



March 18, 2011

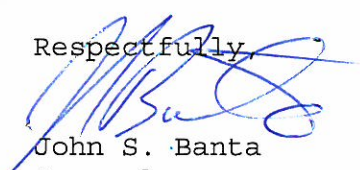
Office of the Commissioner
Attn: Louis A. Alexander
Assistant Commissioner
Office of Hearings and Mediation Services
625 Broadway
Albany, NY 12233-1010

RE: Matter of James W. McCulley
R5-20050613-505

Dear Assistant Commissioner Alexander:

An original and two copies of a brief supporting the Adirondack Park Agency's request for clarification of the Commissioner's May 19, 2009 decision in this matter are enclosed.

Respectfully,



John S. Banta
Counsel

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Enclosures

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STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 9 of the
Environmental Conservation Law and Title 6 Part 196.1 of
the Official Compilation of Codes Rules and Regulations of the
State of New York by:

JAMES W. McCULLEY

Respondent

**BRIEF
SUPPORTING
MOTION FOR
CLARIFICATION**

**VISTA Number:
R520050613-505**

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I. Statement of Interest of NYS Adirondack Park Agency

Under Executive Law § 816, the Adirondack Park Agency (the Agency) is charged with the responsibility for the administration of the Adirondack Park State Land Master Plan (the Master Plan) in consultation with the Department of Environmental Conservation (DEC). The Agency fully supports the Statement of the Case and the Statement of Facts set forth in the Department Staff "Brief Supporting Motion for Clarification" dated February 4, 2011. The Agency herein addresses three of the five points for clarification in the order they are presented in the DEC brief and in further support of the DEC staff argument:

First, Issue 3, criteria for statutory abandonment, arguing the Commissioner lacks jurisdiction over the Master Plan factual determination that the road was impassable and closed in 1987.

Second, Issue 5, the dismissal of Staff's case as a matter of law, arguing that the Master Plan text places the burden of proof on the respondent, not DEC, and therefore the DEC case cannot fail "as a matter of law."

Third, Issue 1, the obligation of the towns of Keene and North Elba to improve the route, arguing the Master Plan prohibits State authorization of improvements to the route of the "Old Military Road" or Old Mountain Road through the Sentinel Wilderness to create a way passable by motor vehicles.

The Agency reiterates that it is solely interested in clarification of the applicable law and does not seek reinstatement of any case against Mr. McCulley. Fundamentally, it is the Agency's position that the status of Old Mountain Road as abandoned was fully settled by Agency actions taken pursuant to the Master Plan in the 1970's and 1980's, and that there is no legal basis for revisiting that issue presented in the May 19, 2009 determination. The Agency sought intervention because the May 19, 2009 determination of the Commissioner has potentially material effects on the implementation and administration of the Master Plan, particularly in areas designated Wilderness under that Plan.

A. The Adirondack Park Agency

The Agency consists of a chairman, ten members, and an administrative staff. Three of its members are the Commissioner of Environmental Conservation, the Commissioner of Economic Development, and the Secretary of State or their respective designees, acting in an *ex officio* capacity. The Governor appoints the other eight members with the advice and consent of the State Senate, and designates one of them to serve as the chairman. *See* Executive Law § 803. The Agency has organized itself into standing committees which review matters for the Agency's full consideration and vote at the Agency's monthly meetings.

Among its duties and responsibilities, the Agency administers and periodically reviews the Master Plan and, in consultation with DEC, recommends amendments to it to the Governor for his approval, pursuant to Executive Law § 816 (formerly § 807). These recommendations include proposed classifications of newly acquired Forest Preserve and other State lands within the Adirondack Park or reclassifications of previously acquired State lands in accordance with the Master Plan. Initial Wilderness classifications and additions are accompanied by an “area description” which sets out facts related to the area involved and its conformance to the guidelines and criteria of the Master Plan. This includes “non-conforming” structures and uses known to be in the Wilderness area. In addition, the Agency is responsible for reviewing Unit Management Plans (UMPs) that DEC prepares for the units of State lands under its administration for consistency with the guidelines and criteria for the classification of these units under the Master Plan. The Agency is also assigned the responsibility for interpretation of the Master Plan.¹

B. The Adirondack Park State Land Master Plan

In Executive Law former § 807 of the Adirondack Park Agency Act, enacted in 1971 (L. 1971, ch. 706), the Legislature directed the Agency to prepare a master plan governing the management of forest preserve and other State-owned lands within the Adirondack Park by June 1972. Pursuant to that direction, the Agency prepared the Master Plan in June 1972 and former Governor Nelson A. Rockefeller approved the Plan on July 20, 1972 (“1972 Master Plan”). Since that date, the Master Plan has undergone major revisions in 1979 and 1987 and periodic updates to reflect the Governor’s approvals of the classifications of new State land acquisitions or reclassifications of existing State lands. The 2001 edition of the Master Plan includes the classification additions or revisions as of August 25, 2000.

Shortly after the 1972 Master Plan was approved, DEC promulgated regulations implementing the Master Plan’s management and use guidelines. In 1973, after the DEC Commissioner issued an order barring float planes from approximately 700 lakes that are completely surrounded by State-owned land classified as “Wilderness,” litigation was commenced to annul the order, DEC’s implementing regulations, and the Master Plan itself. A motion for a preliminary injunction against enforcement of the DEC regulations was denied. *Matter of Helms v. Diamond*, 76 Misc. 2d 253 (Sup.Ct., Schenectady Co., 1973). The action to annul the Master Plan itself was dismissed. *Matter of Helms v. Reid*, 90 Misc.2d 583, 604 (Sup. Ct., Hamilton Co., 1977). In upholding the Master Plan from a constitutional attack, the *Helms v. Reid* court noted that, in 1973, the Legislature enacted Executive Law § 816 of the Adirondack Park Agency Act, which amended Executive Law former § 807 to reflect the Governor’s approval of the Master Plan in 1972. This amendment of former § 807 thereby gave the Master Plan “the force of a legislative enactment.” See 90 Misc. 2d at 602, 604.

¹ The Agency is also separately responsible for the review of new land use and development and subdivision of the privately owned lands in the Park pursuant to the Adirondack Park Land Use and Development Plan, Executive Law §§ 805, 806, 809 and 810, and administers the NYS Freshwater Wetlands Act within the Park, ECL Article 24.

The Master Plan organizes the State lands into specific “units” and establishes a system for classifying the units according to their suitability and capacity for use, in parallel with the fundamental policies established by Article XIV of the New York State Constitution, which requires the Forest Preserve to be kept “forever wild.” The classifications are “Wilderness,” “Primitive,” “Canoe,” “Wild Forest,” “Intensive Use,” “State Administrative,” and “Historic,” each with its own management and use guidelines. The classifications and their respective management and use guidelines represent different levels of environmental protection in different recreational settings authorizing different levels of public use. *See* Master Plan, pages 14-16. The Master Plan then classifies the units of State land under this system. The classifications assigned to the State lands (and also the separate classifications of the privately owned lands) are depicted on a version of the Official Adirondack Park Land Use and Development Plan Map which the Agency maintains electronically and which it provides to the public.²

Guidelines in the Master Plan for new land acquisitions recommend that newly acquired State lands be classified “as promptly as possible following acquisition and in any case classification of new acquisitions will be done annually.” *See* Master Plan, pages 6, 8. However, the classification of newly acquired State lands can be a lengthy legislative process that requires an environmental assessment of alternatives, public review and comment, and the Agency’s resolution of competing public and private interests in the lands, which does not take effect until approved by the Governor. *See* Executive Law § 816(2). Similarly, major updates to the text of the Master Plan are called for at regular intervals, but also involve lengthy legislative-style hearings and since 1987, Master Plan updates have been primarily limited to classifications and related area descriptions. Consequently, the process of updating the Master Plan has not always been completed on an annual basis and the last comprehensive update to guidelines and criteria for management was implemented by the Governor in 1987.

Executive Law § 816(1) directs DEC to develop, in consultation with the Agency, individual UMPs for each unit of land under its jurisdiction classified by the Master Plan. UMPs must conform to the guidelines and criteria set forth in the Master Plan. DEC prepares an UMP or an UMP amendment with Agency staff input. After public review, DEC then presents the UMP or amendment to the Agency members for their determination whether the UMP or amendment conforms to the Master Plan’s guidelines and criteria or whether the UMP or amendment requires modifications. If the APA members determine that the final version of the UMP or amendment conforms to the Master Plan, the DEC Commissioner formally adopts the UMP or amendment.

² The electronic version of the Official Land Use and Development Plan Map shows: (i) the land use classifications of State-owned land on the State Land Master Plan Map and (ii) the land use classifications of privately-owned lands on the Official Adirondack Park Land Use and Development Plan Map. These two maps are separate maps, with their own legal identities and procedures for amendment. However, for administrative purposes, the Agency has combined the two maps in electronic form and provides copies of the electronic form to the public.

II. ARGUMENT

A. THE COMMISSIONER LACKS JURISDICTION OVER THE MASTER PLAN FACTUAL DETERMINATIONS THAT THE ROAD WAS IMPASSABLE FOR MANY YEARS AND CLOSED IN 1987.

1. The Master Plan describes a trail impassable except by snowmobile in 1979³, but yet to be barricaded, and in 1987 describes a road that had been closed, with notice to the municipalities involved and without objection prior to the initiation of the Plan revision approved by Governor Mario Cuomo in 1987.

The issue of old roads in the Forest Preserve is addressed with great specificity in the text of the 1972 Master Plan Wilderness area descriptions, and in particular in the Sentinel Range Wilderness area description. Each designated Wilderness area includes a list of non-conforming structures and uses. For the Sentinel Wilderness, this list includes a 3.5-mile snowmobile trail understood to be in the location of the "Old Mountain Road" at issue in this proceeding. The text of the Sentinel Wilderness description in the 1979 Master Plan states: "The only remaining non-conforming use includes the Old Military Road,⁴ a former town road 3.5 miles in length, which is generally not passable by motorized vehicles but has not yet been appropriately barricaded as required by wilderness guidelines." In 1987, the Master Plan states that there were no longer any non-conforming uses in the Sentinel Wilderness, and the area description includes the following reference: "The Old Military Road, a former town road 3.5 miles in length, has been closed and the area now fully conforms to wilderness standards." These determinations by the Governor in the Master Plan were made after extensive public review and debate, which in 1987 included considerable controversy regarding roads in other Wilderness areas. Furthermore, references were clear that the former town road was now a Wilderness area trail but had not been properly barricaded to snowmobile use until prior to the publication of the 1987 Master Plan.⁵ The text of the 1987 Master Plan was subscribed to by the Commissioner of Environmental Conservation, a voting member of the Agency board, at the time of the revision to its text, and former Governor Mario Cuomo approved it.

The area descriptions reflect factual conclusions and the guidelines and criteria of the Master Plan constrain the DEC in its management of State lands within the Park. The recognition of "non-conforming" uses and structures in the Master Plan is an inherently factual determination that provides direction to the DEC regarding the eventual removal of the non-conformance. Where a non-conformance is legally impossible to eliminate,

³ The contemporaneous NYS DOT 1969 base map data for this location shows the road terminus well short of the State land boundary.

⁴ "Old Military Road" is also known as the Old Mountain Road, the subject of the Commissioner's determination.

⁵ Note that the Adirondack Park Agency has recognized the North Elba-maintained road segment accessing private land in numerous permits. See, e.g., Permits 82-238, 94-205, 2004-49, 2006-200.

typically due to underlying property rights at variance with a Wilderness classification, alternate classification as a Primitive Corridor is available that recognizes the conflicting legal rights involved.

The determinations of the Master Plan regarding the “Old Military Road” or Old Mountain Road were never contested by the municipalities of Keene or North Elba at the time of the 1972, 1979 or 1987 Master Plan adoption (compare Master Plan, 1972, pg 29; Master Plan, 1979, pg 46; and Master Plan, 2001, page 66⁶). The Master Plan text was developed jointly by the Agency and the Department with formal public notice widely disseminated for each iteration of the Plan. Public hearings were held, and the updated Master Plan was ratified by each Governor after the promulgation of the 1972 text and the subsequent update to the APA Act in 1973. The State Land Master Plan had the force of a legislative enactment and the full text and legal effect should be incorporated in the analysis and determination in this matter. *See Helms v Reid*, 90 Misc.2d 583 [S. Ct. Hamilton Co. 1977]; *Baker v Department of Environmental Conservation of the State of New York*, 634 F. Supp 1460 (1986).

The Master Plan area description for each Wilderness area details structures and improvements that are non-conforming, and where appropriate includes a discussion of factors relating to their temporary or permanent retention. In the Town of North Elba, Wilderness areas in addition to the Sentinel Wilderness include the High Peaks Wilderness and the McKenzie Mountain Wilderness. The area description for the High Peaks Wilderness illustrates Master Plan treatment of a road whose retention is sought by the Town. The 1987 text states: “The South Meadows road is a town maintained public road which still extends about a mile east into the wilderness from the Adirondack Loj road. This non-conforming use should have been closed a decade ago. This road will be closed by March 31, 1987 and appropriate parking facilities provided within the 500 foot limit [for such facilities at a Wilderness boundary]. Closure of the road should enhance the wilderness character of the South Meadows area which is frequently used as a jumping-off point for trips into the remoter portions of the Eastern High Peaks.” From that point to Marcy Dam, the former town road has long been maintained as a trail that provides emergency access and allows periodic maintenance of a ranger facility at Marcy Dam, itself another non-conforming improvement whose removal has not yet been scheduled. The Master Plan cannot act to close the road under active town maintenance, and must await collateral action either by the Town or DEC and DOT, or all together to close the road. This remains a subject of negotiation as recognized in the UMP approved by the Agency and implemented by the DEC for the High Peaks Wilderness.

The continuation of the old road to Marcy Dam illustrates a closure in fact that has been a long-settled issue between the State and the Town of North Elba which is potentially reopened by the May 19 determination. The High Peaks Wilderness is also the location of other old, long-abandoned roads that have been actively maintained as trails by the DEC with the assistance of others including volunteers much like those that work with

⁶ The 2001 printing of the Master Plan includes changes to the 1987 Master Plan due to new acquisitions and classification actions, none of which involved the Sentinel Wilderness area. In other words, the 1987 language for the Sentinel Wilderness area is repeated unchanged in the 2001 printing of the Master Plan.

the Jackrabbit Trail on the Old Mountain Road. These are trails detailed in the UMP for the High Peaks Wilderness, a DEC document promulgated by the Commissioner which should be accessible on judicial notice should this be considered relevant to the clarification sought herein.

The determination places the status of both the South Meadow Road and the trail to Marcy dam in question. Within the same vicinity, there are other trails that occupy the track of 19th century roads including the High Peaks Wilderness trail through Indian Pass to Newcomb, whose status is potentially reopened by the determination. These are just two among many recreational trails that occupy the track of 19th century roads and are placed in question by the argument in the Commissioner's May 19 determination.

2. The interpretation of the Master Plan is assigned by law to the Adirondack Park Agency, not the Commissioner of Environmental Conservation, and the Commissioner lacks jurisdiction over its interpretation in an administrative proceeding before the Department.

Insofar as the May 19 determination contradicts or reverses the Master Plan and its management direction to the DEC, those elements are beyond the jurisdiction of the Commissioner.

The Master Plan provides:

“[I]t is well to remember that the legislature has established a two-tiered structure regarding state lands in the Adirondack Park. The Agency is responsible for long-range planning and the establishment of basic policy for state lands in the Park, in consultation with the Department of Environmental Conservation. Via the master plan, the Agency has the authority to establish general guidelines and criteria for the management of state lands, subject, of course, to the approval of the Governor. On the other hand, the Department of Environmental Conservation and other state agencies with respect to the more modest acreage of land under their jurisdictions, have responsibility for the administration and management of these lands in compliance with the guidelines and criteria laid down by the master plan.”

“In accordance with its administrative and management responsibilities, the Department of Environmental Conservation is charged with the duty to prepare, in consultation with the Agency, individual unit management plans for the units of land classified in the master plan....”

-- “The Agency will be responsible, as a policy matter, for general interpretations of the master plan itself either on its own initiative, at the request of any interested state agency, or, for state agencies other than the Department of Environmental Conservation, in connection with its review of state projects under Section 814 of the Act.”

* * *

-- "The Department of Environmental Conservation (or other appropriate state agencies) will be responsible for the application of the master plan and individual unit management plans with respect to administration and management of the state lands under its jurisdiction." (1987 Master Plan p. 12)

The May 19 determination contradicts the Master Plan in two essential respects. First, it rejects the factual characterization of the Master Plan with respect to Old Mountain Road, determining that it is an open town road as detailed above. Second, it provides for the potential construction, restoration and maintenance of the road directly contrary to the guidelines and criteria of the Master Plan for a Wilderness designated area, as detailed in point three below. In both regards, the Commissioner usurped the role and responsibility of the Agency as the entity charged by the Adirondack Park Agency Act and the Master Plan with its interpretation.

The Commissioner lacked jurisdiction over the interpretation of the Master Plan in this instance. Should the elements of the determination that contradict the prior administrative determination be justified by previously undisclosed errors of fact or errors of law, the Master Plan explicitly recognizes the Department capacity to raise the issue before the Agency:

Revisions will be undertaken as needs dictate and may be requested by the Agency, the Department of Environmental Conservation, the Department of Transportation or any other interested state agency.
(2001 Master Plan, p. 8)

The interpretations made were beyond the jurisdiction of the Commissioner in this proceeding.

B. THE MASTER PLAN TEXT PLACES THE
BURDEN OF PROOF ON THE RESPONDENT,
NOT DEC, AND THEREFORE THE DEC CASE
CANNOT FAIL "AS A MATTER OF LAW."

The text of the 1987 Master Plan determined clear conformance with all aspects of Wilderness area guidelines, which included closure of the former road to snowmobile use.

It should have been the burden of respondent McCulley to demonstrate, first, that the findings and conclusions of the Master Plan are in error with no basis in law or fact. The 1987 Master Plan is a settled determination and there is no basis in law for the Commissioner's determination to the contrary.

C. THE MASTER PLAN PROHIBITS STATE AUTHORIZATION OF IMPROVEMENTS TO THE ROUTE OF THE "OLD MILITARY ROAD" OR OLD MOUNTAIN ROAD THROUGH THE SENTINEL WILDERNESS TO CREATE A WAY PASSABLE BY MOTOR VEHICLES.

The Master Plan does not directly regulate the public. Rather, it governs the Department's actions implementing various Master Plan guidelines and criteria, including the prohibitions on road construction or motor vehicle use in Wilderness-classified areas. See, *State of New York v Town of Horicon*, 46 AD3d 1287 (3rd Dept. 2007); *Adirondack Council et al. v Adirondack Park Agency and Jorling*, unreported decision, Supreme Court, Essex County, August 1, 1988. By the text of the Master Plan, the Commissioner was prohibited from authorizing town highway department improvements in the Sentinel Wilderness.⁷

Wilderness Guideline 3 in the Master Plan provides: "No new non-conforming uses will be permitted in any designated wilderness area."

Wilderness Guideline 5 provides: "No new structures or improvements in any wilderness area will be constructed except in conformity with finally adopted unit management plans."

Wilderness Guideline 1 for motor vehicles, motorized equipment and aircraft states: "Public use of motor vehicles, motorized equipment and aircraft will be prohibited." These guidelines go on to limit administrative access with motor vehicles to "sudden, actual and ongoing emergencies involving the protection or preservation of human life or intrinsic resource values – for example, search and rescue operations, forest fires, or oil spills or similar, large scale contamination of water bodies."

Wilderness Guideline 1 for roads, snowmobile trails and state truck trails provides: "No new roads, snowmobile or state truck trails will be allowed." These guidelines go on to specify the removal of non-conformances by various dates (the most recent was March 31, 1987), and recognizing necessary phase-out periods, provides: "the use of motorized vehicles by administrative personnel for transportation of materials and personnel will be limited to the minimum required for proper interim administration and the removal of non-conforming uses; and, maintenance of such roads and [snowmobile] trails will be curtailed and efforts made to encourage revegetation with lower forms of vegetation to permit their conversion to foot trails and, where appropriate, horse trails."

⁷ See also Official NYS Freshwater Wetlands Map, Essex County, Map 14 of 51, 4/26/89. The map depicts a large freshwater wetland within less than 500 feet of the western terminus of the maintained town road in the Town of Keene, New York. Note that the NYS DOT base map used for this and other State mapping shows the town road terminus in this location and "...highways and drainage related to highway construction compiled in 1969 from construction plans, aerial photography dated 1969, and various other sources; road and street names and boundaries compiled from D.O.T. surveys and public records."

These sections of the Wilderness guidelines and criteria provide unequivocal direction to the Department to close non-conforming roads and snowmobile trails, as occurred in the Sentinel Wilderness as described in the 1987 Master Plan, and concurrently provides support for actions resulting in the conversion of such former roads to trails for varied non-motorized uses, and in particular horses, cross-country skiing and hiking. The only known use of this trail under State management was as a truck trail and/or snowmobile trail which were correctly eliminated in accordance with Master Plan Wilderness guidelines.