

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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In the Matter of the Application of

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

Petitioners/Plaintiffs,

for Judgment Pursuant to Article 78 of the New York Civil
Practice Law and Rules, Declaratory Judgment, and Injunctive
Relief

Index No. _____

-against-

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

Respondents/Defendants.

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**PETITIONERS/PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR VERIFIED PETITION AND COMPLAINT**

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PRELIMINARY STATEMENT

Respondent/Defendant Adirondack Park Agency (“APA” or “Agency”) has approved a Unit Management Plan (“UMP”) for recently acquired Forest Preserve lands in the Adirondack Park that violates the Adirondack Park State Land Master Plan (“SLMP”) and the New York Wild, Scenic and Recreational Rivers System Act (“WSRRSA”), N.Y. Env’tl. Conserv. Law. (“ECL”) Art. 15, Tit. 27, by unlawfully introducing motor vehicles and mechanized uses into remote, wild areas that are protected from such uses under state law.

At issue in this proceeding is the Essex Chain Lakes Management Complex Unit Management Plan (“Essex Chain UMP”),¹ which governs management of the recently created Essex Chain Lakes Complex, comprised of the Essex Chain Lakes and Pine Lake Primitive Areas, as well as portions of the Blue Mountain and Vanderwhacker Mountain Wild Forests. This unique complex of Forest Preserve lands and waters consists of a multitude of remote and wild lakes, ponds, and wetlands; secluded and undeveloped stretches of the Hudson, Cedar, Indian, and Rock Rivers; and thousands of acres of intact, unfragmented forest. In recognition of the remote and wild character of these lands, the fragility of the natural resources they contain, and their location adjacent to the Hudson Gorge Wilderness Area, a significant portion of the complex has been classified as Primitive under the SLMP. The SLMP requires that Primitive areas be managed to “*achieve and maintain . . . a condition as close to wilderness as possible, so as to perpetuate a natural plant and animal community where man’s influence is relatively unapparent.*” Ex. 11 (SLMP at 25) (emphasis added). In addition to the safeguards afforded by

¹ The Essex Chain UMP refers to the document, dated November 12, 2015, that is comprised of the UMP for the Essex Chain Lakes Primitive Area and Pine Lake Primitive Area, Amendments to the 1995 Blue Mountain Wild Forest UMP and 2005 Vanderwhacker Mountain Wild Forest UMP, and River Area Management Plans for the Hudson River and Cedar River (attached as Exhibit 1 to the Verified Petition and Complaint).

the Primitive classification, a portion of the lands within the complex are located in the protected Wild river area of the Hudson River, and other portions are located in the protected Scenic river areas of the Hudson and Cedar Rivers. These overlays of legal protection under the WSRRSA specify the types of uses that are compatible with, and allowed in, these fragile wild areas.

APA and Respondent/Defendant Department of Environmental Conservation (“DEC” or “Department”) have disregarded these crucial legal constraints in developing and approving the Essex Chain UMP. A cornerstone of the Essex Chain UMP is the creation of a new snowmobile corridor that will, for the first time, introduce public motorized recreational use into a narrow one-tenth-mile-wide sliver of Forest Preserve threading between lands classified as Wilderness on one side and Primitive on the other. In establishing this new snowmobile corridor, the Essex Chain UMP calls for the crossing of three river areas protected from such intrusive motorized use under the WSRRSA, including the construction of a massive new snowmobile bridge over the Cedar River at a location where the river is designated Scenic under the WSRRSA. The Essex Chain UMP also improperly allows public mechanized use—specifically, all terrain bicycles—in a Primitive area, in violation of the SLMP.

Petitioners wholeheartedly support the opening of these beautiful and wild Forest Preserve lands to public recreation. But the types of recreational use allowed on these lands must comply with the constraints imposed by the SLMP and the WSRRSA—constraints which exist to protect the ecological and scenic attributes of these areas. In their misguided zeal to offer unfettered recreational access, Respondents have ignored the SLMP’s fundamental mandate that the protection and preservation of natural resources on Forest Preserve lands is “paramount” and must take precedence over recreational use, Ex. 11 (SLMP at 1),² and have

² “Ex. [number]” denotes an exhibit to the Verified Petition and Complaint in this case.

disregarded the constraints on mechanized and motorized recreational use imposed by the SLMP and the WSRRSA. Consequently, Petitioners seek judgment annulling and vacating the APA's November 13, 2015 determination that the Essex Chain UMP conforms with the SLMP and other applicable laws, rules, and guidance ("Conformance Determination").

STATEMENT OF FACTS

Petitioners respectfully refer the Court to paragraphs 46-80 of the Verified Petition and Complaint, and the exhibits thereto, for a summary of the facts relevant to this case.

LEGAL FRAMEWORK

I. THE WILD, SCENIC AND RECREATIONAL RIVERS SYSTEM ACT

The WSRRSA, enacted in 1972, implements the policy of the state to preserve certain selected rivers, which "with their immediate environs, possess outstanding natural, scenic, historic, ecological and recreational values," such that "they and their immediate environs shall be protected for the benefit and enjoyment of present and future generations." ECL § 15-2701. Under the WSRRSA, rivers designated for inclusion in the system are classified as wild, scenic, or recreational. *Id.* § 15-2707. The Act vests APA with power and duties for privately owned parts of a river area within the Adirondack Park, and grants DEC "exclusive jurisdiction over all other river areas in the state and of all parts of river areas owned by the state located within the Adirondack park which may become part of the system." *Id.* § 15-2705.³ The Act directs the two agencies to "consult and cooperate to carry out the purposes of this title." *Id.*

Wild rivers are the most pristine and managed under the most restrictive guidelines "directed at perpetuating them in a wild condition." *Id.* § 15-2707(2)(a). Specifically, wild

³ "River area" is defined by regulation as "the river and the land area in its immediate environs . . . Upon designation and until boundaries are established by the commissioner, the river area shall be that area within one-half mile of each bank of the river." 6 NYCRR § 666.3(yy).

rivers are “[t]hose rivers or sections of rivers that are free of diversions and impoundments, inaccessible to the general public except by water, foot or horse trail, and with river areas primitive and undeveloped in nature and with development, if any, limited to forest management and foot bridges.” *Id.* The Act provides that “[i]n wild river areas, no new structures or improvements, no development of any kind and no access by motor vehicles shall be permitted other than forest management pursuant to forest management standards duly promulgated by regulations.” *Id.* § 15-2709(2)(a). The implementing regulations include a “Table of Use Guidelines” that reiterates that in Wild river areas, all uses of motor vehicles or motorized equipment are prohibited, unless for forest management purposes. *See* 6 NYCRR § 666.13(E)(4).

Scenic rivers are defined in the WSRRSA as:

Those rivers, or sections of rivers, that are free of diversions or impoundments except for log dams, with limited road access and with river areas largely primitive and largely undeveloped or which are partially or predominantly used for agriculture, forest management and other dispersed human activities which do not substantially interfere with public use and enjoyment of the rivers and their shores.

Id. § 15-2707(2)(b). The Act provides that “[m]anagement of scenic river areas shall be directed at preserving and restoring the natural scenic qualities of such rivers.” *Id.* More specifically:

In scenic river areas, the continuation of present agricultural practices, the propagation of crops, forest management pursuant to forest management standards duly promulgated by regulations, limited dispersed or cluster residential developments and stream improvement structures for fishery management purposes shall be permitted. There shall be no mining, excavation, or construction of roads, except private roads necessary for residential, agricultural or forest management purposes, and with the further exception that public access through new road construction may be allowed, provided that there is no other such access within two land miles in either direction.

Id. § 15-2709(2)(b). The regulations specify that bridges are allowed over a Scenic river for “public roads or for non-motorized open space recreational uses.” 6 NYCRR § 666.13(E)(5).

In the January 1986 Final Environmental Impact Statement (“FEIS”) for the Part 666 regulations, DEC explicitly stated that the regulations “*prohibit motorized open space recreational uses in scenic river areas. Therefore bridges for this use have been prohibited.*” See Ex. 9 (FEIS at 57) (emphasis added); see also *id.* at 58 (“The Department agrees that motorized recreational vehicles should not be allowed to operate in scenic river areas due to their relatively undeveloped nature and the concurrent extensive low intensity recreational and other passive outdoor uses which predominately [sic] take place within such river areas and conflict with motorized recreational vehicles.”).⁴

The implementing regulations specify that a permit is necessary for construction of new trail in Scenic river areas. The WSRRSA defines a “trail” as “a marked and maintained path or way four feet or less in width, and located and designed to provide for reasonable access in a manner causing the least effect on the local environment.” 6 NYCRR § 666.3(III). In the FEIS, DEC stated that “[a] maximum width of four feet has been established for foot trails. *This will assist in precluding inappropriate motorized uses on such trails and prevent designation of roads as foot trails.*” Ex. 9 (FEIS at 31) (emphasis added).

The WSRRSA contains a conflict of laws provision that states:

Any section of the state wild, scenic and recreational rivers system that is or shall become a part of the Forest Preserve, the Adirondack or Catskill Parks or any other state park . . . shall be subject to the provisions of this title, and the laws and constitutional provisions under which the other areas may be administered, and in the case of conflict between the provisions of those laws and constitutional provisions and the provisions of this title, *the more restrictive provisions shall apply.*

⁴ In 1994, the Part 666 regulations were repealed and readopted, but earlier provisions relating to motorized open space recreational uses in scenic river areas were not substantively altered. See Ex. 10 (DEC Summary of 1994 Part 666 rulemaking (Jan. 27, 1993)).

Id. § 15-2721 (emphasis added). The implementing regulations also state that “[a]ny new land use or development not listed in this Part as ‘no permit necessary’, ‘permit required’ or notification required’, is presumed incompatible with the purposes of the act.” 6 NYCRR § 666.2(h).

II. THE ADIRONDACK PARK STATE LAND MASTER PLAN

In 1971, New York’s Legislature enacted the APA Act, N.Y. Exec. Law §§ 800 *et seq.*, “to insure optimum overall conservation, protection, preservation, development and use of the unique scenic, aesthetic, wildlife, recreational, open space, historic, ecological and natural resources of the Adirondack park.” N.Y. Exec. Law § 801. As originally enacted, section 807 of the Act required the APA to develop and submit to the governor for approval a master plan for management of state lands. Section 816 of the APA Act directs DEC “to develop, in consultation with [APA], individual management plans for units of land classified” in the SLMP. *Id.* § 816(1). UMPs “shall conform to the general guidelines and criteria set forth in the master plan. Until amended, the master plan for management of state lands and the individual management plans shall guide the development and management of state lands in the Adirondack park.” *Id.*

The SLMP received gubernatorial approval in 1972 and provides:

If there is a unifying theme to the master plan, it is that the protection and preservation of the natural resources of the state lands within the Park must be paramount. Human use and enjoyment of those lands should be permitted and encouraged, so long as the resources in their physical and biological context as well as their social or psychological aspects are not degraded. This theme is drawn not only from the Adirondack Park Agency Act . . . and its legislative history, but also from a century of the public’s demonstrated attitude toward the forest preserve and the Adirondack Park.

Ex. 11 (SLMP at 1). Pursuant to the SLMP, all Forest Preserve lands within the Adirondack Park must be classified as one of eight classifications: wilderness, primitive, canoe, wild forest,

intensive use, historic, state administrative, or travel corridors. *See* Ex. 11 (SLMP at 14). Wild, scenic, and recreational rivers are an additional classification under the SLMP. *See id.*

The SLMP defines the Primitive land classification as follows:

A primitive area is an area of land or water that is either:

1. Essentially wilderness in character but, (a) contains structures, improvements, or uses that are inconsistent with wilderness, as defined, and whose removal, though a long term objective, cannot be provided for by a fixed deadline, and/or, (b) contains, or is contiguous to, private lands that are of a size and influence to prevent wilderness designation; or,

2. Of a size and character not meeting wilderness standards, but where the fragility of the resource or other factors require wilderness management.

Id. at 25. Primitive areas are to be managed to “achieve and maintain . . . a condition as close to wilderness as possible, so as to perpetuate a natural plant and animal community where man’s influence is relatively unapparent.” Ex. 11 (SLMP at 25).

The SLMP specifies the recreational uses and structures allowed in each land classification. In Wilderness areas, public use of all terrain bicycles is prohibited. *Id.* at 23. Public use of all terrain bicycles is prohibited in Primitive areas as well, “except that all terrain bicycles may be used on existing roads legally open to the public and on state truck trails specifically designated for such use by [DEC] as specified in individual unit management plans.” *Id.* at 28.

The SLMP also governs the overlay of Forest Preserve classifications in the context of Wild, Scenic and Recreational river areas. The SLMP provides that “[w]ild rivers and their river areas will be managed in accordance with the guidelines for wilderness areas” *Id.* at 44. In Wilderness areas, “[p]ublic use of motor vehicles, motorized equipment and aircraft [is] prohibited.” *Id.* at 22.

III. SNOWMOBILE GUIDANCE

In 2009, APA and DEC entered into a Memorandum of Understanding entitled “Management Guidance: Snowmobile Trail Siting, Construction and Maintenance on Forest Preserve Lands in the Adirondack Park” (“Snowmobile Guidance”). The Snowmobile Guidance implements the October 2006 Snowmobile Plan for the Adirondack Park/Final Generic Environmental Impact Statement, which “present[ed] a conceptual snowmobile plan with the goal of creating a system of snowmobile trails between communities in the Adirondack Park.” Ex. 12 (Snowmobile Guidance at 2). The Snowmobile Guidance “establish[ed] a new DEC snowmobile trail classification system with new standards and guidelines for snowmobile trail siting, construction and maintenance.” *Id.* Two classes of trails were established, one of them being Class II Trails, or Community Connector Trails, which are defined as follows:

Snowmobile trails or trail segments that serve to connect communities and provide the main travel routes for snowmobiles within a unit are Community Connector Trails. These trails are located in the periphery of Wild Forest or other Forest Preserve areas. They are always located as close as possible to motorized travel corridors, given safety, terrain and environmental constraints, and only rarely are any segments of them located further than one mile away from the nearest of these corridors. They are not duplicated or paralleled by other snowmobile trails. Some can be short, linking communities to longer Class II trails that connect two or more other communities.

Id. at 3.

ARGUMENT

I. THE ESSEX CHAIN UMP VIOLATES THE WSRRSA BY ALLOWING PUBLIC MOTORIZED RECREATIONAL USE IN WILD AND SCENIC RIVER AREAS

In shoehorning the new snowmobile community connector into a narrow one-tenth-mile wide strip of land between Primitive and Wilderness areas, the Essex Chain UMP unlawfully introduces public snowmobile use into protected Wild and Scenic river areas where such use is prohibited by the WSRRSA. Specifically, the UMP impermissibly calls for (i) construction of a

massive new snowmobile bridge across the Cedar River where the river is designated Scenic; (ii) the opening of the Polaris Bridge to public snowmobiling where the Hudson River is designated Scenic; and (iii) the opening of a Forest Preserve road to public motor vehicle use within the protected river area of the Hudson River where it is designated Wild.⁵

A. Construction of a New Snowmobile Bridge Over the Scenic Cedar River Is Not Permissible Under the WSRRSA

1. The WSRRSA Prohibits Public Motorized Recreational Uses in Scenic River Areas.

The January 1986 FEIS for the regulations implementing the WSRRSA clearly states that “motorized open space recreational uses in scenic river areas” are prohibited. Ex. 9 (FEIS at 57). The FEIS further states: “Therefore bridges for this use have been prohibited.” *Id.*; *see also id.* at 58, 60 (“The Department agrees that motorized recreational vehicles should not be allowed to operate in scenic river areas due to their relatively undeveloped nature and the concurrent extensive low intensity recreational and other passive outdoor uses which predominately [sic] take place within such river areas and conflict with motorized recreational vehicles.”).

The prohibition of public motorized recreational use in Scenic river areas is evident, though less succinctly, in the WSRRSA’s statutory scheme and implementing regulations. The WSRRSA allows only the following land uses in Scenic river areas: “[1] the continuation of present agricultural practices, [2] the propagation of crops, [3] forest management . . . , [4] limited dispersed or cluster residential developments and [5] stream improvement structures for fishery management purposes.” ECL § 15-2709(2)(b). “[N]o mining, excavation, or construction of roads” is permitted in Scenic river areas, “except private roads necessary for residential, agricultural or forest management purposes” *Id.*

⁵ The Essex Chain UMP would allow, in addition to snowmobile use, seasonal public motorized access in the Hudson River’s Wild river corridor during hunting season. *See* Ex. 2 (UMP at 40).

The implementing regulations contain a Table of Use Guidelines, which includes a section concerning “Roads, Trails, Bridges and Motorized Access.” 6 NYCRR § 666.13(E). Trails, bridges, and “[t]he use and operation of motor vehicles or motorized equipment” are separately referenced within the table, indicating that the permitted construction of a trail or bridge does not necessarily permit motorized use of that trail or bridge. *See id.* The Table of Use Guidelines identifies only two uses for “[t]he use and operation of motor vehicles or motorized equipment” in river areas: (1) “for forest management purpose only” and (2) as “required for any other allowable use.” *Id.* § 666.13[E][4]. As noted above, in Scenic river areas, those allowable uses are statutorily limited to present agricultural practices, propagation of crops, forest management, limited residential development, and fishery management. *See* ECL § 15-2709(2)(b). Thus, the use and operation of motor vehicles for *public recreational purposes* in Scenic river areas is “presumed incompatible with the purposes of the act.” 6 NYCRR § 666.2(h) (“Any new land use or development not listed in this Part as ‘no permit necessary’, ‘permit required’ or notification required’, is presumed incompatible with the purposes of the act.”).⁶

2. DEC Cannot Allow Motorized Recreational Use of the Cedar River Bridge Under 6 NYCRR § 666.9(d).

Respondents seek to evade the prohibition against motorized recreational uses in Scenic river areas by claiming that DEC can issue itself a WSRRSA permit and variance allowing construction of a new snowmobile bridge over the Cedar River. *See* Ex. 2 (UMP at 112) (citing

⁶ The Table of Use Guidelines also indicates that construction of trails and bridges is contemplated only for “*non-motorized* open space recreational uses.” *See* 6 NYCRR § 666.13(E), Notes 3(i), (ii). Because *motorized* open space recreational use of trails and bridges is unlisted, it is presumed incompatible with the WSRRSA for this reason as well. *See* 6 NYCRR § 666.2(h).

6 NYCRR §§ 666.13(E)(3), 666.9(d)).⁷ This claim is baseless for the simple reason that DEC cannot lawfully issue itself a permit and variance allowing a use that is prohibited under the WSRRSA.

The WSRRSA’s implementing regulations clearly state that “[n]o variance may authorize any development or improvement prohibited by the act”; rather, variances are permissible only to “vary or modify any provision of this Part relating to *allowable* land uses or development.” 6 NYCRR § 666.9(a) (emphasis added). Because motorized recreational uses are prohibited in Scenic river areas, *see* Section I.A.1, *supra*, a variance cannot be issued for such a use. Nor can Respondents evade this dictate by seeking authorization pursuant to 6 NYCRR § 666.9(d) (“Section 666.9(d)”). That section provides:

(d) Any land use or development which, but for this subdivision, would require a variance due to noncompliance with one or more specific standards or criteria in this Part, may be permitted by the department without such variance if:

- (1) the department determines that the project, if approved, will not adversely impact any affected river resource; and
- (2) the project satisfies all other applicable standards and criteria, including the standards for permit issuance set forth in section 666.8 of this Part.

6 NYCRR § 666.9(d).

Contrary to the assumption in the Essex Chain UMP, *see* Ex. 2 (UMP at 112), Section 666.9(d) does not authorize DEC to allow a prohibited use that otherwise could not have received a variance; it merely changes the burden the applicant must face in seeking a permissible variance. DEC itself has explained that Section 666.9(d) simply allows the

⁷ DEC’s explanation of how it intends to proceed with construction of the Cedar River bridge mentions only the need for a permit for a “trail” and fails to reference the separate “bridge” and “use and operation of motor vehicle” provisions in the Table of Use Guidelines, 6 NYCRR § 666.13(E).

Department to grant a permissible variance *without the applicant demonstrating the need for the variance* that is otherwise required, *see* 6 NYCRR § 666.9(a):

Existing variance standards are based upon New York State land use control law, which has developed standards for determining if applicants are entitled to a variance by virtue of their circumstances. That system of need justification, based upon judicial precedent, remains a part of the regulation, however, a new avenue has been created for variance determinations that will bypass the traditional standards *for measuring the need for a variance before variance determinations are made*. Under this provision, any standard in the regulation may be reduced, (varied), *without any demonstration of need for relief* from that standard provided the applicant shows that the reduced standard protected river area resources from adverse impacts.

Ex. 10 (DEC Summary of 1994 Part 666 rulemaking at 4) (emphases added). Thus, while Section 666.9(d) allows DEC to “vary or modify any provision of this Part relating to *allowable* land uses or development” without requiring that the “need” test be met, Section 666.9(d) does not authorize DEC to make an end run around the WSRRSA by allowing “development or improvement prohibited by the act.” *Id.* § 666.9(a) (emphasis added).

In any event, DEC cannot lawfully issue itself a permit for motorized recreational use of a new bridge over the Scenic Cedar River under Section 666.9(d) because the Department cannot demonstrate that the bridge meets “the standards for permit issuance set forth in section 666.8.”

6 NYCRR § 666.9(d)(2). Those standards require a determination that:

- (1) the proposed land use or development is consistent with the purposes and policies of the act and with the provisions of this Part;
- (2) the resources specified in section 666.2(e) of this Part will be protected and the proposed activity will not have an undue adverse environmental impact;
- (3) no reasonable alternative exists for modifying or locating the proposed activity outside of the designated river area; and
- (4) actions proposed to be undertaken by State agencies are designed to preserve, protect or enhance the resources and values of designated rivers.

Id. § 666.8(f). Given DEC’s prior acknowledgements in the FEIS that “motorized open space recreational uses in scenic river areas” are prohibited, and “[t]herefore bridges for this use have

been prohibited,” Ex. 9 (FEIS at 57, 60), the Department cannot show that motorized recreational use of a bridge over the Scenic Cedar River “is consistent with the purposes and policies of the act and with the provisions of this Part.” 6 NYCRR § 666.8(f)(1).

Nor can DEC make the requisite showing that the proposed motorized use is “designed to preserve, protect or enhance the resources and values” of the Scenic Cedar River, *id.* § 666.8(f)(4), given DEC’s prior pronouncement that “motorized recreational vehicles should not be allowed to operate in scenic river areas due to their relatively undeveloped nature and the concurrent extensive low intensity recreational and other passive outdoor uses which predominately [sic] take place within such river areas and conflict with motorized recreational vehicles.” Ex. 9 (FEIS at 58).

Finally, the existence of a snowmobile route between Indian Lake and Minerva that will be duplicated by the new snowmobile route over the Cedar River, *see* Section II, *infra*, obviates any possibility that DEC could show that “no reasonable alternative exists” for building a new snowmobile bridge over the Scenic Cedar River. *See* 6 NYCRR § 666.8(f)(3) (emphasis added). Thus, DEC cannot lawfully issue itself a permit under Section 666.9(d) to construct a new snowmobile bridge over the Cedar River.

3. DEC Also Cannot Grant Itself an Area Variance to Allow a Nine Foot Wide “Trail.”

Respondents also incorrectly assume that DEC can issue itself a variance to allow for the massive width of the new snowmobile “trail” over the Cedar River. *See* Ex. 2 (UMP at 112). This assumption is incorrect. The regulations define a trail as “a marked and maintained path or way *four feet or less in width . . .*” 6 NYCRR § 666.3(III) (emphasis added). In the FEIS, DEC explained that this limitation is specifically intended to prohibit inappropriate motorized uses: “A maximum width of four feet has been established for foot trails. *This will assist in precluding*

inappropriate motorized uses on such trails and prevent designation of roads as foot trails.” Ex. 9 (FEIS at 31) (emphasis added). By calling for construction of a 9-foot-wide snowmobile bridge over a Scenic river, the Essex Chain UMP ignores the WSRRSA’s definition of “trail” and condones the inappropriate motorized activity the definition is intended to prevent. Compounding this error, Respondents incorrectly assume that DEC can unilaterally free itself of this key regulatory constraint by granting itself a variance.

But the WSRRSA does not authorize DEC to issue itself a variance to allow construction of a 9-foot wide roadway to accommodate public motorized recreational use in a Scenic river area. As explained above, DEC is authorized only to “vary or modify any provisions of this Part relating to *allowable* land uses or development,” 6 NYCRR § 666.9(a), and, as discussed above, public motorized recreational use is not an allowable land use in Scenic river areas. ECL § 15-2709(2)(b), 6 NYCRR § 666.13[E]. *See* Section I.A.1, *supra*. Consequently, the assumption in the Essex Chain UMP that DEC can issue itself a variance for a 9-foot-wide motorized “trail” over a Scenic river is fatally flawed. Because the WSRRSA prohibits construction of a new snowmobile bridge over the Scenic Cedar River and DEC lacks authority to exempt itself from that legal restriction, the APA’s approval of the Essex Chain UMP, which calls for construction of the illegal bridge, is affected by an error of law, arbitrary and capricious, and an abuse of discretion.

B. Opening the Polaris Bridge to Public Snowmobile Use Is Not Permissible Under the WSRRSA

The Essex Chain UMP opens the Polaris Bridge over the Scenic Hudson River to public snowmobile use in violation of the WSRRSA. As set forth in the preceding section, public motorized recreational use in Scenic river areas is prohibited under the WSRRSA. The UMP seeks to avoid this prohibition by invoking the Act’s “grandfathering” clause, claiming that

“[t]he use of bridges and trails at the location of the existing Polaris Bridge, predates and continued regularly after the enactment of the WSRRS Act,” making “the operation of motor vehicles, including snowmobiles, on the trail leading to and over the Polaris Bridge” an “existing land use” allowed to continue under the WSRRSA. Ex. 2 (UMP at 112) (citing ECL § 15-2709.2, 6 NYCRR §§ 666.13(A)(1), § 666.2(i)(3)&(4)). This argument must fail because there is no evidence supporting the UMP’s claim that motor vehicles, including snowmobiles, were operated at the location of the Polaris Bridge prior to, and continuing after, enactment of the WSRRSA.

Public motorized recreational use of the Polaris Bridge is *not* an existing land use as that term is defined under the WSRRSA. The stretch of the Hudson River the Polaris Bridge crosses was designated Scenic in 1973. *See* ECL § 15-2713(2)(f). The WSRRSA identifies an existing land use as a use that predates inclusion of the river into the WSRRSA system. *See id.* § 15-2709(2). The use the APA has approved in the Essex Chain UMP—public snowmobile use of the Polaris Bridge—does not predate 1973. In fact, the Polaris Bridge did not even exist in 1973; it was not constructed until 1992. The bridge itself therefore does not qualify as an existing land use under the WSRRSA. *See* ECL § 15-2709(2).

Nor is there any evidence of motor vehicle crossing of the Hudson River at that location prior to and continuing after 1973. In the permit it issued in 1992 for construction of the Polaris Bridge, APA stated that crossing of the river at the location of the Polaris Bridge “was last used by [Finch Pruyn] approximately 1957,” and described the bridge site as a remote section of the Hudson River where, “[o]ther than access via the river, the site is not accessible by the general public.” Ex. 14 (APA Polaris Bridge permit at 3). According to the APA, then, no crossing of the Hudson River at the current location of the Polaris Bridge occurred at least between 1957 and

1992. Therefore, crossing of the river at that location by any means, including snowmobiling, cannot be an existing land use predating the 1973 designation of this stretch of the Hudson River as a Scenic river.⁸

Even assuming for the sake of argument that the operation of motor vehicles over the Polaris Bridge is an existing land use under the WSRRSA, as claimed in the UMP, the opening of the bridge to *public* snowmobile use constitutes an expansion of a non-conforming use in violation of the Act. This point is made clear in the affidavit of John Collins. *See* Ex. 13 (Affidavit of John Collins, sworn to on January 6, 2016 (“Collins Aff.")). Mr. Collins is a lifelong resident of Indian Lake who served for 18 years on the Town of Indian Lake Planning Board and was a member of the APA board for eleven years, including five years when he served as APA Chairman. *Id.* ¶¶ 2-3. Based on his years of Planning Board and APA experience, and his personal familiarity with two snowmobile community connector trails in Indian Lake, Mr. Collins states that “snowmobile community connectors generally receive heavy use from the public snowmobiling community, and the level of use generally exceeds that of snowmobile trails located on private lands that are not open to the public.” *Id.* ¶¶ 6-7.

The WSRRSA provides that “existing land uses within the respective classified river areas may continue, but may not be altered or expanded *except as permitted by the respective classification*, unless the commissioner or agency orders the discontinuance of such existing land

⁸ The Essex Chain UMP claims that “[t]he use of bridges and trails at the location of the existing Polaris Bridge, *predates and continued regularly after the enactment of the WSRRS Act.*” UMP at 112 (emphasis added). However, the UMP fails to include or cite to any evidence supporting this claim.

use.” ECL § 15-2709(2) (emphasis added).⁹ Until the State acquired the land in 2013, the tract of land including the Polaris Bridge was under the private ownership of Finch Pruyn and later The Nature Conservancy, and the Polaris Bridge was used only for logging purposes and by private lessees of Finch Pruyn. *See* Ex. 14 (APA Polaris Bridge permit); Ex. 15 (DEC Polaris Bridge permit); *see also* Agency November 2015 Friday Meeting, Statements of Agency Member Richard Booth beginning at 2:10:42, APA (Nov. 13, 2015), http://nysapa.granicus.com/MediaPlayer.php?view_id=2&clip_id=435 [webcast] (“The grandfathering concept that is now before you, embodied in this unit management plan, is a fiction . . . I know there are no facts that would support that regarding [snowmobile] use across the Polaris.”).

Thus, even if the Polaris Bridge were occasionally crossed by private landowners or their lessees on snowmobiles (and there is no evidence that such crossings occurred prior to construction of the bridge in 1992), opening the bridge to public snowmobile use is an “altered or expanded” motorized recreational use of the bridge that is not “permitted by the respective classification.” ECL § 15-2709(2). The Scenic river classification allows only “[1] the continuation of present agricultural practices, [2] the propagation of crops, [3] forest management . . . , [4] limited dispersed or cluster residential developments [or] [5] stream improvement structures for fishery management purposes.” *Id.* § 15-2709(2)(b) (identifying the allowable land uses in Scenic river areas). And as DEC has stated without equivocation: the WSRRSA “prohibit[s] motorized open space recreational uses in scenic river areas.” Ex. 9 (FEIS at 57, 60). Thus, even if snowmobile use of the Polaris Bridge qualifies as an existing

⁹ The Table of Use Guidelines in the implementing regulations identify existing land uses as “[c]ontinuation, *without change*, of land uses lawfully existing on the date upon which this Part first takes effect in the river area.” 6 NYCRR § 666.13[A][1] (emphasis added). Even under this definition, public snowmobile use of the Polaris Bridge is not an existing land use.

land use under the WSRRSA (which it does not), the expansion of that use by allowing public recreational snowmobiling is flatly prohibited under the Act.

C. The Chain Lakes Road South Located Within the Hudson River Wild River Corridor Cannot Be Opened to Public Motorized Use Under the WSRRSA

The WSRRSA provides that “[i]n wild river areas, no new structures or improvements, no development of any kind and *no access by motor vehicles shall be permitted other than forest management pursuant to forest management standards duly promulgated by regulations.*” ECL § 15-2709(2)(a) (emphasis added). The Act’s implementing regulations include a “Table of Use Guidelines” that reiterates that in Wild river areas, while no permit is necessary for “[t]he use and operation of motor vehicles or motorized equipment . . . for forest management purposes only,” all other uses of motor vehicles or motorized equipment are prohibited. 6 NYCRR § 666.13(E)(4). Despite this clear prohibition, the Essex Chain UMP allows public motor vehicle access on Chain Lakes Road South, *see* Ex. 2 (UMP at 40, 52), and within the river area of the Hudson River where the river is designated Wild under the WSRRSA, *id.* at 25.

Respondents attempt to justify this impermissible use by claiming that public motorized use of Chain Lakes Road South predates and continued regularly after the enactment of the WSRRSA, and therefore is “an existing land use that is authorized to continue.” Ex. 2 (UMP at 25) (citing ECL § 15-2709.2, 6 NYCRR section 666.13[A][1]). However, the Essex Chain UMP fails to provide or cite to any evidence to support this claim. In fact, the UMP’s allegation of prior public motorized use of Chain Lakes Road South is explicitly refuted by the affidavits of Peter Bauer and John Collins submitted in support of the Petition. *See* Ex. 6 ¶ 21 (Affidavit of Peter Bauer, sworn to on January 6, 2016 (“Bauer Aff.”)); Ex. 13 (Collins Aff. ¶¶ 4-5). Mr. Bauer, a long-time resident of Indian Lake, states that when Chain Lakes Road South was in private ownership, the road was not accessible to the public. *See* Ex. 6 (Bauer Aff. ¶ 21). Mr.

Collins, a lifelong resident of Indian Lake, former Chairman of the Town of Indian Lake Planning Board, and former APA Chairman, states that the portion of Chain Lakes Road South formerly owned by Finch Pruyn and later by The Nature Conservancy was closed to the general public while under the private ownership of those entities. *See* Ex. 13 (Collins Aff. ¶ 4).

More importantly, though, even if Respondents were correct on the facts, they are still wrong on the law. The WSRRSA contains a conflict of laws provision that states:

Any section of the state wild, scenic and recreational rivers system that is or shall become a part of the Forest Preserve, the Adirondack or Catskill Parks or any other state park . . . shall be subject to the provisions of this title, and the laws and constitutional provisions under which the other areas may be administered, and in the case of conflict between the provisions of those laws and constitutional provisions and the provisions of this title, *the more restrictive provisions shall apply.*

Id. § 15-2721 (emphasis added). The Chain Lakes Road South is part of the Forest Preserve and therefore subject to the SLMP. The SLMP provides that “[w]ild rivers and their river areas will be managed in accordance with the guidelines for wilderness areas,” Ex. 11 (SLMP at 44), and in Wilderness areas, public use of motor vehicles is explicitly prohibited, *id.* at 22. Thus, even if public motor vehicle use on Chain Lakes Road South existed before the 1973 designation of this stretch of the Hudson River,¹⁰ when those lands were in private ownership, once the road became Forest Preserve, the SLMP’s more restrictive provisions prohibiting public motor vehicle use in wilderness areas became operative. Consequently, the Essex Chain UMP’s opening of the Chain Lakes Road South in the Hudson River Wild river corridor to public motorized use violates the SLMP and the WSRRSA.

¹⁰ *See* ECL § 15-2713(1)(c).

II. APA’S APPROVAL OF THE NEW SNOWMOBILE CORRIDOR WAS ARBITRARY AND CAPRICIOUS

Respondents have sited the new snowmobile corridor established in the Essex Chain UMP in clear contravention of the Snowmobile Guidance. It is axiomatic that “when an agency determines to alter its prior stated course it must set forth its reasons for doing so.” *Charles A. Field Delivery Serv., Inc. v. Roberts*, 498 N.Y.S.2d 111, 115 (1985). As the Court of Appeals has made clear: “[a]bsent such an explanation, failure to conform to agency precedent will . . . require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determinations made.” *Id.* (citations omitted). In the Essex Chain UMP, Respondents have established a new snowmobile corridor that duplicates an existing snowmobile route. This is a significant departure from the Snowmobile Guidance, which expressly prohibits duplicative routes for community connectors. Yet, rather than acknowledging this departure from established policy and providing a reasonable explanation for it, Respondents simply deny that they have acted contrary to the Snowmobile Guidance. *See* Ex. 2 (UMP at 170); Ex. 8 (Conformance Determination at 3).

Respondents’ claim that the siting of the new snowmobile corridor complies with the Snowmobile Guidance does not withstand scrutiny. The Snowmobile Guidance establishes a snowmobile trail classification system and “standards and guidelines for snowmobile trail siting, construction and maintenance.” Ex. 12 (Snowmobile Guidance at 2). One class of trails, referred to as Class II Trails or Community Connector Trails, is defined as follows:

Snowmobile trails or trail segments that serve to connect communities and provide the main travel routes for snowmobiles within a unit are Community Connector Trails. These trails are located in the periphery of Wild Forest or other Forest Preserve areas. . . . *They are not duplicated or paralleled by other snowmobile trails. . . .*

Id. at 3 (emphasis added). In the 2006 Snowmobile Plan for the Adirondack Park, the implementation of which is supported by the 2009 Snowmobile Guidance, duplicative trails are described as “trails that connect the same two end points by means of different routes.” DEC, Snowmobile Plan for the Adirondack Park/Final Generic Environmental Impact Statement 48 (Oct. 2006), available at, http://www.dec.ny.gov/docs/lands_forests_pdf/snplfnl.pdf.

The Essex Chain UMP calls for the “[e]stablish[ment of] a community connector trail between the communities of Indian Lake and Minerva.” Ex. 2 (UMP at 51). However, these two end points already are connected by an existing and approved snowmobile route. The Essex Chain UMP itself describes the existing snowmobile route between Indian Lake to Minerva. *See* UMP at 110 (describing the No Action alternative and noting that “[t]he use of these roads and trail segments eventually connects Indian Lake and Newcomb, and then connect to an approved trail between Newcomb and Minerva”). Thus, as APA Member Richard Booth noted when dissenting from the APA’s vote on the Conformance Determination:

The problem with th[e Indian Lake-to-Minerva] community connector is not the connector itself. It is that it is redundant to a connector that already exists west of the Essex Chain primitive area using the Cornell Road connecting Indian Lake to Newcomb. . . . The Redundancy Provision is part of the Snowmobile Guidance. The Snowmobile Guidance cannot be understood except in reference to the SLMP. . . . [T]his agency has a responsibility to abide by it. So does the Department.

Agency November 2015 Friday Meeting, Statements of Agency Member Richard Booth beginning at 2:12:23, APA (Nov. 13, 2015), http://nysapa.granicus.com/MediaPlayer.php?view_id=2&clip_id=435 [webcast].

Respondents’ failure to acknowledge that they have departed from established policy by approving a snowmobile community connector that duplicates an existing route, and to provide a

reasonable explanation for this departure, renders their approval of the new duplicative snowmobile corridor arbitrary and capricious. *See Field Delivery*, 498 N.Y.S.2d at 115.

III. THE OPENING OF FORMER LOGGING ROADS IN THE ESSEX CHAIN LAKES AND PINE LAKE PRIMITIVE AREAS TO PUBLIC ALL TERRAIN BICYCLE USE VIOLATES THE SLMP

The Essex Chain UMP's designation of approximately nine miles of former logging roads in the Essex Chain Lakes and Pine Lake Primitive Area for bicycle use, *see* Ex. 2 (UMP at 45), violates the SLMP. The SLMP prohibits the public use of all terrain bicycles in Primitive areas, with two narrow exceptions: (1) on existing roads legally open to the public and (2) on state truck trails specifically designated for such use in an approved UMP. Ex. 11 (SLMP at 28); *see also id.* at 23. Neither exception applies to 8.35 of the nine miles of roads opened to bicycle use by the Essex Chain UMP.

Of the approximately nine miles of roads designated for public bicycle use in the Essex Chain Lakes and Pine Lake Primitive Areas, a mere 0.65 miles are designated by DEC as state trucks trails, or administrative roads. *See* Ex. 2 (UMP at 28); *id.* App. I (compare map of Proposed Bicycle Trails to map of Proposed Facilities showing location of the administrative roads in the Complex). The remaining 8.35 miles of roads opened for public all terrain bicycle use are not state truck trails. Nor are they “roads legally open to the public”—that is, roads open to public motorized use.¹¹ The roads are currently used on a strictly limited and exclusive basis only by private lessees of the lands, such as the Gooley and Polaris Mountain clubs, whose motorized access will end in 2018. As evidenced in the 2013 leaseholder update from The Nature Conservancy (“TNC”) and by the terms of the leases held by the Gooley Club and the

¹¹ “Existing roads legally open to the public” refers to roads that are open to the public *for motor vehicles*, as evidenced in the SLMP's indication that “existing roads now legally open to the public *may remain open for motor vehicles* at the discretion of the Department” Ex. 11 (SLMP at 27) (emphasis added).

Polaris Mountain Club, only identified members of these private clubs may use motor vehicles on these roads, and such use is for the sole purpose of accessing their private camps. *See generally* Exs. 16-18; *see also* Ex. 16 (TNC Leaseholder update at 1-2); Ex. 17 (TNC-Polaris lease at 8-9, Management Agreement Terms); Ex. 18 (TNC-Gooley lease at 8-9, Management Agreement Terms).

Pursuant to the leases, the clubs were required to provide TNC a list of their members each year, and members were issued and required to display prominent stickers on motorized vehicles identifying themselves as club members. *See* Ex. 16 (TNC Leaseholder update at 2); Ex. 17 (TNC-Polaris lease at 8-9, Management Agreements Terms); Ex. 18 (TNC-Gooley lease at 9, Management Agreement Terms). Each Lessee member is permitted to invite a maximum of two guests onto the leased lands, who must be accompanied by the members at all times when not in camp. *See* Ex. 16 (TNC Leaseholder update at 2); Ex. 17 (TNC-Polaris lease at 6); Ex. 18 (TNC-Gooley lease at 6). Moreover, recreational motor vehicle use on roads outside of the one-acre parcels surrounding existing camp buildings is forbidden under the terms of these leases; lessees may use vehicles, including snowmobiles, only along designated access roads and only to access and exit their camps. *See* Ex. 16 (TNC Leaseholder update at 1-2); Ex. 17 (TNC-Polaris lease at 5, Management Agreement Terms); Ex. 18 (TNC-Gooley lease at 5, Management Agreement Terms).

Such limited access by private lessees does not constitute the “public,” and these roads are therefore not “legally open to the public” within the meaning of the SLMP. *See Madison Products Co. v. Coler*, 242 N.Y. 467, 474 (1926) (interpreting the meaning of “public places” in a different context as those places “which are *open to the general public* and upon the use of which by the general public *there is no limitation*”) (emphasis added). As such, these roads

cannot lawfully be designated for all terrain bicycle use. *See* Ex. 11 (SLMP at 28).¹² APA's approval of the Essex Chain UMP, which illegally opens former logging roads in the Essex Chain Lakes and Pine Lake Primitive

CONCLUSION

For all the reasons set forth above, this Court should enter a declaratory judgment and judgment pursuant to CPLR Article 78 granting the relief requested in Petitioners' Verified Petition and Complaint.

Dated: New York, New York
January 11, 2016

Respectfully submitted,



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¹² The opening of miles of roads in Primitive areas to all terrain bicycles is, moreover, a stark departure from past management practices. *See* Ex. 19 ¶¶ 6-13 (Affirmation of Robert C. Glennon, dated January 6, 2016).