

July 17, 2003

Honorable Margaret H. Marshall  
Chief Justice  
Supreme Judicial Court  
For the Commonwealth  
One Beacon Street  
Boston, MA 02108

Re: Sierra Club v. Commissioner of the Department  
of Environmental Management  
SJC – 08857  
Petition for Rehearing

Dear Chief Justice Marshall;

Plaintiffs respectfully petition for rehearing, pursuant to Rule 27 of Rules of Appellate Procedure, of this Court's decision issued July 14, 2003 in the above-referenced case on the grounds that the Court has overlooked or misapprehended certain significant points of law and fact.

Through its decision, the Court has given the Commissioner of the Department of Environmental Management ("DEM") extraordinary discretion in allowing a private party to destroy unique natural resources for a commercial venture on publicly owned parklands where that destruction is flatly inconsistent with the management plan for the parkland and without requiring a demonstration of need or public purpose for the project. In this case, the Court has lifted an injunction issued by the Superior Court, which now allows a private ski area operator, Wachusett Mountain Associates ("WMA"), to clearcut mature trees within an area buffering an Old Growth Forest on Wachusett Mountain designated in DEM's own management plan as a Biodiversity Significance Overlay Zone ("BSOZ") where such activities are prohibited. The Environmental Secretary directed that the BSOZ was to be managed in a "hands-off" manner (A-728) and DEM's own Board rejected the ski area expansion project (A-654, 1071).

With no support in the factual record before it, the Court found no inconsistency between DEM's management plan, including the BSOZ buffer zone, and the Commissioner's approval of clearcutting within this protected zone. The Court reached this decision based on an obscure document which was not in the record Appendix before the Court and was not relied on by WMA or the Commissioner. Accordingly, the Plaintiffs did not have an opportunity to comment on the document which was the cornerstone of the Court's decision. By this procedure, the Court has enabled private interests to outweigh the interests of the public in preserving Massachusetts' natural resources. The Court's decision substantially weakens (1) the protection available for special natural resources in our state forests and parks, and (2) the prospects for meaningful long term stewardship of those resources in the interest of Massachusetts residents.

1) The Resource Management and Protection Plan ("RMPP") for Mt. Wachusett is Inconsistent With The Proposed Snowboard Park Expansion.

The Court's July 14, 2003 decision allows WMA to clearcut and destroy 12.5 acres with over 2,000 mature trees in the Biodiversity Significance Overlay Zone ("BSOZ") established as a buffer to protect the Old Growth Forest. When the Environmental Secretary issued his Certificate approving the SFEIR for the ski expansion, the RMPP was only in draft form, and did not include the BSOZ. (A-736) The Final RMPP, which was not approved by the Secretary until five months after the Certificate approving the SFEIR (A-139), made a significant change in the draft by adding the BSOZ as an additional buffer to the Old Growth Forest. In his Certificate approving the Final RMPP the Secretary recognized that this new BSOZ was necessary to adequately protect the OGF, stating that "[t]he approximately 900 acre Biodiversity Significance Overlay will be managed in a 'hands-off' manner, to protect the maturing forests around the summit and allow them to regain an old growth character." (A-728) The BSOZ in the RMPP was the site-specific buffer for the Old Growth Forest as contemplated in DEM's Old Growth Forest Policy. Despite the plain inconsistency between the goals of the RMPP and the use restrictions in the BSOZ with the ski area expansion project, the Court held that the RMPP's biodiversity significance overlay zone "expressly envisions the type of work that WMA proposes for the leased ski area." With respect, the Court's conclusion is strained, at best, and it misapprehends the factual record presented by both Sierra Club and WMA.

In reaching its conclusion, the Court relied on language regarding "annual work plans" in a document that the Court referenced as being contained in Appendix I to the RMPP. Slip op. at 26. Appendix I, however, is not included in the record Appendix filed with the Court, it was not relied upon by WMA, the project proponent, and therefore the quoted language is not in any document before the Court. Nor are there any "annual ski area work plans" in the record. Moreover, the use of the term "annual work plans" in the RMPP does not support a conclusion that the ski area expansion is consistent with the RMPP. "Annual

work plans” is defined in the RMPP as “work plans for maintenance of ski trails within the Administrative limits,” not for new construction (A-970). This provision is consistent with the section of the RMPP that provides that the biodiversity significance overlay “will allow continued use and maintenance of the numerous hiking and skiing trails within the limits of the overlay, including any necessary infrastructure improvements (e.g. dam reconstruction at Echo Lake and Everett Pool, annual ski area work plans).” (A-974) The proposed clearcutting of 12.5 acres of mature public forest for the snowboard park cannot be deemed maintenance of trails, including “necessary infrastructure improvements.” That new trails were not contemplated in the BSOZ is evidenced by the fact that the proposed expansion is not included in §6.4.3 of the RMPP headed “Capital Improvement Recommendations,” which lists the proposed projects “consistent with the objectives of the RMPP.” (A.978-9)

While the Court acknowledges that the RMPP bans commercial silviculture (the selective cutting of trees and regeneration) in the BSOZ, it nonetheless and inexplicably holds that clearcutting all trees within a 12.5 acre swath of mature forest for a private commercial enterprise is not inconsistent with the silviculture ban. Slip op. at 26. Nothing cited by the Court, even the material relied upon that is outside the record, supports this conclusion. In reaching its result, the Court misapprehends the factual record before it.

## 2) The Commissioner Does Not Have Exclusive Authority Over the Permitting of the Project

The Court erroneously states that the judge ruled against the plaintiffs on the issue of the respective authority of the board and commissioner over the project. He did not. The judge noted: “Defendants’ ask me to rule that Chapter 287 of the Acts of 1977 makes the Commissioner the exclusive authority within DEM of what construction activities may occur on Mount Wachusett Reservation.” The judge responded: “I decline the invitation.” (A-122) The judge explained that to accept the defendants’ argument would render “meaningless” the statutory provisions for managing State Reservations, including the Board’s authority to adopt management plans for Mount Wachusett and the requirement that the Commissioner “act in accordance with the Board’s policies and plans.” (A-122-3) The judge recognized the Legislature’s decision to limit the Board’s “daily supervision of the Commissioner’s exercise of operational authority” and “to leave to other officials and institutions the responsibility and power to resolve conflicts between the Board’s exercise of authority and the Commissioner’s activities,” (A-174) referring in a footnote to the procedure in G.L.c. 30, §5. In directing the parties to this administrative procedure for resolving the dispute, the judge plainly did not consider that he had decided the issue.

However, despite the Court’s misconstruction of what the Superior Court decided, the decision recognizes that the commissioner is required to act “in accordance with such programs and policies as may from time to time be

promulgated by the board of environmental management” as provided in G.L.c. 21, §3. The Court then erroneously concluded that by approving the RMPP the board had promulgated a policy that contemplates the expansion of the ski area, as contained in a document not before the Court and to which defendants made no reference at any time during the proceedings. As discussed above, “annual work plans” in the BSOZ pertain to “maintenance,” including “necessary infrastructure improvements,” not to construction of new trails. The extra record document referred to by the Court provides for DEM approval of work plans for specific projects, after review and recommendations by the Wachusett Mountain Advisory Council (WMAC) and the Wachusett Monitoring Board (MB). Plainly, the board’s adoption of the RMPP cannot reasonably be construed as approval of all present and future specific projects in the ski area, all of which must be approved by a separate process involving DEM, WMAC and MB.

More importantly, however, the board clearly has stated its policy disapproving WMA’s particular expansion project, based in part on the project’s inconsistency with the RMPP. By a unanimous vote on August 10, 1999 the Board adopted the following policy:

“The Board of Environmental Management advises Commissioner Peter Webber that, given the current knowledge, the Board opposes construction of the Alpine Park. The Board believes the subject area has not been sufficiently studied to establish its environmental values; that alternatives have not been thoroughly presented and studied; and that proceeding without such information would be in non-compliance with the conservation zone established in the 1999 Resource Management and Protection Plan prepared for Board approval pursuant to Massachusetts General Laws Chapter 21, Section 2F.

Therefore, the Board advises the Commissioner, as a policy recommendation, that no approval of said Alpine Park trails proceed until such time as the above concerns are addressed.” (A-654)

The board reaffirmed its policy opposing WMA’s expansion project on July 17, 2000 when it formally adopted the RMPP (A-1069) and subsequently at the same meeting refused to approve WMA’s expansion project as requested by the Commissioner. (A-1071) The Court’s July 14, 2003 decision misapprehends the Superior Court’s decision on this issue and incorrectly concludes that the board approved the project.

3) The Environmental Impact Report (“EIR”) is required to address need for the project.

This Court held that the Superior Court improperly criticized the SFEIR as containing an inadequate analysis of the need for the expansion, stating that: “Neither the MEPA statute nor regulations contain any requirement that an EIR

should include analysis of the ‘need’ for the project itself. . . .” (Slip op. pp. 15-16). Sierra Club respectfully notes that the Court misapprehends the requirements of MEPA. Section 11.07(6)(e) 2 of the MEPA regulations provides that the EIR shall contain, inter alia, a detailed description of “the objectives and anticipated benefits of the project,” which is commonly referred to as a “needs” analysis. WMA conceded as much when it stated in its brief (p. 37) that the “decision-makers” must determine “whether there is a need for a project and whether it should be implemented.” WMA’s statements of the “perceived need” for the project referred to by the Court do not indicate that the project was needed to increase capacity or to provide any benefit to the public, particularly when balanced against the threatened harm to the Old Growth Forest and other public natural resources. Moreover, the safety issue raised by WMA pertained only to widening existing trails, which required cutting 4.5 acres of trees, not to constructing new trails in an Alpine Park for snowboarders, which required clearcutting 8 acres of mature trees. Indeed, separation of snowboarders from downhill skiers never was touted as a reason for the Alpine Park since snowboarders still will be allowed to use all of the existing downhill trails.

4) The Court Ignored Relevant Statutory Mandates

Finally, in reaching its decision the Court failed to give effect to several statutory mandates as set forth in the Order of the Appeals Court as support for granting a preliminary injunction (A-70-71), as follows:

“(f) the fundamental condition that the Commissioner’s exercise of any such power must be ‘consistent with the policy of the [C]ommonwealth’ (ibid.) that sites such as the Wachusett Mountain State Reservation (in the midst of which the challenged project is located) ‘shall insofar as practicable be preserved in their natural state . . . and . . . no commercial activities except those essential to the quiet enjoyment of the facilities by the people shall be permitted’ (G.L.c. 132A, §2B);

“(g) the mandate that the statutes at issue under which both the Board and the Commissioner derive their respective authority as well as their exercise of that authority must be construed in light of the authoritative interpretation by the Attorney General, to effect that any conflict between the Commissioner’s dual responsibilities, to conserve and increase natural resources while at the same time being concerned with the development of public recreation involving such resources, is to be ‘resolved by the legislative emphasis on the conservation aspect of [the Commissioner’s] duties’, 1966 Op. Atty. Gen. 335, 335; and

“(h) the overriding State policy canon that ‘[u]nless a clear contrary intent is manifested, all statutes shall be interpreted and administered so as to minimize and prevent damage to the environment’ (G.L.c. 30, §61). . . .”

This Court upheld the Appeals Court Order in a Memorandum of Decision and Judgment entered September 5, 2000. (A-81)

In view of the significant public interest in preserving the natural resources in the Wachusett Mountain State Reservation and WMA's announced intention of proceeding forthwith to clearcut over 2,000 mature trees in connection with its expansion project, Plaintiffs urge the Court to stay the effectiveness of its order vacating the permanent injunction entered by the Superior Court pending final action on the within petition.

Very truly yours

Thomas B. Bracken  
Counsel for Plaintiffs

cc: Steven Thomas, Esq.  
John Stevens, Esq.  
Irene Freidel, Esq.