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FACSIMILE SERVICE NOT ACCEPTED

TELECOPY TRANSMITTAL

DATE: September 17, 2009
TO: Commissioner Alexander B. Grannis
COMPANY: NYS DEC
FAX NO: 402-8541
CC: James McClymonds, Chief Administrative Law Judge (402-9037)
Randall Young, Esq. (315-785-2242)
John Banta, Esq. (891-3938)
Marc Gerstman, Esq. (432-4200)
Governor David Paterson (w/ Sept. 8, 2009 Letter-Motion) 36 pp
Andrew Cuomo, Attorney General (w/ Sept. 8, 2009 Letter-Motion) 36 pp.
Senator Betty Little (w/ Sept. 8, 2009 Letter-Motion) 36 pp.
Assemblywoman Teresa Sayward (w/ Sept. 8, 2009 Letter-Motion) 36 pp.
FROM: Matthew D. Norfolk, Esq.
RE: DEC v. McCulley BN FILE NO. 1134

MESSAGE: Please see respondent's Supplement to Letter-Motion of September 8, 2009, attached. Original to be filed with affidavit of service by regular mail.

The information contained in this telecopy message is intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, or is the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this confidential communication is strictly prohibited. If you have received this message in error, please immediately notify us by telephone and return the message to us at the above address via the U.S. Postal Service. Thank You.

Thank you. Call if you have any questions.
Number of pages including this cover: 28

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FACSIMILE SERVICE NOT ACCEPTED

SUPPLEMENT TO LETTER-MOTION

September 17, 2009

Via Facsimile and First Class Mail

Commissioner Alexander B. Grannis
(Attn: Joan Leary Matthews, Associate Commissioner)
NYS Department of Environmental Conservation
Office of Hearings and Mediation Services
625 Broadway, 14th Floor
Albany, New York 12233-1010

Re: Matter of James W. McCulley
DEC Case No. R5-20050613-505

Dear Commissioner Grannis:

Please consider this letter as a supplement to respondent's motion, dated September 8, 2009, regarding improper and undisclosed ex parte communication between Adirondack Park Agency, Adirondack Council, DEC Staff and Commissioner Grannis. If my adversaries will require more time to respond to this supplement, I have no objection to a reasonable extension of time for them to submit a response. If necessary, I will file a separate motion. Please advise accordingly.

State Administrative Procedure Act §307 (2) states in pertinent part:

Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.

We recently received, and completed our review of, documents provided by DEC to our client, Mr. McCulley, in response to a FOIL request he filed some time back. It is unfortunate, but we have discovered that there has been ongoing, improper and undisclosed ex parte communication between "members or employees" of DEC and

"person[s]" and "part[ies]" in connection with issues of law and fact involved in the above-referenced administrative enforcement proceeding against Mr. McCulley. This communication is in direct violation of SAPA §307 (2). But for Mr. McCulley's request, DEC would have never disclosed the ex parte communication.

Enclosed are true and accurate printouts of email transmissions containing improper and undisclosed ex parte communication we obtained as a result of Mr. McCulley's FOIL request. As the enclosures demonstrate, DEC employees, including but not limited to Alison Crocker, Esq., Ken Hamm, Esq., Christopher Amato, Esq., Charles Sullivan, Esq., Rob Davies, Esq., and Judy Drabicki, Esq. regularly communicated with Dave Gibson of The Association for the Protection of the Adirondacks, Brian Houseal of Adirondack Council, Marc Gerstman, Esq., attorney for Adirondack Council and ex-DEC General Counsel, and Neil F. Woodworth, Deputy Executive Director of Adirondack Mountain Club.¹ The communication was often unsolicited and in some instances suggests that there was further ongoing communication between DEC employees and representatives of various private environmental interest groups not contained in the enclosures.

Below are examples of ex parte communication we have uncovered in addition to the letters from Adirondack Park Agency Chairman Curtis Stiles and Adirondack Council Executive Director Brian Houseal to you.

- On May 29, 2009, DEC employee Charles Sullivan, Esq. provided to Adirondack Council's attorney Marc Gertsman, Esq., via email, copies of DEC Staff and respondent's closing briefs submitted to Administrative Law Judge James T. McClymonds. This offering appears to be unsolicited and gratuitous.

- On June 9, 2009, at 11:06 am, DEC employee Ken Hamm, Esq. sent emails to Neil F. Woodworth, Deputy Executive Director of Adirondack Mountain Club, and Marc Gerstman, Esq., Adirondack Council's attorney, regarding "McCulley filings," that attached an unknown document relating to the administrative enforcement proceeding that was not provided in DEC's FOIL response. These emails appear to be unsolicited and gratuitous.

- On June 9, 2009, at 11:11 am, Marc Gerstman, Esq., attorney for Adirondack Council, sent a responsive email to DEC employee Ken Hamm, Esq. regarding "McCulley filings," thanking Mr. Hamm for sending him the unknown document relating to the administrative enforcement proceeding.

- On June 9, 2009, at 11:40 am, Neil F. Woodworth, Deputy Executive Director of Adirondack Mountain Club, sent a responsive email to DEC employee Ken Hamm, Esq. regarding "McCulley filings," thanking Mr. Hamm for sending him the unknown document relating to the administrative enforcement proceeding.

¹All DEC employees named are attorneys.

- On June 10, 2009, at 9:22 am, Adirondack Council's attorney Marc Gerstman, Esq. emailed DEC employee Judy Drabicki, Esq. (Region 6 Director) and informed her that he has reviewed DEC Staff's motion for clarification and finds it persuasive. Mr. Gertsman goes on to state that he will discuss with Adirondack Council its role in the proceeding. (It should be noted that I did not receive DEC Staff's motion for reconsideration and clarification until June 9.

- On June 10, 2009, at 9:55 am, DEC employee Christopher Amato, Esq. sent Dave Gibson of The Association for the Protection of the Adirondacks and Neil F. Woodworth, Deputy Executive Director of Adirondack Mountain Club, an email as an "FYI" that a motion for reconsideration and clarification was filed by DEC Staff against Mr. McCulley. This email appears to be unsolicited and gratuitous.

- On June 10, 2009, at 10:52 am, Neil F. Woodworth, Deputy Executive Director of Adirondack Mountain Club, sent DEC employee Christopher Amato, Esq. a thank you email in response to the notice that DEC Staff filed a motion for reconsideration and clarification in the enforcement proceeding against Mr. McCulley.

- On June 10, 2009, at 11:44 am, Dave Gibson of The Association for the Protection of the Adirondacks sent DEC employee Christopher Amato, Esq. a responsive email thanking Mr. Amato for the notice that DEC Staff filed a motion for reconsideration and clarification in the enforcement proceeding against Mr. McCulley. Mr. Gibson also stated, **"If you could provide any details, it would help us. If not, I understand and will closely keep in touch on this."**

- On June 10, 2009, at 11:44 am, Dave Gibson of The Association for the Protection of the Adirondacks sent DEC employee Ken Hamm, Esq. an email apologizing for not sending earlier The Association for the Protection of the Adirondacks' statement on this proceeding. The Association for the Protection of the Adirondacks written statement criticizing Commissioner Grannis' final decision was attached. Mr. Gibson also expressed his eagerness to learn more from DEC of the details of this proceeding against Mr. McCulley. Mr. Gibson stated, **"I look forward to hearing from you any details you are able to provide about the motion, and its reception, and any opportunities for the outside world to get involved."**

- On June 10, 2009, at 4:48 pm, DEC employee Christopher Amato, Esq. sent Dave Gibson of The Association for the Protection of the Adirondacks and Neil F. Woodworth, Deputy Executive Director of Adirondack Mountain Club, an email attaching a pdf. copy of DEC Staff's motion for reconsideration and clarification. This offering appears to be in response to Mr. Gibson's request to remain informed of the factual and legal issues involved in the proceeding and DEC's position on same, and clearly provides a roadmap for what arguments to make in favor of intervention and clarification.

- On June 11, 2009, at 1:50 pm, DEC employee Christopher Amato, Esq. sent Dave Gibson of The Association for the Protection of the Adirondacks and Neil F. Woodworth, Deputy Executive Director of Adirondack Mountain Club, an email attaching a pdf. copy of DEC Office of Hearings and Mediation Services' letter to me as respondent's attorney requiring a response to DEC Staff's motion for reconsideration and clarification by July 3.

- On June 12, 2009, at 1:59 pm, Dave Gibson of The Association for the Protection of the Adirondacks sent an email to DEC employee Christopher Amato, Esq., thanking Mr. Amato for sending him a copy of DEC Staff's motion for reconsideration and clarification in the enforcement proceeding against Mr. McCulley. Mr. Gibson stated to Mr. Amato that he is "**reading with interest, and passing along to Dale Jeffers in confidence. Please continue to keep us apprised, particularly with regard to opportunities to participate in the briefings.**" (Emphasis added.) As you probably know, Dale Jeffers is an attorney and was or is a trustee for The Association for the Protection of the Adirondacks. Mr. Jeffers also was or is "of counsel" to the Albany-based law firm of Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C. Mr. Jeffers through his personal law office and Lombardi, Walsh, Wakeman, Harrison, Amodeo & Davenport, P.C. has sponsored events for Adirondack Mountain Club.

- On June 12, 2009, at 2:28 pm, Dave Gibson of The Association for the Protection of the Adirondacks sent an email to DEC employee Ken Hamm, Esq., thanking Mr. Hamm for keeping Mr. Gibson and The Association for the Protection of the Adirondacks apprised of the administrative proceeding against Mr. McCulley.

- On June 26, 2009, DEC employee Alison Crocker, Esq. sent Marc Gertsman, Esq., attorney for Adirondack Council, an email, stating, "**Hopefully you have caught up with Ken [Hamm] and are aware that the Dept. will not oppose a Motion to Intervene.**"

- On July 8, 2009, DEC employee Ken Hamm, Esq., sent an email to Marc Gerstman, Esq., attorney for Adirondack Council, regarding "(no subject)" that had attached an unknown document relating to the administrative enforcement proceeding at Mr. Gerstman's "FOIL" request. It should be noted that FOIL requests to DEC are processed by DEC Records Access Officers, not Ken Hamm, Esq. Typically, DEC requires members of the public filing FOIL requests to complete a FOIL request form and pay \$.25 per page for copies made. There is no indication that Mr. Gerstman was required to complete a FOIL request form or pay for any documents he received.

In addition to foregoing ex parte communication recently uncovered, you should know that in the beginning of June, 2009, we discovered that DEC Administrative Law Judge James T. McClymonds provided individuals not parties to this proceeding a courtesy copy of the final decision in this matter. Only after being asked did ALJ McClymonds state in a letter that he sent a copy of the final decision to Westlaw, Albany Law School, Daniel Ruzow,

Esq. and Michael Gerrard, Esq. Enclosed are copies of my letter to ALJ McClymonds inquiring about his communication to individuals not a party to this proceeding, dated June 1, 2009, and ALJ McClymonds' letter, dated June 4, 2009, in response.

While ALJ McClymond's sharing of the final decision in this matter to non-parties may appear at first glance to be innocuous, identification of some of the recipients makes it suspect. Mr. Daniel Ruzow is an attorney and a partner at Whiteman, Osterman & Hanna. According to his law firm's website, Mr. Ruzow previously served as Assistant Commissioner and Counsel for Hearings of DEC and as SEQRA counsel for DEC. He was also an advisor to DEC on the 1987 and 1996 amendments to SEQRA regulations Mr. Ruzow.

Mr. Michael Gerrard of the law firm of Arnold & Porter in NYC is an environmental advocate and attorney. According to his firm's website, in 2007 he won the Environmental Advocates of New York, Advocate Award. Upon information and belief, Mr. Gerrard is also on the board of directors of EPL – Environmental Advocates, an organization that we believe has taken the same position on some environment issues as Adirondack Council. See EPL's website, <http://eplvotersguide.org/about.html>. In addition, Mr. Gerrard was or is on the board of directors of Environmental Advocates of New York. Finally, upon information and belief, Mr. Gerrard has been an attorney for Adirondack Communities Advisory League, and is affiliated with Natural Resources Defense Council.

Notably, when I asked ALJ McClymonds to also send the final decision in this matter to New York Snowmobile Association and Town of Keene and Town of North Elba officials, among others, he refused and referred me to DEC's website. There is no rationale basis for State officials and employees to voluntarily provide some members of the public access to information concerning pending administrative enforcement proceedings while denying others the same treatment and opportunity. Moreover, it is illegal.

It is evident that DEC has developed over the years a close alliance with various environmental groups and, in reality, has morphed into a State-sponsored environmental advocacy organization, itself, funded by the taxpayers of the State of New York. It is also evident that, in this administrative enforcement proceeding against my client, DEC Staff encouraged and invited The Association for the Protection of the Adirondacks, Adirondack Council, Adirondack Mountain Club and Adirondack Park Agency to file motions to intervene to keep alive the meritless prosecution of Mr. McCulley through ex parte communication in violation of SAPA §307 (2). This encouragement influenced Adirondack Council to seek to intervene.

Enough is enough. The facts and the law favor Mr. McCulley. DEC Staff and those environmental advocacy groups that oppose your final decision must face this reality.

Wherefore, on behalf of respondent, James W. McCulley, I hereby again demand Adirondack Council and APA's petitions to intervene and for clarification be stricken, that

Commissioner Alexander B. Grannis

September 17, 2009

Page 6

you recuse yourself as the decision-maker in this administrative proceeding and that all ex parte communication between you and your office, APA, DEC Staff, Adirondack Council and any other persons, organization or parties be disclosed immediately. In the alternative, we would be happy to have you immediately issue a decision denying the motions pending and discontinuing this enforcement proceeding once and for all.

Sincerely,

Briggs Norfolk LLP

By:

Matthew D. Norfolk

Encs.

cc (w/encs.): Mr. James W. McCulley

James T. McClymonds, Chief ALJ

Randall C. Young, Esq.

Marc S. Gerstman, Esq.

John S. Banta, Esq.

Governor David Paterson (w/ Sept. 8, 2009 Letter-Motion)

Andrew Cuomo, Attorney General (w/ Sept. 8, 2009 Letter-Motion)

Senator Betty Little (w/ Sept. 8, 2009 Letter-Motion)

Assemblywoman Teresa Sayward (w/ Sept. 8, 2009 Letter-Motion)

13/2009, Louis, Richard, New York, New York, 12111

From: [REDACTED]
To: [REDACTED]
CC: [REDACTED]
Date: 4/1/2009 2:08 PM
Subject: Re: Fwd: McCulley case

[REDACTED]

[REDACTED]

>>> "Phil Brown" <phil@adirondackexplorer.org> 4/1/2009 1:57 PM >>>
Yancey/Dave, has DEC issued a decision in the McCulley dispute over Old Mountain Road?

Phil Brown
Editor
Adirondack Explorer
36 Church St.
Saranac Lake, NY 12983
518-891-9352
Fax 518-891-9312
www.adirondackexplorer.org

From: Charles Sullivan
To: msgerstman@aol.com
CC: Hamm, Kenneth
Date: 5/29/2009 10:10 AM
Subject: McCulley matter
Attachments: EDMSPROD-#344141-v1-McCulley_respondent's_closing_brief.TIF; EDMSPROD-#279156-v2-McCulley_matter_using_motorized_vehicle_on_Forest_Preserve.WPD; EDMSPROD-#279156-v4-McCulley_matter_using_motorized_vehicle_on_Forest_Preserve.WPD

I attach copies of my brief opposing motion to dismiss and of my closing brief and of Respondent's closing briefs.

From: <Msgerstman@aol.com>
To: <krhamm@gw.dec.state.ny.us>
Date: 6/9/2009 11:11 AM
Subject: Re: McCulley filings

thank you.

In a message dated 6/9/2009 11:06:12 A.M. Eastern Daylight Time, krhamm@gw.dec.state.ny.us writes:

See attached

*****Download the AOL Classifieds Toolbar for local deals at your fingertips.
(<http://toolbar.aol.com/aolclassifieds/download.html?ncid=emlcnlusdown00000004>)

From: "Neil F. Woodworth" <adk@nycap.rr.com>
To: Kenneth Hamm <krhamm@gw.dec.state.ny.us>
Date: 6/9/2009 11:40 AM
Subject: Re: McCulley filings

Thank you, Ken

best, Neil

On Tue, Jun 9, 2009 at 11:00 AM, Kenneth Hamm <krhamm@gw.dec.state.ny.us> wrote:

> See attached

>
>

—
Neil F. Woodworth
Executive Director and Counsel
Adirondack Mountain Club
adk@nycap.rr.com

From: <Msgerstman@aol.com>
To: <jxdrabic@gw.dec.state.ny.us>
Date: 6/10/2009 9:22 AM
Subject: mcculley

Good morning Ms. Drabicki,

I have reviewed Mr. Young's Motion for Clarification and find the motion persuasively makes the case to reopen the Commissioner's Decision. I will be discussing the Adirondack Council's possible role in the proceedings with my client shortly.

Marc

*****Download the AOL Classifieds Toolbar for local deals at your fingertips.
(<http://toolbar.aol.com/aolclassifieds/download.html?ncid=emlcntusdown00000004>)

From: Christopher Amato
To: Gibson, Dave; Woodworth, Neil
Date: 6/10/2009 9:55 AM
Subject: McCulley Update

FYI, staff filed a Motion for Reconsideration and Clarification last week.

Christopher A. Amato
Assistant Commissioner for Natural Resources
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233
Phone: (518) 402-8533
Fax: (518) 402-9016

From: "Neil F. Woodworth" <adk@nycap.rr.com>
To: Christopher Amato <caamato@gw.dec.state.ny.us>
Date: 6/10/2009 10:52 AM
Subject: Re: McCulley Update

Thank you, Chris

best, Neil

On Wed, Jun 10, 2009 at 9:55 AM, Christopher Amato <caamato@gw.dec.state.ny.us> wrote:

- > FYI, staff filed a Motion for Reconsideration and Clarification last week.
- >
- > Christopher A. Amato
- > Assistant Commissioner for Natural Resources
- > New York State Department of Environmental Conservation
- > 625 Broadway
- > Albany, New York 12233
- > Phone: (518) 402-8533
- > Fax: (518) 402-9016
- >
- >

—
Neil F. Woodworth
Executive Director and Counsel
Adirondack Mountain Club
adk@nycap.rr.com

From: "David H. Gibson" <dgibson@protectadks.org>
To: "Christopher Amato" <caamato@gw.dec.state.ny.us>
Date: 8/10/2009 11:44 AM
Subject: RE: McCulley Update

Chris,

Thanks for this word. If you can provide any details, it would help us. If not, I understand and will closely keep in touch on this.

Best,

Dave Gibson
Executive Director
The Association for the Protection of the Adirondacks
www.protectadks.org
897 St. Davids Lane
Niskayuna, NY 12309
dgibson@protectadks.org
518-377-1452, Ext. 1

—Original Message—

From: Christopher Amato [mailto:caamato@gw.dec.state.ny.us]
Sent: Wednesday, June 10, 2009 9:56 AM
To: Neil Woodworth; Dave Gibson
Subject: McCulley Update

FYI, staff filed a Motion for Reconsideration and Clarification last week.

Christopher A. Amato
Assistant Commissioner for Natural Resources
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233
Phone: (518) 402-8533
Fax: (518) 402-9016

From: Christopher Amato
To: Gibson, David H.
CC: Woodworth, Neil
Date: 6/10/2009 4:48 PM
Subject: RE: McCulley Update
Attachments: McCulley.motion.pdf

Dave and Neil,

Here's a PDF copy of the staff's motion for reconsideration.

Christopher A. Amato
Assistant Commissioner for Natural Resources
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233
Phone: (518) 402-8533
Fax: (518) 402-9016

>>> "David H. Gibson" <dgibson@protectadks.org> 6/10/2009 11:44 AM >>>

Chris,

Thanks for this word. If you can provide any details, it would help us. If not, I understand and will closely keep in touch on this.

Best,

Dave Gibson
Executive Director
The Association for the Protection of the Adirondacks
www.protectadks.org
897 St. Davids Lane
Niskayuna, NY 12309
dgibson@protectadks.org
518-377-1452, Ext. 1

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From: Christopher Amato [<mailto:caamato@qwr.dec.state.ny.us>]
Sent: Wednesday, June 10, 2009 9:56 AM
To: Neil Woodworth; Dave Gibson
Subject: McCulley Update

FYI, staff filed a Motion for Reconsideration and Clarification last week.

Christopher A. Amato
Assistant Commissioner for Natural Resources
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233
Phone: (518) 402-8533
Fax: (518) 402-9016

From: Christopher Amato
To: Gibson, Dave; Woodworth, Neil
Date: 6/11/2009 1:50 PM
Subject: McCulley
Attachments: 06-11-09 Alexander Letter Setting Date For Response.pdf

Please see attached, in which OHMS gives McCulley until July 3 to respond to staff's motion.

Christopher A. Amato
Assistant Commissioner for Natural Resources
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233
Phone: (518) 402-8533
Fax: (518) 402-9016

From: "David H. Gibson" <dgibson@protectadks.org>
To: <krihamm@gw.dec.state.ny.us>
Date: 6/12/2009 2:28 PM
Subject: FW: McCulley Update

Ken,

Thanks very much to you as well. Please stay in touch on this.

Best,

Dave Gibson
Executive Director
The Association for the Protection of the Adirondacks
www.protectadks.org
897 St. Davids Lane
Niskayuna, NY 12309
dgibson@protectadks.org
518-377-1452, Ext. 1

—Original Message—

From: David H. Gibson [mailto:dgibson@protectadks.org]
Sent: Friday, June 12, 2009 1:59 PM
To: 'Christopher Amato'
Cc: 'adk@nycap.rr.com'
Subject: RE: McCulley Update

Thank you so much, Chris, for the Motion for Clarification and Reconsideration. I am reading with interest, and passing along to Dale Jeffers in confidence.

Please continue to keep us apprised, particularly with regard to opportunities to participate in the briefings.

My best,

Dave Gibson
Executive Director
The Association for the Protection of the Adirondacks
www.protectadks.org
897 St. Davids Lane
Niskayuna, NY 12309
dgibson@protectadks.org
518-377-1452, Ext. 1

—Original Message—

From: Christopher Amato [mailto:caamato@gw.dec.state.ny.us]
Sent: Wednesday, June 10, 2009 4:48 PM
To: David H. Gibson
Cc: Neil Woodworth
Subject: RE: McCulley Update

Dave and Neil,

Here's a PDF copy of the staff's motion for reconsideration.

Christopher A. Amato
Assistant Commissioner for Natural Resources
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233
Phone: (518) 402-8533
Fax: (518) 402-9016

>>> "David H. Gibson" <dgibson@protectadks.org> 6/10/2009 11:44 AM >>>
Chris,

Thanks for this word. If you can provide any details, it would help us. If not, I understand and will closely keep in touch on this.

Best,

Dave Gibson
Executive Director
The Association for the Protection of the Adirondacks
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Christopher A. Amato
Assistant Commissioner for Natural Resources
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233
Phone: (518) 402-8533
Fax: (518) 402-9016

From: "David H. Gibson" <dgibson@protectadks.org>
To: <krhamm@gw.dec.state.ny.us>
CC: <Drpadk@aol.com>, "Dale Jeffers" <DFJ@lrwhlaw.com>
Date: 6/10/2009 11:44 AM
Subject: FW: McCulley Update
Attachments: News Release, Old Mountain Road, Keene.doc

Dear Ken,

Here is a quick email from C. Amato today.

I promised to send you our statement and then I promptly forgot. Apologies. It is attached.

I look forward to hearing from you any details you are able to provide about the motion, and its reception, and any opportunities for the outside world to get involved.

Yours,

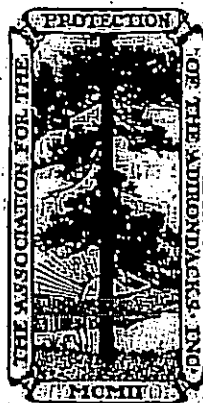
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Christopher A. Amato
Assistant Commissioner for Natural Resources
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233
Phone: (518) 402-8533
Fax: (518) 402-9016



News Release

**The Association for the
Protection of the
Adirondacks**

www.protectadks.org

May 22, 2009

For Immediate Release

Contact: Dave Gibson 518-377-1452, Ext. 1

or Dan Plumley, 518-576-4430

The Association for the Protection of the Adirondacks affirms Wilderness values along a State-owned trail connecting Keene and North Elba; DEC already has the legal authority to close the route to motorized use

Keene, NY – DEC has failed in its stewardship of an old route heavily used as a cross country ski, rock climbing and hiking destination through the Sentinel Range Wilderness Area. The Association for the Protection of the Adirondacks, long dedicated to high standards of wilderness stewardship and user management of the NYS Forest Preserve, believes that the DEC has the authority to prevent all terrain vehicle and snowmobile use from eroding the solitude that the public has come to expect here, as in all Adirondack and Catskill Wilderness areas.

This week DEC Commissioner Grannis ruled that his agency can not prevent motorized uses of this so-called Old Military or Mountain Road which forms the principle route for the Jack Rabbit Trail through this Wilderness area connecting Keene and North Elba. The Commissioner based his decision on the fact that the trail was never officially abandoned

From: Crocker, Allison (Allison Crocker)
To: Msgerstman@aol.com
CC: Hamm, Kenneth
Date: 8/26/2009 5:56 PM
Subject: Discussion with Ken

Hopefully you have caught up with Ken and are aware that the Dept will not oppose a Motion to Intervene.

From: "Marc Gerslman" <msgerslman@aol.com>
To: "Kenneth Hamm" <krhamm@gw.dec.state.ny.us>
Date: 7/10/2009 9:00 AM
Subject: RE: (no subject)

Thank you

—Original Message—

From: Kenneth Hamm [mailto:krhamm@gw.dec.state.ny.us]
Sent: Wednesday, July 08, 2009 11:08 AM
To: Msgerstman@aol.com
Subject: Re: (no subject)

See attached

>>> <Msgerstman@aol.com> 7/7/2009 2:00 PM >>>

Ken,
Pursuant to FOIL, please send a copy of Mr. McCulley's answering papers.
Thank you.
Marc

Marc S. Gerslman, Esq.
Law Office of Marc S. Gerslman
Robinson Square
313 Hamilton Street
Albany, New York 12210
518-432-4100
518-432-4200 (fax)

*****An Excellent Credit Score Is 750. See Yours in Just 2 Easy
Steps!
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June 1, 2009

Hon. James T. McClymonds
Chief Administrative Law Judge
NYS Dept. of Environmental Conservation
625 Broadway
Albany, NY 12233-1550

Re: DEC v. James W. McCulley
DEC No.: R520050613-505
BN File No.: 1134

Dear Judge McClymonds:

I am in receipt of your letter, dated May 20, 2009, together with a copy of the Decision and Order by Commissioner Grannis, dated May 19, 2009, enclosed. Surprisingly, in your letter you state that a copy of the Decision and Order is also being sent "to all other persons believed to have an interest in the matter."

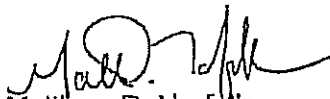
Please provide me with the list of the names of the persons you provided courtesy copies of the Decision and Order. If you have provided persons other than State employees with a copy of the Decision and Order, I request you also send the following persons a copy as well to ensure all persons representing different Interest groups or municipalities are put on notice by DEC:

1. Mike Fischer, President of New York Snowmobile Association;
2. Jeff Bling, President of NYSORVA;
3. Gene Spencer, President of Adirondack ATV Riders;
4. Carol W. LaGrasse, President of Property Rights Foundation of America, Inc.;
5. Paul Maggy, Northern Adirondack Mountain Bike Association;
6. Robert T. Politi, Supervisor, Town of North Elba; and,
7. William Ferebee, Supervisor, Town of Keene.

Thank you for your cooperation.

Sincerely,

Briggs Norfolk LLP

By: 
Matthew D. Norfolk

Hon. James T. McClymonds
June 1, 2009
Page 2

cc: Charles Sullivan, Esq.
Mr. James W. McCulley
Mr. Mike Fischer
Mr. Jeff Bling
Mr. Gene Spencer
Ms. Carol Lagrasse
Mr. Paul Maggy
Mr. Robert T. Politi, Supervisor, Town of North Elba
Mr. William Ferebee, Supervisor, Town of Keene

New York State Department of Environmental Conservation
Office of Hearings and Mediation Services, 1st Floor
625 Broadway, Albany, New York 12233-1550
Phone: (518) 402-9003 • Fax: (518) 402-9037
Website: www.dec.ny.gov



Alexander B. Grannis
Commissioner

Via Email and Regular Mail

June 4, 2009

Matthew D. Norfolk, Esq.
Briggs Norfolk, LLP
2284 Saranac Avenue
Lake Placid, New York 12946
Email: matt@briggsnorfolk.com

RE: Matter of James W. McCulley
DEC Case No. R5-20050613-505

Dear Mr. Norfolk:

I received your letter dated June 1, 2009, requesting a list of persons who received "courtesy copies" of the Commissioner Decision and Order in the above referenced matter. You also request that if persons other than State employees were provided with a copy of the Decision and Order, that other persons listed by you receive a copy as well.

In enforcement hearing proceedings, the usual practice of the Department's Office of Hearings and Mediation Services ("OHMS") is to provide a copy of a Commissioner's decision and order to the named respondent, the respondent's representative, if any, and Department staff's attorney (see 6 NYCRR 622.18[f]; State Administrative Procedure Act ["SAPA"] § 307[1]). In addition, OHMS distributes the order to various other Department officials, both in the Department's Central Office and the applicable Regional office. Copies of the Commissioner's orders are also sent electronically to various attorneys employed by the New York State Attorney General's Office and the New York Department of State.

The only non-State persons that regularly receive copies of Commissioner's orders are Westlaw, the Albany Law School library, Daniel Ruzow of Whiteman, Osterman & Hanna, and Michael Gerrard of Arnold and Porter, all of whom maintain repositories of all OHMS decisions, orders and rulings. In addition, if a member of the public contacts OHMS and requests a copy of a Commissioner's order, such a copy will be provided. Otherwise, no other non-State persons are provided a "courtesy copy" of any Commissioner decisions and orders in enforcement proceedings.

In the McCulley matter, OHMS received no requests from the public for copies of the Commissioner Decision and Order. Accordingly, the only non-State persons that received an electronic copy of the Commissioner's Decision and Order are Westlaw, Albany Law School, and Messrs. Ruzow and Gerrard, as previously noted.

As to the individuals you list in your letter, they may obtain copies of the Commissioner's Decision and Order on the Department's website. A PDF-formatted copy of the Order is located at www.dec.ny.gov/docs/legal_protection_pdf/mcculleydo.pdf; an HTML-formatted copy is located at www.dec.ny.gov/hearings/54774.html.

Please let me know if I can be of further assistance.

Sincerely,

/s/

James T. McClymonds
Chief Administrative Law Judge

cc: L. Alexander
J. Matthews
C. Sullivan

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LETTER-MOTION

September 8, 2009

Via Facsimile and First Class Mail

Commissioner Alexander B. Grannis
(Attn: Joan Leary Matthews, Associate Commissioner)
NYS Department of Environmental Conservation
Office of Hearings and Mediation Services
625 Broadway, 14th Floor
Albany, New York 12233-1010

Re: Matter of James W. McCulley
DEC Case No. R5-20050613-505

Dear Commissioner Grannis:

6 NYCRR §622.16 (d) states:

Parties or their representatives must not communicate with the ALJ or the commissioner, or any person advising or consulting with either of them, in connection with any issue without providing proper notice to all the other parties.

This rule forbids an ALJ or the Commissioner, and by extension, anyone in the decision-making chain, from communicating with any party or that party's representative in connection with any issue without providing proper notice to all other parties. The language of SAPA §307 (2) is similar. In addition, 22 NYCRR §1200.41 (b) [DR 7-110] prohibits an attorney from engaging in ex parte communication with an official of a tribunal in an adversary proceeding.

Adirondack Park Agency ("APA") and Adirondack Council both filed petitions to intervene to have your final decision in the above-referenced matter overturned. We learned over the past weekend that APA Chairman Curtis F. Stiles and Adirondack Council Executive Director Brian Houseal provided you with letters regarding the above-referenced matter and your final decision. However, neither Mr. McCulley nor I as his attorney of record was provided copies of these letters.

As you know, Mr. Stiles sent you a three-page letter discussing the merits of the proceeding in detail, arguing that you have made the wrong decision in the matter and pleading for you to "correct" your final decision so that it goes against Mr. McCulley. A true

Commissioner Alexander B. Grannis
NYS Department of Environmental Conservation
September 8, 2009
Page 2

and accurate copy of Mr. Stiles' letter to you is enclosed. Mr. Stiles' letter was copied to Department Staff through their attorney, Ms. Alison Crocker, DEC General Counsel, and APA attorney, Mr. John S. Banta.

As you also know, Mr. Houseal sent you a two-page letter expressing his concern of the precedent your final decision will have on roads in the forest preserve that were illegally closed by DEC and urging you to close Old Mountain Road. A true and accurate copy of Mr. Houseal's letter is enclosed.

With the filing of Adirondack Council and APA's petitions, as a matter of law and fairness, Mr. McCulley was entitled to disclosure of Mr. Stiles and Mr. Houseal's letters and an opportunity to respond to same as they are ex parte communication. You, as Commissioner, and Ms. Crocker and Messrs. Young, Banta and Gertsman, as attorneys for the others parties involved in this proceeding, were obligated to immediately disclose the existence of the letters and provide copies of same to me as Mr. McCulley's attorney. Unfortunately, this never happened. Your and the attorneys' failure to disclose Mr. Stiles and Mr. Houseal's letters is not only unseemly and inappropriate, but prejudicial to the administration of justice.

In addition to Mr. Stiles and Mr. Houseal's undisclosed communication, we recently learned that on at least one occasion Ms. Crocker has communicated with you in connection with the above-referenced proceeding. This ex parte communication also clearly violates 6 NYCRR § 622.16 (d). A true and accurate copy of Ms. Crocker's memorandum, dated March 6, 2009, is enclosed.

The foregoing examples of undisclosed ex parte communication raise serious questions of whether all relevant information is receiving equal consideration by you and ALJ James T. McClymonds in deciding the motions to intervene filed by DEC Staff, APA and Adirondack Council. They also cause Mr. McCulley and me to question whether more ex parte communication has occurred and gone undisclosed.

Based upon the foregoing, on behalf of respondent, James W. McCulley, I hereby demand Adirondack Council and APA's petitions to intervene and for clarification be stricken, that you recuse yourself as the decision-maker in this administrative proceeding and that all ex parte communication from APA, DEC Staff, Adirondack Council and any other parties be disclosed immediately.

Sincerely,

Briggs Norfolk LLP

By:

Matthew D. Norfolk

Encs.

cc: Mr. James W. McCulley

Commissioner Alexander B. Grannis
NYS Department of Environmental Conservation
September 8, 2009
Page 3

James T. McClymonds, Chief ALJ
Randall C. Young, Esq.
Marc S. Gerstman, Esq.
John S. Banta, Esq.
Allson Crocker, Esq.



NEW YORK STATE
Adirondack
Park Agency

CONFIDENTIAL INTRER-AGENCY COMMUNICATION
NOT FOR PUBLIC DISTRIBUTION

June 3, 2009

Alexander "Pete" Grannis
Commissioner
NYS Department of Environmental Conservation
625 Broadway
Albany, New York 12233

Dear Pete:

Re: DEC Case No. R5-20050613-505 (Alleged Violation of Article 9 of the ECL by James McCulley)

I am writing to express the Adirondack Park Agency's concern regarding the above-referenced matter.

I appreciate the complex issues associated with the McCulley matter; however, the Agency believes that your determination in this matter fails to take into account the legal effect of the Adirondack Park State Land Master Plan. As a result, it reaches the wrong conclusion, and provides a precedent that could lead to years of unnecessary litigation and conflict over long-closed motor vehicle roads, particularly in various Wilderness-classified portions of the Adirondack Forest Preserve.

The Department's recent determination that the Old Mountain Road, Towns of North Elba and Keene, Essex County, continues to be a town road is contrary to the State's factual determination in 1987 that the road was barricaded and abandoned in fact (Adirondack Park State Land Master Plan, page 66). Once the barricades were in place c. 1984, any observed public motor vehicle use was illegal under 6 NYCRR Part 190. The Master Plan position was developed jointly by the Agency and the Department and ratified by the Governor in 1987.

Alexander "Pete" Grannis
June 3, 2009
Page 2

In our view, the law does not support a 2009 transfer of legal responsibility and control of recreational use in the Forest Preserve from DEC back to a town or towns in the face of the uncontested 1987 Master Plan factual determination. Common sense suggests it is a mistake to use old non-Forest Preserve legal precedents which relied on recreational use to defeat private appropriation of town road rights of way.

We have not examined the administrative record or the specific manner in which the Department addressed its burden to establish this alleged violation and are only concerned with the legal conclusions drawn related to town road status. In that regard, the Master Plan conclusion regarding abandonment should be presumptive, shifting the burden of proof to show ongoing maintenance by the Town for vehicular traffic, not simply recreational use under the auspices of the Department and the Master Plan. In our view, the Master Plan conclusion is adequately supported in facts rooted in the time period from 1979 to 1993, and vetted in public hearings in 1985 that provided an opportunity for the communities involved to respond.

Mere maintenance of recreational uses by and on behalf of the State without any other attributes of a road such as access to private property, DMV-regulated vehicular use, or formal town assumption of ongoing maintenance and liability for public use, should not defeat the State's responsibility to implement the Master Plan Wilderness classification for State lands in the Forest Preserve.

There is a history of litigation relating to the status and effect of the Master Plan that establishes its authority. These cases begin with the issue of aircraft access in Wilderness, but also include more recent litigation regarding timber harvest and motor vehicle use in Wilderness. While the Master Plan does not directly regulate the public, it governs the Department's actions implementing various Master Plan guidelines and criteria, including the prohibitions on motor vehicle use in Wilderness-classified areas. See, *State of New York v Town of Horicon*, 46 AD3d 1287 (3rd Dept. 2007); *Helms v Reid*, 90 Misc.2d 583 (S.Ct. Hamilton Co. 1977).

An expeditious and decisive resolution of this dilemma is essential. It is also critical to correct the mischaracterization of the Master Plan and its effect in this matter. In addition, we support a formal abandonment proceeding provided by the Highway Law §212.

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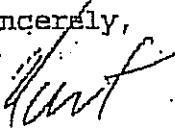
Alexander "Pete" Grannis

June 3, 2009

Page 3

I offer any resources we can bring to bear to assist in this outcome.

Sincerely,

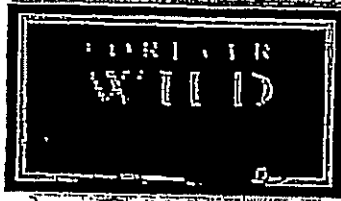


Curtis F. Stiles
Chairman

CFS:dal

c: Alison Crocker, Counsel, DEC
James E. Connolly
John S. Banta

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ADIRONDACK COUNCIL
Defending the Park's Greatest Wilderness

Adirondack Council Albany Office
342 Hamilton Street, Albany, New York 12210
Phone (518) 432-1770 Fax (518) 449-4839
www.adirondackcouncil.org

Fax Cover Page

To: Commissioner Grannis To Fax #: _____

From: Brian Houck Date: 6-1-09

Pages (including cover): 3

Message:

Letter on Old Mountain Road/
McCulley decision

The Adirondack Council is a not-for-profit organization with more than 18,000 members and is dedicated to ensuring the ecological integrity and wild character of the Adirondack Park.



ADIRONDACK COUNCIL

Defending the East's Greatest Wilderness

June 1, 2009

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EXECUTIVE DIRECTOR
BRUAN L. HOUSEAL

Commissioner Pete Grannis
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233

RECEIVED

JUN 2 2009

EXECUTIVE OFFICE

Re: Old Mountain Road, Sentinel Range Wilderness

Dear Commissioner Grannis:

The Adirondack Council strongly urges you to use your authority to permanently close the section of the Old Mountain Road which extends through the Sentinel Range Wilderness that was reopened to motorized traffic by your recent decision on the recommendation of State Administrative Law Judge James T. McClymonds in the case involving James W. McCulley. This decision potentially sets a precedent to reopen literally hundreds of miles of roads on the Forest Preserve that were abandoned, and will result in significant environmental damage and loss of their wild character.

This decision must not be the final word on the matter. As Commissioner, you have the authority to use the NYS Highway Law Section 212 to prohibit the use of motorized vehicles on this and other roads in the Forest Preserve that are affected by this decision.

It makes little or no sense that Old Mountain Road be opened to vehicular traffic. We believe ALJ McClymonds provided you with very sound advice in his final recommendation, "...I urge the Commissioner to consider exercising the authority vested in the Department under Highway Law § 212 to discontinue that portion of the Old Mountain Road that passes through the forest preserve as a town road and public right-of-way, and reopen the Road as a trail fully under the Department's jurisdiction."

The mission of the ADIRONDACK COUNCIL is to ensure the ecological integrity and wild character of the ADIRONDACK PARK.

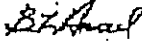
342 HAMILTON STREET ALBANY, NEW YORK 12210 tel 518-432-1770 fax 518-449-4839 info@adirondackcouncil.org
103 Hand Avenue, Suite 3 P.O. Box D-2 Elizabethtown, New York 12932-0640 TEL: 518-873-2240 FAX 518-873-6675

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We urge you to follow the Judge's recommendation and take immediate steps to close Old Mountain Road through the administrative process available to you. In addition, we suggest you have Forest Rangers and ECOs continue to treat all other roads that have been presumed to be closed as such and continue to cite violators.

Thank you for your consideration.

Cordially,



Brian L. Houseal
Executive Director

cc: Robert Davies

New York State Department of Environmental Conservation
Deputy Commissioner & General Counsel
Office of General Counsel, 14th Floor
625 Broadway, Albany, New York 12233-1500
Phone: (518) 402-9185 • FAX: (518) 402-9018
Website: www.dec.ny.gov



Alexander B. Grannis
Commissioner

MEMORANDUM

TO: Commissioner Grannis

SUBJECT: Litigation Advisory: *James W. McCulley v New York State Department of Environmental Conservation; Pête Grannis, Commissioner; et al.*

DATE: MAR 06 2009

James W. McCulley, a respondent in a Department administrative enforcement proceeding, commenced this Article 78 proceeding, the objective of which is to either dismiss the case against him or compel you to immediately issue a decision.

Since you are the ultimate decisionmaker in enforcement proceeding brought against Mr. McCulley, I am not going to discuss the merits of the underlying enforcement proceeding and shall instead focus on the case's processing, which lies at the base of Mr. McCulley's proceeding.

The underlying proceeding against Mr. McCulley was started in 2005, was the subject of a motion for order without hearing in 2006 and 2007 (which ultimately was denied) after the case was temporarily suspended as a result of federal litigation brought against the Department and several Department officers and employees, and then became the subject of a three day trial in November 2007. The hearing closed in April 2008 after both sides presented arguments on Mr. McCulley's dismissal motion and, should the dismissal motion be denied, on the merits and sentencing.

Essentially, Mr. McCulley complains that the respondents have failed to perform a duty enjoined upon them by law, which is to decide the matter within a reasonable time, by letting nearly one year pass without a decision having been issued.

I shall inform you of significant developments as they may arise in this case.

Alison H. Crocker
Deputy Commissioner
and General Counsel