

**New York State Department of Environmental Conservation**

**Deputy Commissioner & General Counsel**

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Alexander B. Grannis  
Commissioner

JAN 06 2010

Stephen F. Downs, Esq.  
26 Dinmore Road  
Selkirk, New York 12158

Re: In the Matter of the Petition of Save the Pine Bush, Inc.  
for a Declaratory Ruling Declaratory Ruling Numbers 08-03/11-08

Dear Mr. Downs:

Enclosed is the declaratory ruling in the above referenced matter.

For the reasons explained in the ruling, I find that the Department does not have license or permit authority regarding the Worm snake as a species of special concern. Based on 6 NYCRR 619.3(a), I decline to answer the second and third questions raised by Save the Pine Bush's petition since they do not raise a question of the applicability of any regulation or statute enforceable by the Department.

If you have any questions regarding the ruling, please contact Mark Sanza, Esq. or Larry Weintraub, Esq. of my office at (518) 402-9188.

Sincerely,

Alison H. Crocker  
Deputy Commissioner  
and General Counsel

Enclosure

c: M. Lenane  
C. Amato  
J. Sama  
G. Kelly, Region 4  
A. Marcuccio, Region 4  
K. Parker, Region 4  
Peter Innes, Region 4  
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STATE OF NEW YORK:  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Petition of Save the Pine Bush, Inc.  
for a declaratory ruling pertaining to the DEC's duty to  
protect the Eastern Worm Snake, generally, and in  
connection with the Tharaldson Residential Inn project  
in the Pine Bush

**DECLARATORY  
RULING**

Numbers: 08-03/11-08

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Save the Pine Bush, Inc., through its representative, Stephen F. Downs, Esq., petitions the Department of Environmental Conservation ("the Department" or the "DEC"), pursuant Part 619 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), for a declaratory ruling with respect to the following questions:

1. "What are the obligations of the Department of Environmental Conservation ("DEC") to protect Worm Snakes in general, and in particular the Eastern Worm Snakes [*sic*] present on or near the site of a proposed hotel/residence inn being developed by Tharaldson [Development Company] next to Crossgates Mall, in light of the fact that the Court of Appeals recently dismissed a petition and stay of construction of the project so that construction may now proceed? Specifically, does DEC have an obligation to take action to prohibit construction until Tharaldson obtains a permit pursuant to ECL 11-0103?"
2. "What are the obligations of the DEC and Tharaldson to fulfill certain obligations and agreements which they made for the protection of the Worm Snakes located on the hotel site, in connection with a Supplemental Environmental Impact Statement (SEIS) review of the Hotel project, as described in a letter from the DEC to the Albany Common Council dated December 15, 2008?"
3. "Can Tharaldson proceed with its development before the City of Albany has made SEQRA findings on the SEIS in light of the ruling of the Court of Appeals?"



## 1. THE DEPARTMENT'S LEGAL AUTHORITY TO ISSUE DECLARATORY RULINGS

Pursuant to Section 204 of the State Administrative Procedure Act ("SAPA"), on petition of any person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. The Department implements Section 204 of SAPA through 6 NYCRR Part 619. For the purposes of issuing a declaratory ruling only, the Department will assume that the facts alleged in the petition are true, subject to the caveat that the Department may take official notice of any fact not subject to reasonable dispute if it is either generally known or can be accurately and readily verified. 6 NYCRR 619.2(b). The Department will not assume the truth of statements which are legal conclusions. Under 6 NYCRR §619.3(a), the Department may decline to issue a declaratory ruling if the petition does not raise a question of the applicability of any regulation or statute enforceable by the Department.

## 2. BACKGROUND

This ruling is based on the facts provided in the petition dated November 6, 2009, and for the purpose of discussion those facts will be assumed to be true. The Department may also take official notice of a fact not subject to reasonable dispute if it is either generally known or can be accurately and readily verified. *See* 6 NYCRR 619.2(b).

In addition to the facts set out in your letter, I take official notice of the facts described in *Save the Pine Bush, Inc. v. Common Council of the City of Albany*, 2009 NY Slip Op 7667 (October 27, 2009)<sup>1</sup> and in the Department's correspondence regarding the Tharaldson development. Specifically, Tharaldson Development Company ("Tharaldson") applied to the Common Council of the City of Albany for a zoning change to construct a hotel on Washington Avenue Extension in the City of Albany in close proximity to the Albany Pine Bush Preserve (*see* ECL Article 46). The City of Albany served as "lead agency" in the State Environmental Quality Review ("SEQR") process. While initially there was some question as to whether the Department was an involved agency predicated on the applicant's possible need for the Department to issue a license under ECL §11-0535 for the taking of Karner blue butterflies or their habitat, the Department ultimately determined that it was not an involved agency. The applicant sought coverage under the general permit for stormwater under the State Pollution Discharge Elimination System or "SPDES" (ECL Article 17), which does not involve a discretionary approval. The Department participated in the SEQR process as an "interested agency."

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<sup>1</sup> In that case, the DEC appeared as *amicus curiae* and filed a brief limited to the issue of standing.



In the scoping phase for the environmental impact statement ("EIS"), the Department's staff issued a letter asking the City to assess the impact of the development on the Worm snake, the Eastern Hognose snake, and Karner blue butterflies, among other species. After the City issued findings and approved the zoning change, Save the Pine Bush commenced an Article 78 proceeding in which it claimed, *inter alia*, that the City had failed to take a hard look at the impact of the development on the Worm snake. The Supreme Court and Appellate Division agreed with Save the Pine Bush's contention and annulled the City's approval. The Court of Appeals in Save the Pine Bush, *supra*, reversed the lower courts and sustained the City's SEQR review. In the interim between the lower court and Court of Appeals' decisions, a supplemental EIS was prepared. As part of the supplemental process, Tharaldson agreed to some mitigation measures through which it attempted to address the impact of the development on the Worm snake. These measures are set out in a letter dated December 15, 2008 from Angelo R. Marcuccio, DEC Environmental Analyst, to Richard Nicholson, Planner, City of Albany. The City, however, has not issued findings based on the supplemental EIS.

### 3. SUMMARY

I accept the first question for declaratory ruling since the Department implements Article 11 of the Environmental Conservation Law ("ECL Article 11"), and more particularly ECL §11-0535 related to Endangered and Threatened Species. As for the second and third questions, which are SEQR related, for the reasons stated below, I decline to answer these questions.

### 4. OPINION

#### First Question

The obligations of the Department to protect the Worm snake (*Carphophis amoenus*) and Eastern Hognose snake (*Heterodon platyrhinos*)<sup>2</sup> in general, and in particular to any such species present on or near the site of the proposed hotel/residence inn being developed by Tharaldson in the Albany Pine Bush, are the same as for any other species of special concern found in New York.

6 NYCRR Part 182 contains the Department's lists of endangered and threatened species of fish and wildlife, and species of special concern in New York. "Species of

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<sup>2</sup> Petitioner's request for a declaratory ruling does not mention the Eastern Hognose snake. However, inasmuch as both species were at issue in the Tharaldson development, they are discussed together herein.



special concern" are defined as "species of fish and wildlife found by the department to be at risk of becoming threatened in New York. Species of special concern do not qualify as either endangered or threatened, as defined in subdivisions (g) and (h) of this section at this time." 6 NYCRR 182.2(i). Both the Worm Snake and Eastern Hognose snake are listed as species of special concern in 6 NYCRR 182.6(c)(5)(v) and (vi).

The Department is not authorized to require a permit for the "taking" of any species of special concern in New York. Environmental Conservation Law ("ECL") § 11-0535(2) provides as follows:

Notwithstanding any other provision of this chapter, the taking, importation, transportation, possession or sale of any endangered or threatened species of fish, shellfish, crustacea or wildlife, or hides or other parts thereof, or the sale or possession with intent to sell any article made in whole or in part from the skin, hide or other parts of any endangered or threatened species of fish, shellfish, crustacean or wildlife is prohibited, except under license or permit from the department.

This statute forbids the taking of any endangered or threatened species, defined as those so designated by the Department (and by the Secretary of the Interior as adopted under the federal Endangered Species Act – 16 U.S.C.A. §§ 1531 to 1544 [50 CFR 17.11 to 17.12]), but it does not apply to species of special concern. Similarly, 6 NYCRR 182.4 provides that:

The department may, at its discretion, issue a license or permit to a person to take, transport, sell, import and/or possess endangered or threatened species of fish and wildlife for purposes it deems legitimate. Such license or permit shall state the species to which it applies and any other conditions the department may deem appropriate.

While a recent amendment to ECL § 11-0535 (L.2005, c. 706) added a new subdivision providing the Department with authority to promulgate regulations for, among other things, the "taking" of species of special concern, the Department has yet to promulgate any such regulations:

Notwithstanding any other provision of this chapter, the department may promulgate regulations to the taking, importation, transportation, possession or sale of any species of special concern as the department



deems necessary for the proper protection of such species. [ECL § 11-0535(3)].

Moreover, this new subdivision did not extend the statutory requirement of a permit from the Department to species of special concern. *See* ECL § 11-0535(3). To be sure, the Department's lack of permitting authority over species of special concern (such as the Worm snake and Eastern hognose snake) under ECL § 11-0535 was made clear in the Department's correspondence dated August 13, 2008, November 25, 2008, and December 15, 2008 to the City of Albany (Richard Nicholson, Planner) concerning the Tharaldson proposal. Nevertheless, in its December 15, 2008 letter the Department endorsed several mitigation measures and made additional suggestions to Tharaldson that would serve to protect, and reduce impacts to, the snake species of special concern located at the proposed development site.

Accordingly, given the foregoing, particularly the fact that the Worm snake and Eastern Hognose snake are both listed as species of special concern (and not endangered or threatened), the Department does not have the authority to require Tharaldson to obtain a license or permit under ECL § 11-0535 to prohibit the taking of either species in connection with, or incidental to, Tharaldson's development of the proposed hotel/residence inn.

#### Second and Third Questions

It is beyond the Department's declaratory ruling authority to decide the second and third questions as these portions of the petition do not raise a question of the applicability of any regulation or statute enforceable by the Department. *See* 6 NYCRR 619.3(a). Both questions involve SEQR and its application to the Tharaldson development. While the Department is charged with issuing regulations implementing SEQR, the Department has no authority to review the application of SEQR by other agencies. *See* DEC Declaratory Ruling 8-01 (1984).

As a note of further explanation, essentially, the second question asks the Department for a declaratory ruling on the validity of the supplemental EIS process that preceded the Court of Appeals' decision, and any agreements Tharadson made with the City of Albany and the Department stemming from that process. The Department has no authority to interpret the Court of Appeals' decision and its meaning with respect to the City of Albany's remaining duties in reviewing Tharaldson's hotel project or Tharaldson's obligations stemming from the supplemental EIS.



The Department's ability to enforce the mitigation measures set out in the December 15, 2008 letter are limited by the fact that the Department was not an involved agency in the SEQR process for the hotel. As a result, the Department does not make findings or issue permits for the hotel.

On the third question, the Department has no authority to render a declaratory ruling on whether the City of Albany must make SEQR findings on the Supplemental EIS.

## 5. CONCLUSION

Based on the foregoing, I conclude that the Department does not have license or permit authority regarding the Worm snake as a species of special concern. Based on 6 NYCRR 619.3(a), I decline to answer the second and third questions since they do not raise a question of the applicability of any regulation or statute enforceable by the Department.

Finally, in past years, the State has made great efforts to protect the Pine Bush Preserve and its environs. *See* ECL Article 46 (McKinney's 2008). What lies beneath these efforts and the work being done to save threatened and endangered species, as well as species of special concern in the Pine Bush, is the paramount policy objective of preserving the overall habitat of the Albany Pine Bush Preserve against encroaching development. Protection of the Worm snake and other species of special concern contributes to protection of the habitat as well as the species themselves. Accordingly, notwithstanding whether the Department has specific permitting jurisdiction to protect the Worm snake, or the ability to make SEQR findings, the Department would hope that the City and Tharaldson would honor the commitments set out in the December 15, 2008 letter. As stated in the legislative findings for SEQR, "[i]t is the intent of the legislature that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future



generations." In the case at hand, this expectation may be met through the measures already agreed to for protection of the Worm snake and as a consequence the Department urges both the developer and the City of Albany to carry through with those measures.



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Alison H. Crocker  
Deputy Commissioner  
and General Counsel

Dated: January 6, 2010