



September 21, 2018

Marc S. Migliore, Regional Permit Administrator
Division of Environmental Permits
NYS DEC Region 5
1115 State Rte. 86
Ray Brook, NY 12977

**Re. Proposed Cedar River Bridge and Recreational Trail, Application 5-1599-00021/00001,
Article 15 Title 27 Wild, Scenic & Recreational Rivers**

Dear Mr. Migliore:

Adirondack Wild: Friends of the Forest Preserve (“Adirondack Wild”) submits these comments in response to the application by the New York State Department of Environmental Conservation (“DEC” or “Department”) for a permit and variance under 6 NYCRR Part 666 of the Department’s regulations implementing the New York Wild, Scenic, and Recreational Rivers Act (“Rivers Act”), N.Y. Env’tl. Conserv. Law (“ECL”) art. 15, title 27. Adirondack Wild respectfully submits that an adjudicatory hearing on the application is required pursuant to 6 NYCRR § 621.8(d) because substantive and significant issues exist relating to the application, and the resolution of those issues may result in denial of the permit application.

Specifically, as discussed in detail below, the substantive and significant issues include the following: (1) the proposed construction of a new snowmobile trail within the river area of the Cedar River where it is designated Scenic under the Rivers Act violates the Rivers Act, and DEC lacks authority to administratively override that violation by issuing itself a permit or variance; (2) the proposed construction of a new snowmobile bridge over the Cedar River where it is designated Scenic under the Rivers Act violates the Rivers Act, and DEC lacks authority to administratively override that violation by issuing itself a permit or variance; (3) the application cannot meet the statutory and regulatory criteria for permit issuance under the Rivers Act; (4) the Department’s SEQRA review is inadequate because it unlawfully segments this portion of the proposed snowmobile trail from other portions of the trail that require construction and intrusion of prohibited motorized uses in the river areas of the Hudson and Boreas rivers designated Scenic under the Rivers Act; and (5) a portion of the proposed snowmobile trail that is located within the Wild river area of the Hudson River (the South Chain Lakes Road) is currently the

subject of ongoing litigation that challenges the legality of that portion of the trail and that may result in the application being rendered moot.¹

Each of the issues set forth above may result in denial of the application (or in the case of the South Chain Lakes Road litigation, render the application moot). These legal issues should (and must) be decided by an impartial DEC administrative law judge (“ALJ”), not by regional staff. This is particularly imperative given the sworn testimony submitted by the Regional Permit Administrator in a related proceeding providing clear evidence of bias.²

I. The Proposed New Snowmobile Trail and Bridge in the Scenic River Area of the Cedar River Is Not Permissible Under the Rivers Act.

A. The Rivers Act Prohibits Public Motorized Recreational Uses in Scenic River Areas.

The January 1986 Final Environmental Impact Statement (“FEIS”) for the regulations implementing the Rivers Act clearly states that “motorized open space recreational uses in scenic river areas” are prohibited. *See FEIS, attached hereto as Exhibit A, 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 Rivers Act’s statutory scheme and implementing regulations. The Act 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.*

¹ The proposed snowmobile trail and bridge in the Department’s application would allow snowmobilers heading north from Indian Lake on the South Chain Lakes Road to continue on to more northerly and easterly portions of the trail leading to Minerva (and vice versa). Should the New York Court of Appeals determine that DEC’s opening of the South Chain Lakes Road to motorized recreational use violates the Rivers Act and/or the Adirondack Park State Land Master Plan (“Master Plan”), that portion of the proposed new snowmobile trail would have to be closed, thereby eliminating a key portion of the trail and rendering construction of new trails and a bridge in the Scenic river area of the Cedar River pointless.

² Furthermore, in light of the Regional Permit Administrator’s unequivocal demonstration of bias in favor of approving all aspects of the proposed snowmobile community connector, we believe that his recusal from all matters concerning the application is necessary and appropriate. *See Point V, infra.*

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.”).³

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

The Department seeks to evade the prohibition against motorized recreational uses in Scenic river areas by claiming that it can issue itself a Rivers Act permit and variance allowing construction of a new snowmobile bridge over the Cedar River. 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 Rivers Act.

The Rivers Act’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, a variance cannot be issued for such a use. Nor can DEC 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.

³ 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 WSRRA for this reason as well. *See* 6 NYCRR § 666.2(h).

6 NYCRR § 666.9(d).

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 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.

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 Rivers Act by allowing “development or improvement prohibited by the act.” *Id.* § 666.9(a) (emphasis added). Consequently, the Department cannot lawfully grant itself a variance for the prohibited action of building new snowmobile trails and a bridge in the Scenic river area of the Cedar River.

C. DEC Cannot, in Any Event, Meet the Standards for Permit Issuance

Even assuming that DEC could lawfully issue itself a permit for the proposed actions (which it cannot), the Department cannot demonstrate that the proposed Cedar River snowmobile 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.” 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.

II. DEC Also Cannot Grant Itself an Area Variance to Allow a 9-12 Foot Wide “Trail”

The Department also incorrectly assumes that it can issue itself a variance to allow for the massive width of the new snowmobile “trail” over the Cedar River. 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.*” FEIS at 31 (emphasis added). By proposing construction of a 9-foot-wide snowmobile bridge over a Scenic river, DEC ignores the Rivers Act’s definition of “trail” and condones the inappropriate motorized activity the definition is intended to prevent. Compounding this error, DEC incorrectly assumes that the Department can unilaterally free itself of this key regulatory constraint by granting itself a variance.

But the Rivers Act 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]. Consequently, the assumption that DEC can issue itself a variance for a 9-foot-wide motorized “trail” over a Scenic river is fatally flawed.

III. DEC Has Improperly Segmented Its Environmental Review in Violation of SEQRA

The Department's August 22, 2018 ENB notice states:

The NYSDEC Division of Lands and Forests has applied for Wild, Scenic and Recreational Rivers System Act (Rivers Act) approvals to construct a bridge over and multiple use recreational trails within a river area of a segment of the Cedar River designated Scenic in order to provide year-round recreational access across the Cedar River which will complete the multiple use, community connector trail between Indian Lake and Minerva across the Essex Chain Lakes Management Complex Area, as described in the 2016 Essex Chain Lakes Management Complex Unit Management Plan (UMP): River Area Management Plan for the Cedar River and Final Environmental Impact Statement.

This notice is factually incorrect. The Cedar River project will not “complete the multiple use, community connector trail between Indian Lake and Minerva.” To the contrary, in order to complete the connector to Minerva – as noted in the DEC's Essex Chain of Lakes Complex Unit Management Plan and the Community Connector GEIS – the Department will need to (i) open the existing Polaris bridge in the Hudson River Scenic river area to public motorized recreational use, and (ii) create new snowmobile trails and build a new snowmobile bridge in the Scenic river area of the Boreas River.

The Department's SEQRA regulations state that “[a]ctions commonly consist of a set of activities or steps. *The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.*” 6 NYCRR § 617.3(g) (emphasis added). The regulations further require that, in determining the significance of the environmental impacts of a proposed action:

[T]he lead agency must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are:

- (i) included in any long-range plan of which the action under consideration is a part;
- (ii) likely to be undertaken as a result thereof, or
- (iii) dependent thereon.

Id. § 617.7(c)(2).

By failing to include both the Polaris Bridge and the new trails and bridge in the Scenic river area of the Boreas River, the Department has unlawfully segmented its environmental review of the new snowmobile community connector. The SEQRA regulations define segmentation as “the division of the environmental review of an action so that various activities or stages are addressed as though they were independent, unrelated activities needing individual determinations of significance.” *Id.* § 617.2(ag). The regulations specify that “considering only a part or segment of an action is contrary to the intent of SEQR.” *Id.* § 617.3(g)(1).

By limiting its environmental review to the Cedar River bridge and trail project alone and failing to include “other simultaneous or subsequent actions which are included in [the community

connector] long-range plan, DEC has improperly segmented its environmental review in violation of SEQRA.

IV. The Application May Be Rendered Moot by a Decision in the Pending South Chain Lakes Road Litigation

As the Department is aware, DEC's decision to open the portion of the South Chain Lakes Road within the Hudson River Wild river area to motorized recreational use is the subject of litigation currently pending before the New York Court of Appeals. *Adirondack Wild: Friends of the Forest Preserve, et al. v. New York State Adirondack Park Agency, et al.* (Index No. APL-2018-00112). Specifically, Adirondack Wild and Protect the Adirondacks! have challenged that decision as violating both the Rivers Act and the Master Plan. If the Court finds that the opening of that portion of South Chain Lakes Road to motorized recreational uses is unlawful, it would have to be closed to snowmobiles.

The South Chain Lakes Road is essential to establishing the new (and redundant) community connector between Indian Lake and Minerva, and there is no possible alternative route that could be developed since the road is bordered on one side by lands classified as Wilderness and on the other by lands classified as Primitive. Thus, closure of a portion of South Chain Lakes Road to snowmobiles would effectively foreclose completion of the new community connector trail, thereby rendering the construction of new snowmobile trails and a new snowmobile bridge within the Scenic river area of the Cedar River pointless and the pending application moot.⁴

V. Resolution of the Legality of the Department's Application May Result in Denial of the Application and Thus Substantive and Significant Issues Exist Requiring an Adjudicatory Hearing

The Department's regulations provide:

The determination to hold an adjudicatory public hearing shall be based on whether the department's review raises substantive and significant issues relating to any findings or determinations the department is required to make pursuant to the Environmental Conservation Law, *including the reasonable likelihood that a permit applied for will be denied or can be granted only with major modifications to the project because the project, as proposed, may not meet statutory or regulatory criteria or standards.* In addition, where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, *and resolution of any such issue may result in denial of the permit application,* or the imposition of significant conditions thereon, the department *shall* hold an adjudicatory public hearing on the application.

6 NYCRR § 621.8(b); (emphasis added).

⁴ For this reason, Adirondack Wild questions why the Department is rushing forward with this application rather than awaiting the outcome of the Court of Appeals litigation before proceeding.

Thus, the regulations impose a mandatory duty on the Department to hold an adjudicatory hearing when substantive and significant issues are raised as defined in the regulations. Because the issues raised herein raise a reasonable likelihood that the application will be denied because it “may not meet statutory or regulatory criteria or standards,” an adjudicatory hearing is required.

Moreover, as noted above, the substantive and significant legal issues raised in these comments are most appropriately resolved by an impartial ALJ, not by regional staff. *See Id.* §§ 624.8(b)(1)(i), (ix) (providing that ALJs have authority to “rule upon all motions and requests, including those that decide the ultimate merits of the case,” and to “hear and determine arguments on fact or law . . .”). This is particularly true here, where the Regional Permit Administrator has submitted sworn testimony providing clear evidence of bias in favor of issuing all approvals necessary to establish the new Indian Lake-Minerva snowmobile community connector. *See* Aff. of Marc S. Migliore ¶ 11 (June 3, 2016) *attached hereto as Exhibit B* (“DEC intends to issue a permit to allow the continued use of the Polaris Bridge for a multi-use trail that connects the hamlets of Indian Lake and Minerva.”) (emphasis added). Under these circumstances, recusal of the Regional Permit Administrator from any involvement in this matter and referral to an ALJ is clearly appropriate and necessary. *See* N.Y. State Administrative Procedure Act § 303 (providing for recusal where personal bias has been demonstrated).

VI. Conclusion

For the reasons set forth above, setting forth significant and substantive issues concerning the Department’s application, Adirondack Wild respectfully requests that DEC fulfill its mandatory duty to hold an adjudicatory hearing on the application.

Thank you for this opportunity to comment.

Sincerely,

/S/ Chris Amato

Christopher Amato, Board Vice Chair & Counsel

/S/ David Gibson

David Gibson, Managing Partner

/S/ Dan Plumley

Dan Plumley, Partner

Cc: Rob Davies, DEC Division of Lands and Forests
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