EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

January 17, 2014

VIA E-MAIL and FIRST CLASS MAIL
Joseph Martens, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-0001

Re: Potential Mining Operations in Jay Mountain Wilderness, Adirondack Forest Preserve

Dear Commissioner Martens:

We understand that, at a meeting of the Forest Preserve Advisory Committee ("FPAC") on January 10, 2014, the New York State Department of Environmental Conservation ("DEC" or the "Department") announced that it intends to publish a draft temporary revocable permit ("TRP") authorizing NYCO Minerals, Inc. ("NYCO") to engage in mineral sampling operations on designated wilderness land within the Adirondack forest preserve, notwithstanding the protections afforded to such land under the following statutes, regulations, plans, and policies:

- the Adirondack Park Agency Act, N.Y. Exec. L. §§ 800 *et seq.* (the "APA Act" or the "Act"),
- the Adirondack Park State Land Master Plan ("APSLMP"),
- the adopted Jay Mountain Wilderness Unit Management Plan ("UMP"),
- New York Environmental Conservation Law ("ECL") §§ 9-0101 *et seq.*,
- New York Codes, Rules and Regulations ("NYCRR"), tit. 6, parts 190-99 (the "Part 190 Regulations"), and
- DEC Program Policy, ONR-3, Temporary Revocable Permits for State Lands and Conservation Easements.

At the FPAC meeting, DEC evidently contended that, under *Durante v. Evans*, 464 N.Y.S.2d 264 (3d Dep't 1983), *aff'd*, 476 N.Y.S.2d 828 (N.Y. 1984), all of the foregoing law governing wilderness areas within the state forest preserve was abrogated with respect to "approximately 200 acres of forest preserve land contained in lot 8, Stowers survey, town of Lewis, Essex county" ("Lot 8"), when the voters approved Proposal Number Five last November.[1]

On behalf of Adirondack Wild: Friends of the Forest Preserve, Atlantic States Legal Foundation, Protect the Adirondacks!, and the Sierra Club, Atlantic Chapter, we respectfully suggest that *Durante v. Evans* does not support DEC's contention and that the provisions listed above remain in full force and effect. Although Proposal Number Five exempted Lot 8 from the "forever

[1] *See* New York State Board of Elections, Form of Submission of Proposal Number Five, An Amendment (2013), http://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalFiveFinal.pdf.

wild" mandate and other protections in article XIV, section 1, of the New York State Constitution, for the narrow purposes approved by the voters, the listed requirements remain unchanged, and the amendment imposed new requirements for implementing legislation. Accordingly, we request that within 15 business days DEC confirm the continuing applicability to Lot 8 of all non-constitutional protections for wilderness areas on forest preserve land, including those listed above and the following provisions:

- the State Environmental Quality Review Act ("SEQRA"), ECL article 8,
- 6 NYCRR Part 617 (State Environmental Quality Review),
- the State Administrative Procedures Act ("SAPA"),
- the Mined Land Reclamation Law ("MLRL"), ECL §§ 23-2701 *et seq.*,
- 6 NYCRR subch. D (Mineral Resources), and
- the Freshwater Wetlands Act, ECL article 24.

We also ask for confirmation at the same time that DEC will fulfill its obligations under all of those unaltered, non-constitutional provisions before permitting NYCO to conduct any minerals sampling operations in Lot 8 and that the Department will await passage of the implementing legislation required under the new constitutional amendment before authorizing any exchange of Lot 8 (in whole or in part) for other land. The legal analysis underlying our requests is set forth in brief below.

BACKGROUND

As long ago as 1885, the New York Legislature declared that State-owned lands in eight Adirondack counties were protected forest preserve.[2] In 1892, after the designation proved inadequate to afford the desired protection, the Legislature created the Adirondack Park, encompassing both the state forest preserve and private lands in the central region. *See id.* The Park now is "the largest publicly protected area in the contiguous United States, greater in size than Yellowstone, Everglades, Glacier, and Grand Canyon National Park combined."[3]

In 1894, the voters of New York amended the State Constitution, to give forest preserve land within the Adirondack Park a layer of protection beyond that afforded by previously enacted legislation. The new constitutional provision, effective in 1895, stated:

> 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.[4]

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[2] Adirondack Park Agency, State Land, http://apa.ny.gov/State_Land/index.html.

[3] Adirondack Park Agency, About the Adirondack Park, http://www.apa.ny.gov/About_Park/index.html.

[4] N.Y. Const. art. XIV, § 1 (formerly art. VII, § 7).

We understand that the State acquired Lot 8 at a tax sale in the early 1890s, prior to passage of the constitutional amendment in 1894. Lot 8 has remained forest preserve land since that time.

NYCO operates a wollastonite mine (the Lewis mine) on land it owns adjacent Lot 8. The open pit mine now plunges nearly eight stories down, and "[t]rucks the size of small buildings" haul out the rock.[5] NYCO hopes to expand the Lewis mine into Lot 8, but first it must conduct mineral sampling operations to determine the quality and quantity of wollastonite that exists there. The sampling operations initially would involve geologic mapping, core drilling, and trenching; if the initial exploration shows favorable results, "it is then necessary to extract a bulk sample of representative material from the deposit for additional testing to determine what marketable products can be produced."[6] If mining proceeds, it will require drilling and blasting to fragment the wollastonite prior to removal.[7] As is explained below, none of these activities are permissible on Lot 8 under current law.

LEGAL ANALYSIS

I. Passage of Proposal Number Five Gave the State the Option to Permit Exploratory Drilling on Lot 8, Subject to Compliance with Non-Constitutional Requirements Protecting Forest Preserve Land.

The recent passage of Proposal Number Five removed from Lot 8 the permanent and absolute constitutional protection afforded to other state-designated wilderness areas in the Adirondack forest preserve, for specific purposes identified in the text of the Proposal, but the amendment of article XIV, section 1, of the New York Constitution left intact all protections established in non-constitutional requirements. Those requirements must be followed if the State chooses to exercise its newly granted option to authorize mineral sampling operations on Lot 8. The following analysis outlines the implications of the constitutional amendment, summarizes the key applicable non-constitutional protections for Lot 8, and explains why *Durante v. Evans* does not excuse compliance with those provisions.

A. New York Constitution, Article XIV, Section 1

The constitutional amendment approved by the voters on November 5, 2013, directly addressed the provisions of article XIV, section 1, of the New York Constitution requiring that state forest preserve "be forever kept as wild forest lands," forbidding sale or exchange of forest preserve lands, and barring the sale, removal, or destruction of timber on those lands.[8] The amendment stated in pertinent part:

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[5] Brian Mann, *Mining Company Pushes for Adirondack Land Swap* (Oct. 9, 2013), http://www.northcountrypublicradio.org/news/story/22951/mining-company-pushes-for-adirondack-land-swap.

[6] Jessica E. Kogel, *et al., Industrial Minerals & Rocks: Commodities, Markets and Uses* 1031 (7th ed. 2006).

[7] *See id.*

[8] N.Y. Const. art. XIV, § 1.

> Notwithstanding the foregoing provisions, the state *may* authorize NYCO Minerals, Inc. to engage in mineral sampling operations, solely at its expense, to determine the quantity and quality of wollastonite on approximately 200 acres of forest preserve land contained in lot 8, Stowers survey, town of Lewis, Essex county provided that NYCO Minerals, Inc. shall provide the data and information derived from such drilling to the state for appraisal purposes. *Subject to legislative approval of the tracts to be exchanged* prior to the actual transfer of title, the state *may* subsequently convey said lot 8 to NYCO Minerals, Inc.. . . on condition that *the legislature shall determine* that the lands to be received by the state are equal to or greater than the value of the land to be conveyed by the state and on condition that the assessed value of the land to be conveyed to the state shall total not less than one million dollars.[9]

Following passage of Proposal Number Five, Lot 8 no longer must "be forever kept as wild," and the state may choose to allow its use for the limited purposes expressly stated in the text, but the amendment did not abrogate any other legal requirements.

Moreover, when it passed the concurrent resolution approving Ballot Proposal Five and sent it to the voters, the Legislature did not enact companion legislation enabling the relevant state agencies to change the use of forest preserve land or to exchange it for other land (as it did, for example, with Proposal Number Four), and such implementing legislation has not even been introduced. Therefore, all of the non-constitutional substantive and procedural safeguards for state forest preserve land, including Lot 8, continue in full force and effect, until they are amended in accordance with law. The amendment lifts the *constitutional* prohibition on mineral sampling operations in Lot 8 and on the exchange of Lot 8 for other land, but it does so subject to other unchanged legal requirements, subsequent legislative approval of the tracts to be exchanged, and legislative confirmation that the value of the land to be given to the State equals or exceeds the value of the forest land and have an assessed value of at least $1 million.

The language of the proposal that appeared on the November 2013 ballot confirms that the voters amended the Constitution to allow (but not require) the transfer under article XIV. In relevant part, the proposal stated:

> The proposed amendment to section 1 of article 14 of the Constitution would *authorize* the Legislature to convey forest preserve land located in the town of Lewis, Essex County, to

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[9] New York State Board of Elections, Text of Proposal Number Five, An Amendment (2013), http://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalFiveFinal.pdf (emphasis added).

NYCO Minerals, a private company that plans on expanding an existing mine that adjoins the forest preserve land.[10]

The proposal presented to the voters on the ballot also stated that, in exchange for Lot 8, NYCO would give the State land of at least equal value, which would be added to the forest preserve, and that NYCO would restore Lot 8 and return it to the forest preserve upon completion of the mining.[11]

In sum, the passage of Proposal Number Five removed for limited purposes the layer of special protection conferred by the New York Constitution, so the questions whether and to what extent Lot 8 may be developed or transferred now are governed only by non-constitutional legal requirements. Those statutory and regulatory requirements remain in effect, and they provide substantial, multi-layered protections for state forest preserve land. The State therefore may not approve mineral sampling operations on Lot 8 or conveyance of Lot 8 to NYCO, unless both approvals comply fully with those requirements, the key provisions of which are summarized below.

B. Adirondack Park Agency Act

In 1971, New York's Legislature enacted the APA Act "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."[12] To those ends, the Legislature also established the Adirondack Park Agency ("APA" or the "Agency") and gave the Agency until June 1, 1972, to adopt a master plan for management of state lands within the park.[13] Following gubernatorial approval of the APSLMP, as required under the Act, DEC was "authorized and directed to develop, in consultation with the agency, individual management plans for units of land classified in the master plan," which were to guide the development and management of State lands in the Park.[14] The Act also required periodic review, and permitted amendment, of both the APSLMP and the individual management plans, in the same manner as initially adopted.[15]

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[10] New York State Board of Elections, Form of Submission of Proposal Number Five, An Amendment (2013) (the "Ballot Language"), http://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalFiveFinal.pdf; *see also* New York State Board of Elections, Abstract of Proposal Number Five, An Amendment (2013), http://www.elections.ny.gov/NYSBOE/Elections/2013/Proposals/ProposalFiveFinal.pdf ("The proposed amendment would *allow* the State to convey approximately 200 forest preserve acres to NYCO Minerals for mining.") (emphasis added).

[11] *See* Ballot Language, *supra* note 10.

[12] N.Y. Exec. L. § 801.

[13] *See id.* § 803; APA, APSLMP, App. I (Oct. 2011) (setting forth original section 807(1) of the Act).

[14] APSLMP, App. I (setting forth original section 807(2) of the Act); *see* N.Y. Exec. L. § 816(1).

[15] *See* APSLMP, App. I (setting forth original section 807(3) of the Act).

1. Adirondack Park State Land Master Plan

The APSLMP, as amended by the Agency in consultation with DEC and approved by the Governor, currently provides a legally binding classification system and guidelines for the preservation, management, and use of state lands within the Park.[16] Recognizing that "the protection and preservation of the natural resources of the state lands within the Park must be paramount[,]" the APSLMP states unequivocally that "[h]uman 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.*"[17] The land classification system developed with that theme in mind includes nine basic categories, and the most strictly protected category is "wilderness."[18]

"Wilderness" is defined by the APSLMP as an area of state land "where the earth and its community of life are untrammeled by man."[19] Such land has "a primeval character, . . . which is protected and managed so as to preserve, enhance and restore, where necessary, its natural conditions."[20] There are 16 officially designated wilderness areas within the Park, representing nearly 85 percent of the designated wilderness in eleven northeastern states.[21] Lot 8 is within the Jay Mountain Wilderness Area.[22]

Guidelines for management and use of state lands within the Park are tailored to each category within the land classification system. The APSLMP provides: "The primary wilderness management guideline will be to achieve and perpetuate a natural plant and animal community where man's influence is not apparent."[23] Specifically, the APSLMP prohibits any new non-conforming uses within any designated wilderness area as well as any new structures or improvements that are not in conformity with finally adopted unit management plans.[24] All structures and improvements other than those specifically permitted are deemed to be non-conforming, and no structures or improvements associated with mining are listed.[25] Specifically, new roads are prohibited, and individuals other than administrative personnel are barred entirely from using motorized vehicles or equipment in wilderness areas.[26] Under the

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[16] *See* APSLMP at 1. Because the APSLMP is subject to gubernatorial approval, "it has been construed as having 'the force of a legislative enactment.'" *Adirondack Mountain Club Inc. v. Adirondack Park Agency*, 33 Misc. 3d 383, 837 (Sup. Ct. Albany Cnty. 2011) (citing *Helms v. Reid*, 90 Misc. 2d 583, 604 (Hamilton Cnty. 1977).

[17] *Id.* (emphasis added).

[18] *See id.* at 14.

[19] *Id.* at 19.

[20] *Id.*

[21] *See id.* at 19, 24.

[22] *See id.* at 62.

[23] *Id.* at 19.

[24] *See id.* at 19-20.

[25] *See id.* at 20-21.

[26] *See id.* at 21-22.

APSLMP, Lot 8 thus may not be used for minerals sampling operations; any approval of such operations will require the prior amendment of the APSLMP.

2. Jay Mountain Wilderness Area Unit Management Plan

Management of Lot 8 is governed by the UMP.[27] "The UMP provides a proactive and unified strategy for protecting the natural resources of the unit while allowing for public recreation."[28] The document also sets forth 15 management principles specific to wilderness areas, which guide management of the Jay Mountain Wilderness Area, including Lot 8. For example, the UMP states that "[a]ll management actions must consider their effect on the wilderness resource so that *no harm* comes to it."[29] Adirondack wilderness areas are to be preserved "as wild and natural as possible."[30]

The UMP specifically addresses the permissible extent of "Man-made Facilities," including boundary lines, trails, trail-heads, campsites or lean-tos, and signs.[31] Notably, the UMP recognizes that there is not a single maintained facility or improvement within the unit, and that the small size of the Jay Mountain Wilderness Area increases the risk that its wilderness character will be compromised by improvements.[32] Accordingly, the UMP provides:

> Therefore, no new trails are being proposed . . . in order to preserve the opportunities for solitude and primitive unconfined recreation that characterize the unit at present. In future revisions of this plan, new trails should only be proposed if necessary for resource protection.[33]

The UMP notes that there is not even a campsite or a lean-to in the Jay Mountain Wilderness Area and that none are needed, none are being proposed, and none will be proposed unless they are "absolutely necessary" for resource protection.[34] Rather, the overall management objective is to "[k]eep area wild/undeveloped."[35] Similarly, because "[p]ublic use is permitted to the extent that it does not degrade the physical, biological, and social characteristics of the area," the UMP recommends adoption of new regulations limiting the size of groups visiting the area for recreational purposes.[36]

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[27] *See* DEC, UMP (Aug. 2010), *available at* http://www.dec.ny.gov/docs/lands_forests_pdf/jmwump.pdf.
[28] *Id.* at ii.
[29] *Id.* at 71 (emphasis added).
[30] *Id.* at 72.
[31] *See id.* at 86-92.
[32] *See id.* at 46, 88.
[33] *Id.*
[34] *Id.* at 90.
[35] *Id.*
[36] *Id.* at 92

No use other than recreation is permitted by the UMP. A single half-mile dirt road of undetermined legal status is the only non-conforming use identified within the entire Jay Mountain Wilderness Area.[37] The use of the area for mining, including minerals sampling operations, plainly would be inconsistent with the current UMP. Accordingly, the fundamental premises of the UMP would have to be revised before Lot 8 could be used for such purposes.

C. Article 9 of the ECL, the Part 190 Regulations, and DEC Guidance

The UMP is designed to comply not only with the APSLMP but also with article 9 of the ECL ("Article 9") and its implementing regulations.[38] Article 9 confirms that all state-owned lands within Essex County (with a few exceptions inapplicable here) are "forest preserve" and confers upon DEC the "power, duty and authority to: 1. Exercise care, custody and control" of those lands.[39] Article 9 also empowers DEC to "[i]dentify, manage and conserve" rare plants, animals, and ecological communities on state-owned land under DEC's jurisdiction and to "[m]ake rules and regulations and issue permits for the temporary use of the forest preserve."[40]

To protect the state lands governed by Article 9, the Legislature banned the cutting, removal, injury, or destruction of trees (except in specific circumstances not relevant here), and prohibited the building of any structures without a DEC permit.[41] Article 9 also flatly proscribes—with no exceptions—the depositing of rubbish or any other waste on forest preserve lands or the lease or transfer of any such lands.[42] Thus, the Legislature would have to amend Article 9 before DEC could approve any use of Lot 8 that would require tree clearance or the depositing of waste or any transfer of Lot 8 in exchange for other land.

Pursuant to Article 9, the APA Act, and other provisions of federal and state law, DEC promulgated the Part 190 regulations, which govern the use of state lands.[43] To preserve the character of the lands governed by the Part 190 Regulations, DEC bars the erection of any permanent tent platforms or lean-tos on the lands.[44] The Part 190 Regulations also specifically provide: "The use of State lands . . . for private revenue or commercial purposes is prohibited" (except under circumstances not relevant here).[45]

Some of the Part 190 Regulations apply specifically to "Wilderness Areas in the Adirondack Park" and to the forest preserve.[46] Section 196.1 forbids the use of motorized vehicles in the

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[37] *Id.* at 96.
[38] *See id.* at 64.
[39] ECL §§ 9-0101(6), 9-0105(1).
[40] *Id.* § 9-0105(15), (19).
[41] *See id.* § 9-0309(1)-(2).
[42] *See id.* § 9-0309(4)-(5).
[43] *See* 6 NYCRR parts 190-99, *available at* http://www.dec.ny.gov/regs/2493.html.
[44] *See id.* § 190.5.
[45] *Id.* § 190.8(a).
[46] *Id.* §§ 190.13, 196.1-196.8.

forest preserve, except on specified roads and pursuant to a TRP. Even bicycles are prohibited in the Jay Mountain Wilderness Area.[47] The use or possession of motorized equipment within wilderness areas also requires DEC authorization or legal permission under an easement or use reservation, neither of which applies to Lot 8.

DEC also has published a formal program policy governing issuance of TRPs (the "TRP Policy"), which it revised in 2011. The TRP Policy states in pertinent part:

> The Department issues TRPs in its sole discretion for the temporary use of State Lands . . . *only* for activities that are in compliance with *all* constitutional, statutory and regulatory requirements; the Adirondack and Catskill State Land Master Plans; adopted Unit Management Plans . . . ; the APA/DEC MOU; Department policies; approved work plans and guidance documents; *and that have negligible or no permanent impact on the environment.*[48]

It will take more than 100 years to recover from the destruction of old growth trees that will be cut for roads through Lot 8, and any pit needed for bulk sampling or mining could be open indefinitely. Because NYCO's proposed mining operations within the Jay Mountain Wilderness Area, including sampling, thus are not in compliance with "all" of the listed requirements, plans, memoranda, policies, and guidance documents, and because those operations will have a far more than negligible or temporary impact on Lot 8, issuance of a TRP would violate DEC's stated policy and thus constitute an abuse of discretion.

Specifically, the TRP Policy identifies three types of TRPs: (1) an Expedited TRP, (2) a Routine TRP, and (3) a Non-Routine TRP.[49] An Expedited TRP may not be issued if trees will be cut, and thus may not be issued for the proposed mining.[50] A Routine TRP may be issued only for listed activities, none of which covers mining, and thus is inapplicable to the activities that NYCO proposes to undertake on Lot 8.[51]

To obtain permission to conduct minerals sampling operations on Lot 8, NYCO may attempt to invoke provisions of the TRP Policy that allow issuance of Non-Routine TRPs for "collection of . . . minerals . . . on State Land," for "surveying State Land for exploration purposes, including seismic (with required lease agreement), geodetic and mineral exploration," or for "any activity

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[47] *See id.* § 196.7(b).

[48] *See* DEC, DEC Program Policy, ONR-3, Temporary Revocable Permits for State Lands and Conservation Easements (May 26, 2011), http://www.dec.ny.gov/lands_forests_pdf/trppolicyfinal.pdf (emphasis added).

[49] TRP Policy at 2-4.

[50] *See id.* at 2,

[51] *See id.* at 3.

involving motorized equipment."[52] Even those provisions do not permit DEC to authorize NYCO's activities, however, because the TRP Policy expressly states that "Non-Routine TRPs will be issued only where they will result in negligible or no permanent impacts if conducted in compliance with the terms and conditions of the TRP."[53] Minerals sampling operations cannot be undertaken without permanently destroying the rich and complex forest of Lot 8, which contains ecologically significant stands of old growth, including trees more than 100 years old and 100 feet high.

Moreover, the TRP Policy expressly forbids issuance of a TRP for many of the activities inherent in minerals sampling operations. Under "Activities on State Land for which TRPs will not be issued," DEC lists:

> (2) Any activity which could . . . change the mandated use of the State Land.
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> (3) Any construction or installation of permanent facilities such as roads, bridges, trails, [or] structures . . . not authorized by law, deeded right or easement.
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> . . . .
>
> (8) Any activity not compatible with the purpose for which the State land was acquired or is managed. [54]

Those prohibitions, individually and collectively, preclude issuance of a TRP for NYCO's exploratory mining, unless the Legislature passes new legislation amending provisions of the New York Executive Law and ECL applicable to Lot 8 and enabling the APA and DEC to revise the APSLMP, the UMP, the Part 190 Regulations, and the TRP Policy. Only after all of those laws, plans, regulations, and policies are revised to allow mineral sampling operations within Lot 8, may DEC consider issuance of a TRP.

D. The State May Not Ignore Non-Constitutional Protections for Lot 8.

DEC has cited *Durante v. Evans* as grounds for disregarding the non-constitutional protections for Lot 8 described above. That case involved constitutional amendments that, read together, vested complete administrative powers with respect to all of the New York courts in the Chief Judge of the Court of Appeals. *See* 464 N.Y.S.2d at 266. Notwithstanding the amendments, five County Clerks claimed that they had the power to appoint deputy county clerks and counsel to the county clerks under two provisions of the County Law, *see* N.Y. County L. §§ 911-12 (last amended 1950), which conferred that power on them. Noting that the New York Court of Appeals previously had ruled that the constitutionally defined powers of the Chief Judge were

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[52] *Id.*

[53] *Id.* at 4.

[54] *See id.* at 5-6.

"complete" and embraced "'the power to deal with all personnel matters,'" the *Durante v. Evans* court held that the statutory provisions contravened what the Constitution "necessarily implies" and thus were abrogated by the amendments. *Id.* at 266-67 (citations omitted). Moreover, "[s]tatutes enacted as a result of the aforementioned constitutional amendments" reinforced the court's conclusion. *Id.*

The situation with respect to Lot 8 is very different. The constitutional amendment passed in 2013 states that the State "may" (has the option to, but is not required to) authorize minerals sampling in Lot 8 and potentially the conveyance of all or part of Lot 8 to NYCO. It is perfectly consistent with that amendment for the State to comply fully with existing non-constitutional legal requirements in deciding whether or not to allow the drilling or land transfer, and if the State did so the authorization would be denied, for the reasons explained above. It is also perfectly consistent with the 2013 amendment for the State to revise the statutes, plans, regulations, and policies that currently foreclose exploratory drilling on Lot 8 or its transfer to NYCO and, following those revisions and in compliance with applicable law, to permit NYCO to proceed. The Constitution does not mandate a decision either way; nor does it suggest that, if the State wishes to allow sampling operations on Lot 8, a permit may be granted in complete disregard of more than a century of vigilant protection for state forest preserve land. Rather, the 2013 amendment simply gives the State a choice that it previously did not have. The non-constitutional law described earlier does not prevent the State from making that choice and thus does not contravene "what the Constitution necessarily implies."

In addition, DEC's reading of *Durante v. Evans* has highly implausible consequences. The relevant constitutional amendments in *Durante v. Evans* abrogated the entirety of sections 911 and 912 of the County Law. The Department surely does not contend, however, that the 2013 amendment abrogated all of the non-constitutional protections for state forest preserve land outlined above. Rather, DEC must be suggesting that the amendment supersedes those requirements only as to Lot 8, and only temporarily, given that Lot 8 ultimately must be reclaimed and returned to the forest preserve, at which time it would receive the benefit of all of the protections allegedly voided by the amendment. We are familiar with no precedent holding that a constitutional amendment may carve out from otherwise fully effective law a partial abrogation that affects only one parcel over only a limited time, especially when—as is the case here –the amendment is not in direct conflict with the allegedly superseded law.

II. Any Agency Action Amending Plans and Regulations Applicable to Lot 8 Must Comply with Applicable Provisions of SEQRA and SAPA.

If the Legislature were to pass legislation enabling the APA and DEC to revise the APSLMP, the UMP, and the Part 190 Regulations, as required to permit mineral sampling on Lot 8 and its potential transfer to NYCO, the approval of those revisions would require compliance with SEQRA and, with respect to the regulations, SAPA. Under the regulations promulgated by the APA, the amendment of the APSLMP to reclassify Lot 8 from wilderness to a less restrictive category, which would be necessary before sampling could begin, is a Type I action likely to

require preparation of an environmental impact statement ("EIS") because it is "likely to have a significant impact on the environment."[55] Revisions of the UMP and the Part 190 Regulations to allow for minerals sampling within Lot 8 also would require preparation of an EIS, because the introduction of roads, motorized vehicles and equipment, and other elements of such operations into an area valued for more than 100 years for its primeval character unquestionably "may have a significant impact on the environment."[56] Only upon completion of the environmental review and applicable SAPA processes for, and approval (including gubernatorial approval, where required) of, the amendments of the APSLMP, UMP, and Part 190 Regulations could DEC revise its TRP Policy to allow issuance of a TRP for exploratory mining on Lot 8. Typically, revision of the TRP Policy would be subject to public review and comment, as it was when it was amended in 2011.[57]

III. Even After the Law Has Been Amended as Required, NYCO's Operations Remain Subject to Permitting Requirements under the APA Act, the MLRL, and the Freshwater Wetlands Act.

Assuming that the State lawfully revises all applicable non-constitutional provisions governing potential minerals sampling on and transfer of Lot 8, NYCO's operations still will be subject to the APA Act, the MLRL, and the Freshwater Wetlands Act.[58] Pursuant to those statutes and their implementing regulations, NYCO has operated its Lewis mine under APA and DEC permits, which have been amended numerous times as the scope of operations has changed. For example, NYCO obtained permit amendments in 2013, when it sought to expand the Excavation Area Boundary within the previously approved life of mine and to revise the Lot 8 setback description. If providing access to Lot 8 will require additional road building or other industrial operations on land owned by NYCO but outside the scope of its current permits, those permits will have to be amended again.[59]

A number of permits, in addition to the TRP required under article 9 of the ECL, will be needed for NYCO operations on Lot 8. APA approval will have to be obtained for sampling operations, if they affect freshwater wetlands.[60] Depending on the amount of material to be removed during those operations, a DEC permit under the MLRL also may be required.[61] If mining proceeds on Lot 8, new or amended permits would have to be obtained from both the APA and DEC. All of the permit approvals, as well as any agency approval of land transfer documents, would be governed by SEQRA. If more than 100 acres are involved in the exchange, it is likely that an EIS will be required.[62]

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[55] 9 NYCRR § 586.5(a)(6).

[56] 6 NYCRR § 617.1(c).

[57] *See* DEC, Guidance and Policy Documents, http://www.dec.ny.gov/regulations/397.html.

[58] *See* ECL §§ 24-0105(6), 24-0301(8), 24-0511, 24-0801, 24-0805.

[59] *See* 6 NYCRR parts 421-22. The permit amendments also would be governed by SEQRA.

[60] *See* N.Y. Exec. L. § 810; 9 NYCRR § 573.5(a); *see also* 9 NYCRR part 578 (governing freshwater wetlands).

[61] *See* MLRL § 23-2711.

[62] *See* 6 NYCRR § 617.4(b)(4), (6).

IV. Conclusion

The passage of Proposal Number Five removed only one layer of legal protection for Lot 8 and only for expressly specified purposes. Because no enabling legislation has been passed to implement the amendment of article XIV, section 1, of the New York Constitution, minerals sampling operations may not proceed on Lot 8, and Lot 8 may not be exchanged for other land, until, at a minimum, the Legislature passes new legislation revising the Executive Law and the ECL, and the relevant agencies implement the newly amended statutes by revising the APSLMP, UMP, Part 190 Regulations, and TRP Policy in compliance with SEQRA and SAPA. Following those revisions, additional land clearance on the Lewis mine site needed for the sampling operations on Lot 8 will be subject to the requirements of the APA Act, MLRL, and Freshwater Wetlands Act, and those laws will constrain activity directly on Lot 8 as well. To confirm DEC's agreement with our analysis, we respectfully request written notice within 15 business days of receipt of this letter that the Department acknowledges all of the foregoing legal prerequisites and intends to comply fully with them.

Should you have any questions, you may call my direct line: 212-845-7377 or reach me via e-mail at dgoldberg@earthjustice.org. Thank you for your consideration.

Respectfully,

Deborah Goldberg

Deborah Goldberg
Managing Attorney

cc: Andrew Cuomo, Governor (via First Class Mail only)
Basil Seggos, Deputy Secretary for Environment
Eric Schneiderman, Attorney General
Lisa M. Burianek, Deputy Chief, Environmental Protection Bureau, OAG
Dean Skelos, Senate Majority Leader
Sheldon Silver, Assembly Speaker
Mark J. Grisanti, Chair, Environmental Conservation Committee, Senate
Robert Sweeney, Chair, Environmental Conservation Committee, Assembly
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Leilani Ulrich, Chairwoman, and Members of the Board, APA (via First Class Mail only)
James T. Townsend, General Counsel, APA
Terry Martino, Executive Director, APA