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September 18, 2024

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Mitchell Krah (mitchell.krah@dec.ny.gov)
NYS DEC – Region 5 Office
Division of Operations
1115 Route 86
Ray Brook NY 12977

Re: Draft Work Plan for Prospect Mountain Overlook Maintenance

Dear Mr. Krah,

Protect the Adirondacks has reviewed the draft Work Plan prepared by the Department of Environmental Conservation (DEC), which was noticed in the September 4, 2024 Environmental Notice Bulletin, for the proposed tree cutting on five summits (Overlooks 1, 2, and 3 and Summit Overlook north and south) of the Prospect Mountain Veterans Memorial Highway Day Use Area. We appreciate the opportunity to review and comment on this draft Work Plan that provides details about the work proposed on Forest Preserve lands on Prospect Mountain. We understand that this location continues to see a significant number of visitors, even after DEC stopped cutting trees at the site in 2020.

While we realize that Prospect Mountain is a highly visible and highly visited site that DEC desires to manage for people to experience the “Forest Preserve and adjacent lands of the Adirondack Park in a unique and positive way” (Work Plan p. 1), we are concerned about the potential Article 14 compliance problems with the proposed work. We urge DEC not to undertake the cutting of 13,393 trees as is currently proposed.

As discussed below, the proposed level of tree cutting will violate Article 14 of the New York State Constitution, the “forever wild” clause, and the Adirondack Park State Land Master Plan (APSLMP). Moreover, DEC’s proposal to undertake this significant tree cutting work, which is not considered “ordinary maintenance”, without an approved Unit Management Plan, is unnecessary and unwarranted. In addition, the Work Plan fails to include an analysis of Article 14 compliance and DEC has apparently failed to first consult with the Adirondack Park Agency before publicly proposing this

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action, both in apparent violation of DEC Commissioner Policy 78/Forest Preserve Work Plan Policy (CP-78). We therefore urge DEC to withdraw its proposed action.

Finally, there are other priority work items that we can envision, such as restoring, rerouting and repairing the extremely steep, rocky, and washed-out hiking trail that serves untold numbers of visitors from all over the world who are visiting the Lake George area, which may be their only experience hiking in the Adirondacks. We urge DEC not to carry out the proposed work until a Unit Management Plan is completed for this area.

Failure to Comply with the Adirondack Park State Land Master Plan

The Prospect Mountain Veterans Memorial Highway Day Use Area is classified as an Intensive Use area pursuant to the APSLMP. APSLMP p. 45. The Intensive Use classification requires that all management actions “blend with the Adirondack environment,” “have the minimum adverse impact possible on surrounding state lands,” and must “limit vegetative clearing.” Further, improvements in an Intensive Use Area must conform to “a final adopted unit management plan for such area”. APSLMP p. 42.

The Work Plan references irrelevant language in the APSLMP regarding “scenic vistas” from “travel corridors” as a justification for the significant amount of tree cutting proposed for this action. Work Plan p. 2, quoting APSLMP p. 51. However, Prospect Mountain Highway is not located in a designated “Highway Corridor” where scenic vistas may be permitted, and it is not located in “Railroad Corridor” where scenic vistas are allowed pursuant to “an adopted unit management plan”. APSLMP pp. 54-55. The APSLMP provisions referenced in the Work Plan are thus inapplicable.

In fact, the APSLMP, which has the force and effect of law, prohibits the tree cutting that DEC is proposing. The proposed tree cutting does not “blend with the Adirondack environment,” “have the minimum adverse impact possible on surrounding state lands,” “limit vegetative clearing,” and does not conform to “a final adopted unit management plan for such area”. APSLMP p. 42. The Legislature’s approval of the funds for the creation of the Prospect Mountain State Parkway in 1964 does not render the provisions of the APSLMP ineffective. We urge DEC not to carry out the proposed work in violation of the APSLMP.

Failure to Comply with Article 14 of the Constitution

The draft Work Plan contains no discussion of Article 14 compliance. We appreciate that trees were counted down to 1” DBH, as required by the *Protect the Adirondacks* Article 14 court decision (2021), and that the tree tally information in the Work Plan shows all of the trees 1” DBH and larger. However, the tree tally provided in the Work Plan does not constitute an analysis of Article 14 compliance as required by CP-78, which sets forth criteria that must be analyzed for determining compliance with the provisions of Article 14, the “Forever Wild Clause”.

CP-78 requires DEC to evaluate constitutional compliance and to “document the detailed, site-specific assessments conducted by Regional Land and Facility Managers when siting a particular project to ensure that an analysis of the relevant constitutional, statutory, and regulatory factors have been considered.” CP-78 p. 5. The draft Work Plan does not document any analysis by DEC staff to ensure that the constitutional provisions have been considered, and more importantly, have been satisfied. In fact, the criteria set forth in CP-78 make clear that the actions proposed in the Work Plan do not pass constitutional muster.

Criterion 1: Is the proposed cutting, removal, or destruction of timber “material or substantial”?

In this Work Plan, DEC proposes to cut 13,393 trees over 3.88 acres of land. In *Association for Protection of Adirondacks v. MacDonald* (253 NY 234 [1930]), the Court of Appeals held that the destruction of 2,500 trees over 4.5 acres for the 1932 Winter Olympics in Lake Placid was unconstitutional. In *Protect the Adirondacks v. DEC* (37 NY3d 73 [2021]), the Court of Appeals held that the destruction of 25,000 trees over 27 miles for Class II snowmobile trails was unconstitutional. The amount of tree cutting proposed for this project far exceeds the amount of tree cutting found to be unconstitutional in *Association for Protection of Adirondacks* and approaches the level of tree cutting (in a smaller geographic area) found to be unconstitutional in *Protect the Adirondacks*. Thus, the tree cutting proposed in the Work Plan is “material or substantial” and is unconstitutional.

Criterion 2: Is the degree of alteration of the existing Forest Preserve terrain permissible?

The Work Plan does not describe any new terrain alteration.

Criterion 3: Do the impacts of the proposed project impair the wild forest nature of the Forest Preserve?

The proposal in the Work Plan does not preserve the “wild forest” setting and character of the Forest Preserve, and does not preserve the natural aesthetics associated with a Day Use Area in the Forest Preserve. The draft Work Plan fails to analyze the impact on the wild forest nature of the Forest Preserve, including impacts of the tree cutting on the wild forest character of the Forest Preserve on Prospect Mountain and the impacts on the adjoining Forest Preserve lands constituting part of the Lake George Wild Forest, resulting from cutting 13,393 trees across five areas on the top of Prospect Mountain. We also believe that the views of Prospect Mountain from the Village of Lake George, Beach Road, Lake George Beach (aka Million Dollar Beach), Lake George Battlefield Day Use Area, and the lake itself, would be adversely impacted. DEC should conduct a visual impact analysis of the proposed tree cutting showing the views of Prospect Mountain from these highly visited areas. It is our position that the proposed action impairs the wild forest nature of the Forest Preserve.

Statutes Cannot Supersede Article 14 of the Constitution

The Work Plan claims that DEC has a “legislative mandate” to construct and “maintain facilities and appurtenances along Prospect Mountain State Parkway and on Prospect Mountain for the public not inconsistent with state park and parkway purposes”. Work Plan pp. 2-3. The laws cited by DEC are Chapter 267 of the laws of 1954 relating to the Whiteface Mountain Authority, and the 1964 appropriation of funds by the Legislature to the Adirondack Mountain Authority.

In 1929, the Legislature passed a similar law purporting to authorize the Conservation Commissioner to “construct and maintain, for the use and pleasure of the public, a bobsleigh run or slide . . . and to clear the land necessary therefor.” *Association for Protection of Adirondacks v. MacDonald* (228 AD3d 73 [3d Dept. 1930]). The Appellate Division held that “the Legislature has no power” to sanction projects that violate the Constitution. *Id.* at 82. The Court of Appeals affirmed, holding that “chapter 417 of the Laws of 1929, permitting the erection of this bobsleigh slide and the destruction of trees is unconstitutional” and stating that “[t]rees could not be cut or the timber destroyed, even for the building of a road”. *Association for Protection of Adirondacks v. MacDonald* (253 NY 234, 240, 242 [1930]).

Likewise, trees cannot be cut for the maintenance of Prospect Mountain Veterans Memorial Highway Day Use Area in violation of the Constitution because the laws of 1954 and 1964 relating to the Prospect Mountain State Parkway and Prospect Mountain cannot supersede the Constitution. *Id.* A constitutional amendment, such as the one approved by the voters for the highway to the top of Whiteface Mountain, is necessary to carry out the proposed tree cutting. See *Protect the Adirondacks v. DEC* (37 NY3d 73, 81-82, fn 5 [2021]).

Withdraw the Proposed Action

In summary, the amount of tree cutting that is proposed in this Work Plan does not adequately ensure that the wild forest nature of the Forest Preserve is protected and as such it violates the “forever wild” clause of the Constitution. DEC must withdraw this proposed action and reconsider the proposed unconstitutional level of tree cutting that currently threatens to undermine the wild forest nature of the Forest Preserve. Any future action must ensure that there is compliance with Article 14 and that the proposed tree cutting can pass constitutional muster before a Work Plan is finalized. Additionally, following such reconsideration, any revised or modified Work Plan must comply with the analysis required by CP-78.

There are currently spectacular views from the Day Use Area (see photos below). While there is mature vegetation at Overlook Summit 3 (Eagle’s Eye), cutting all of the vegetation proposed in the draft Work Plan for all five summits is not necessary and does not appear to take into consideration the more distant terrain and other vegetation that block some views, even if the vegetation directly at the five summits is removed. Moreover, the cutting proposed attempts to create extremely broad, open, treeless areas that will change the character of the Day Use Area, and, as shown above, are unconstitutional. Again, we ask DEC to withdraw this Work Plan and reconsider the proposal.

On behalf of the Board of Directors of Protect the Adirondacks, please accept our gratitude for the opportunity to share our comments on this draft Work Plan.

Sincerely,

Claudia K. Braymer

Claudia K. Braymer
Deputy Director

cc: Megan Phillips, APA
Molly Breslin, Esq., DEC



View east/southeast from above Summit Overlook south



View north from Summit Overlook north



View north from Overlook 1