonstrate that such activities indicate a significant and detrimental impact upon the Forest Preserve. It is to be noted that NY Constitution article XIV, §1 does not expressly prohibit the construction of trails within the Forest Preserve and plaintiff's evidence does not indicate how, or in what respect, the grading and excavation work "to a substantial extent" or "material degree" impairs the forever wild character of the Forest Preserve (*see Association for Protection of Adirondacks v MacDonald, supra*, at 238; *Balsam Lake Anglers Club v Department of Env'tl. Conservation, supra*, at 853; *Matter of Protect the Adirondacks! Inc. v. New York State Dep't of Env'tl. Conservation*, 2013 NY Slip Op 32083 (U) [Alb. Cty., Aug. 22, 2013] (Ceresia, J.)).

Finally, DEC has begun construction of the Palmer Pond Dam Administrative Road and Bridge for which it published a notice in the ENB on May 4, 2016, including the cutting of 266 trees (according to the Frank Affidavit). The purposes of such bridge, according to the relevant UMP is to serve two purposes, "1) to provide administrative road motor vehicle access to the south side of the dam that impounds Palmer Pond, and 2) to provide a crossing for the Newcomb-to-North Hudson community connector trail that is also proposed in such [UMP]". At oral argument, plaintiff withdrew any application for injunctive relief as to such construction, and, accordingly, the Court need not address such requested relief at this juncture.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.


Accordingly, based upon a review of the record, it is hereby

**ORDERED** that plaintiff's application is denied in its entirety.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the defendants. A copy of the decision

and order and the supporting papers are being delivered to the County Clerk for placement in the file. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the provision of that rule regarding filing, entry or notice of entry.

Dated: Albany, New York  
August 10, 2016

  
Gerald W. Connolly  
Acting Justice of the Supreme Court

Papers Considered:

1. Order to Show Cause dated July 8, 2016; Affidavit of Claudia K. Braymer, Esq. dated July 6, 2016 with accompanying exhibits A-D; Affidavit of Steve Signell dated June 30, 2016 with accompanying exhibits A-M; Memorandum of Law in Support of Plaintiff's Motion for Injunctive Relief;
2. Defendants-Respondents' Affidavits in Opposition to July, 2016 Motion for Preliminary Injunction dated July 20, 2016 including Karyn B. Richards dated July 20, 2016; Affidavit of Peter J. Frank dated July 19, 2016 with accompanying exhibit A; Affidavit of Robert Ripp dated July 19, 2016 with exhibits A-G; Affidavit of Eric J. Kasza dated July 19, 2016; Affidavit of Thomas M. Miller dated July 19, 2016; Affirmation of Loretta Simon dated July 20, 2016 with accompanying exhibits A-J; Defendants-Respondents' Memorandum of Law in Opposition to July, 2016 Motion for Preliminary Injunction dated July 20, 2016;
3. Reply Affidavit of Claudia K. Braymer in Support of Preliminary Injunction dated July 22, 2016 with accompanying exhibits A-B; Reply Affidavit of Steve Signell dated July 22, 2016 with accompanying exhibits A-B; Reply Affidavit of Peter Bauer dated July 22, 2016 with accompanying exhibits A-B; Deposition of Karyn Richards of January 7, 2015.