STATE OF NEW YORK
COUNTY OF ALBANY SUPREME COURT

In the Matter of the Application of

SAVE THE PINE BUSH, REZSIN ADAMS, JOHN WOLCOTT, LYNNE JACKSON, SANDRA CAMP, RUSSELL ZIEMBA, SHARON CASTERLIN, PAULA SPRATT, SALLY CUMMINGS, CLAIRE NOLAN, GRACE NICHOLS, JAMES A. TRAVERS III, and TIM TRUSCOTT,

Petitioners,

Index No.

for judgment pursuant to Article 78 of the CPLR

RJI No.:

-against-

The NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and the CITY OF ALBANY,

Respondents.

VERIFIED PETITION

Peter Henner
Attorney for Petitioners
P.O. Box 326
Clarksville, NY 12041
Tel. No. (518) 768-8232
Fax. No. (518) 768-8235

Dated: October 19, 2009

Table of Contents

Petitioners respectfully allege as follows:

INTRODUCTION

1. This Article 78 proceeding seeks: 1) to annul the determination of the New York State Department of Environmental Conservation ("DEC") to issue five environmental permits to the City of Albany to expand its landfill (a copy of the permit document, referencing all five permits, is annexed hereto as Exhibit A), and 2) to enjoin the issuance of bonds by the City of Albany.

2. The permits will enable the City of Albany ("Albany" or "the City") to construct and operate a fourth expansion (known as the "Eastern Expansion") of the Rapp Road Landfill into an environmentally sensitive area known as the Albany Pine Bush ("Pine Bush"). Petitioner Save the Pine Bush is dedicated to the preservation and protection of the Pine Bush, and believes that the City's proposed landfill expansion should be stopped because it represents a taking of an irreplaceable and unique ecological area, and the City should not be permitted to take it for the purposes of an ill-considered landfill.

3. Petitioners Save the Pine Bush and individual petitioners (collectively referred to as Save the Pine Bush in this proceeding), maintain that the determination of DEC to approve the Eastern Expansion should be overturned and annulled because:

   a. DEC violated its own procedural regulations, specifically 6 NYCRR Parts 621 and 624, when it refused to conduct a formal adjudicatory hearing before issuing permits for the Eastern Expansion,

   b. the permits, particularly the permit to operate a solid waste management facility under 6 NYCRR Part 360, do not comply with regulatory criteria, and

c. DEC failed to comply with the New York State Environmental Quality Review Act ("SEQRA"), Article 8 of the Environmental Conservation Law. At the conclusion of the environmental review mandated by SEQRA, DEC issued a Findings Statement as explicitly required by SEQRA (see ECL § 8-0109 (8)). A copy of the Findings Statement prepared for the Eastern Expansion is annexed hereto as Exhibit B.

4. DEC approved the Eastern Expansion even though the City has failed to:

a. for more than 20 years, to develop a Solid Waste Management Plan ("SWMP"), as specifically required by 6 NYCRR § 360-1.9 (g), for the handling of solid waste for the municipalities that are part of the Capital Region Solid Waste Management Planning Unit Partnership ("CRSWMP"), formerly known as the Albany New York Solid Waste Energy Recovery System ("ANSWERS"),

b. consider alternatives and mitigation measures to the continual taking of Pine Bush land for landfill purposes, as specifically required by SEQRA,

c. conduct an assessment of the value of the Pine Bush land, which is critical for the Karner Blue Butterfly, an endangered species, which will be destroyed for the Eastern Expansion, and

d. comply with the specific regulatory requirements of Part 360, including the requirements that a landfill not be sited over a principal aquifer, and have adequate contingency plans, leachate management plans, landfill cover, and comply with a maximum slope requirement.

5. Petitioners also seek to enjoin the City of Albany from issuing bonds to pay the cost of complying with special condition 34 (a) of the permit which requires the City to "set

aside a Habitat Restoration Plan implementation and maintenance fee in the amount of ten ($10.00) dollars per ton of solid waste accepted at the facility ("Habitat Restoration Plan Fees"). Petitioners maintain that the cost of compliance should properly be borne by commercial users of the landfill, and that the issuance of these bonds is an unconstitutional and illegal gift of public monies to these users; particularly private individuals and companies, in violation of Article VIII, § 1 of the New York State Constitution.

VENUE

6. Pursuant to CPLR § 506 (b), venue for the Article 78 proceeding is proper in any county in the Third Judicial District, including Albany County, because the principal offices of the respondents New York State Department of Environmental Conservation and the City of Albany are both located in Albany County, and Albany County is located in the Third Judicial District.

PARTIES

A. Petitioners

7. Petitioner Save the Pine Bush, Inc. is a not for profit corporation, organized under the laws of the State of New York, with its principal place of business in Albany, New York. Save the Pine Bush has been involved in vigorous advocacy for the preservation of pine barrens in Albany County, and particularly in the City of Albany and the Town of Guilderland, for over 30 years.

8. The following individual petitioners are also officers of Save the Pine Bush (addresses are provided for petitioners who are residents of the City of Albany to demonstrate standing for petitioners' Fourth Cause of Action).

a. Rezsin Adams, President, 112 Chestnut Street, Albany

b. John Wolcott, First Vice Preident, 344 Sheridan Avenue, Albany

c. Lynne Jackson, Secretary, 223 South Swan Street, Albany

d. Sandra Camp, Board Member, 13 Gipp Road, Albany

e. Russell Ziemba, Board Member

i. Standing allegations

9. Petitioners Sharon Casterlin and Paula Spratt are members of Save the Pine Bush who live in close proximity to the proposed landfill expansion and will be directly affected by the Eastern Expansion. They will suffer a special harm, either not shared by members of the general public, or to a greater degree than members of the general public, based upon the geographic proximity of their homes to the landfill. In particular:

a. Sharon Casterlin has resided at 154 Lincoln Avenue, Albany, N.Y. , immediately adjacent to the proposed Eastern Expansion, for over 50 years. Ms. Casterlin regularly walks on trails in the Pine Bush, but has done so less frequently because of the odors from the landfill. Because of the proximity of her residence to the landfill, the odor from the landfill impacts her more than the general public. Her house is also affected by rodent infestations which are related to the landfill.

b. Paula Spratt resides at 155 Lincoln Avenue, Albany, N.Y. , trailer #77 in the former Fox Run Mobile Home Park, which had been considered as a possible site for

expansion of the landfill. Her home is located within 500 feet of the existing landfill. She is affected by odors and wind-blown trash from the landfill, and suffers from headaches in the summer which she believes are caused by air pollution from the landfill.

Affidavits describing the impacts of the landfill upon these petitioners are annexed hereto as Appendix A: Supplemental Affidavits of Standing.

10. Petitioners Sandra Camp, Sally Cummings (12 Malpass Rd. Albany) and Claire Nolan (11 Norwood Street, Albany) assert standing based upon an injury-in-fact because they are offended by landfill odors, even though they do not allege an injury different in degree from the public at large. Instead, they assert standing based upon an alternate theory of standing. They allege that the fact that the odors from the landfill impact a large group of people makes them general in nature, rather than site specific.

11. Many courts, based on the 1991 holding of the Court of Appeals in Society of Plastics v. Suffolk Co., 77 N.Y. 2d 761 (1991), have held that a petitioner must demonstrate a special environmental harm, not shared by members of the public, to demonstrate standing to maintain a SEQRA challenge to governmental action. However, the majority opinion in Plastics "explicitly [did] not reach the question of standing to challenge actions that apply indiscriminately to everyone, whether a local law permitting all residents to throw their garbage in street…or any other action." 77 N.Y.2d at 781.

12. The Eastern Expansion is a "general" action that applies indiscriminately to everyone; thousands of people who reside in the area of the landfill are and will be adversely affected by odors from landfill operations. No showing of special harm is required to

establish standing to challenge such an action because the impacts are not limited to residents in the immediate vicinity of the landfill.

13. Petitioners Grace Nichols (439 Elk Street, Albany), James A. Travers III, and Tim Truscott (131 Jay Street, Albany), as well as the petitioners identified in ¶¶ 8-10 above, have a special interest in the preservation of land in the Albany Pine Bush; these petitioners as well as other members of Save the Pine Bush, regularly hike, bird watch, cross-country ski, jog, and engage in recreational activities in the Pine Bush, and have a long history of special concern with respect to the preservation of the Pine Bush in general and, with respect to the preservation of Karner Blue Butterfly habitat in particular.

14. All of the petitioners use the Pine Bush for recreation and to study and enjoy the unique habitat found there. All of the petitioners have made extraordinary efforts over the years to protect the Pine Bush by speaking out at hearings, reviewing documents and development plans, organizing fund raisers to fund law suits and in many other ways advocating on behalf of the Pine Bush.

15. All of the Petitioners will suffer injury to and loss of their use and enjoyment of the natural resources of the Pine Bush as a result of the expansion of the Rapp Road Landfill. The landfill expansion will result in the permanent destruction of unique Pine Bush land, and injury to, or extirpation of, the Karner Blue butterfly and other rare and endangered species that inhabit the Pine Bush.

16. Save the Pine Bush has standing to maintain this proceeding under the criteria set forth by the New York State Court of Appeals in Douglaston Civil Associations v. Galvin, 36 N.Y.2d 1,7 (1974) because:

a. Save the Pine Bush clearly has the capacity to assume an adversary position, as evidenced by its long history of advocacy and litigation with respect to Pine Bush preservation issues,

b. Save the Pine Bush's position, with respect to the Pine Bush is fairly representative of the community of interests of groups and individuals dedicated to preservation of the Pine Bush,

c. the expansion of the landfill into lands in the Albany Pine Bush, in close proximity to the Albany Pine Bush Preserve, is squarely within the zone of interests that Save the Pine Bush seeks to protect, and

d. full participating membership in Save the Pine Bush is open to all residents and property owners in the relevant neighborhood.

17. Save the Pine Bush has litigated a number of issues pertaining to preservation of the Pine Bush, and has actively advocated for the creation of the Albany Pine Bush Preserve, which was established pursuant to Article 45 of the Environmental Conservation Law.

18. Save the Pine Bush's standing to assert claims similar to the instant proceeding was expressly upheld by the Court of Appeals in Save the Pine Bush v. City of Albany, 70 N.Y.2d 193, 201 (1987).

19. The standing of Save the Pine Bush to assert claims upon the group's recreational interests and special interest in the preservation of Karner Blue habitat in the Pine Bush was also explicitly recognized by the Appellate Division, Third Department in Save the Pine Bush v. Common Council of the City of Albany, 56 A.D.3d 32 (3d Dept. 2008) (appeal pending), where the Court stated:

> Save the Pine Bush has long been recognized as "a not-for-profit corporation whose purpose is to 'promote the preservation of Albany's unique and beautiful pine barrens.'" [citation omitted] In furtherance of that purpose, Save the Pine Bush and many of its individual members have, for more than 25 years, brought a myriad of legal proceedings challenging development in the area surrounding the Preserve and its potential affect thereon. [citations omitted] In fact, Save the Pine Bush's earliest legal proceedings were instrumental in the creation and designation of the Preserve, [citations omitted] and in some later proceedings successfully challenged various SEQRA determinations that affected development in that area.

56 A.D.3d at 39-40.

20. Furthermore, in the 2008 decision, the Appellate Division found "[i]n our view, the amended petition adequately alleged that [petitioners'] use and enjoyment of the Preserve, coupled with their historic involvement in its creation, protection and preservation, is so significant as to establish an injury greater than that suffered by the public at large." 56 A.D.3d at 39. The allegations of the Amended Petition in that case are identical to the standing allegations in this case.

21. Petitioners Adams, Wolcott, Jackson, Camp, Nolan, Nichols and Truscott are residents and taxpayers in the City of Albany and, with the exception of petitioner Nichols, all own homes at the addresses listed above.

22. These petitioners therefore have an interest sufficient to confer standing with respect to their claims that the Albany Common Council resolution authorizing the issuance of bonds to comply with the conditions of the DEC permit is arbitrary, capricious and illegal.

ii. Exhaustion of administrative remedies

23. On December 15, 2008, petitioner Save the Pine Bush, by its attorney, Peter Henner, submitted a 17 page comment letter on the application and the Draft Environmental Impact Statement for the landfill expansion ("Save the Pine Bush comment letter"). This letter set forth petitioners' concerns, objections to the Eastern Expansion, and proposed issues requiring adjudication at a formal evidentiary hearing under 6 NYCRR Part 624. A copy of this letter is annexed hereto as Exhibit C.

24. Mr. Henner, on behalf of Save the Pine Bush, had previously submitted a letter, on December 5, 2008, requesting an extension of the comment period, and requesting hat DEC hold an adjudicatory hearing with respect to the landfill expansion application. Mr. Henner attached a 28 page letter, written by Lewis Oliver, that Save the Pine Bush had submitted to DEC in opposition to the 2000 expansion of the landfill. A copy of Mr. Henner's letter is annexed hereto as Exhibit D. A copy of Mr. Oliver's letter is annexed hereto as Exhibit E.

25. Individual petitioners Cummings, Nichols, Travers and Wolcott also submitted written comments on the proposed Eastern Expansion.

26. In addition, individual petitioners Jackson, Wolcott, Cummings, Travers and Ziemba, as well as Mr. Henner, spoke at a public hearing on the proposed Eastern Expansion on December 3, 2008, raising the concerns that are now at issue in this lawsuit.

27. Petitioners have therefore raised the concerns and issues that are the subject of this proceeding in the relevant administrative processes, and respondents have had an opportunity to address petitioners' concerns prior to the commencement of this lawsuit.

B. Respondents

28. Respondent New York State Department of Environmental Conservation is an agency of the State of New York with the powers and duties set forth in the New York State Environmental Conservation Law. The principal office of the Department is located in Albany County.

29. Respondent City of Albany is a municipal corporation established pursuant to the provisions of § 20 of the General City Law.

30. Upon information and belief, the City, as the entity that has received the permits that are at issue in this proceeding is a necessary party pursuant to CPLR 1001 with respect to petitioners' claims against DEC.

31. The City is also named as a respondent because petitioners allege that it has illegally issued bonds to fund compliance with DEC's permit condition 34 (a).

FACTUAL BACKGROUND

A. Prior expansions of the Rapp Road Landfill

32. The permits issued by DEC represent the fourth time in less than 20 years that DEC has approved a request by the City of Albany to expand the Rapp Road Landfill into lands within the Pine Bush.

33. The first expansion was the subject of an administrative hearing before a DEC Administrative Law Judge in 1989. The Administrative Law Judge found that "the interim landfill construction and operation…would cause and/or contribute in the harming killing destruction and elimination of existing Karner Blue butterfly (i.e. eggs and/or larvae, and/or adults) and would therefore be a 'taking of any endangered or

threatened species' as described in former 6 NYCRR 360.8 (b) (1) (xx)." (p.26). A copy of the Hearing Report of ALJ Francis Serbent is annexed hereto as Exhibit F.

34. The decision of DEC Commissioner Thomas Jorling accepted ALJ Serbent's "finding of fact," but overruled the conclusion that "the proposed action would constitute a taking of individual Karner Blues…[because] the speculative possibility of the loss of individual members of an endangered species when viewed in the context of the mitigating conditions which are designed to avoid any interference can not be held to constitute a taking of individuals of the species." (p.3). A copy of Commissioner Jorling's ruling of February 13, 1990 is annexed hereto as Exhibit G.

35. Commissioner Jorling justified his determination because the expansion provided, as a mitigation measure, "a mechanism" to establish a Pine Bush Preserve. He stated: "in the absence of the project . . . there would be no alternative legal mechanisms that are likely to provide . . . assurances regarding the establishment and management of a Pine Bush preserve. Without such mechanisms, it is far more likely that the Karner Blue would perish. Therefore the parcel cannot be regarded as critical habitat and in fact, if it were, we would be faced with the ultimate irony of preserving a parcel at the expense of reducing the likelihood of the long-term survival of the species." (p.4)

36. Although Commissioner Jorling approved the 1990 expansion of the landfill, he intended the 1990 expansion to be the final expansion into the Pine Bush. He stated "in light of the fact that the interim landfill will only provide capacity for an estimated three years of solid waste management, it is critically important for the City and other municipalities that will use this interim landfill to move rapidly to complete a long-term management study and implement an alternative solid waste program in that time

period. Based on the record of this proceeding, **I cannot envision any set of circumstances that would justify the extension of the life of this interim landfill or the approval of another such facility in any part of the Albany Pine Bush.**" (p.6) (emphasis added)

37. Although it appears that the first expansion of the landfill, in 1990, was only approved for the purposes of providing the necessary funds for creation of a Pine Bush preserve and protection of the Karner Blue Butterfly, DEC subsequently approved two more expansions of the landfill.

38. In 1997, a second expansion was approved, involving the taking of an additional 8.7 acres of Pine Bush land.

39. In 2000, a third expansion was approved, once again expanding the landfill's footprint in the Pine Bush by an additional 23 acres.

40. As a result, the total footprint of the existing landfill has been expanded to approximately 104 acres.

41. Although the 1990 expansion was justified on the basis of the need to provide protection for the Pine Bush and Commissioner Jorling stated that he could not envision any additional expansions, we have now had two additional expansions. DEC's approval of a fourth expansion is the subject of this lawsuit.

42. Commissioner Jorling, in 1990, recognized the "critical importance" of a long-term management study and for the development of alternatives to continued expansion of the landfill in the Pine Bush. However, almost twenty years later, the City has not identified any alternative to continual expansion of its landfill, still has no long-term plan to handle solid waste, and continues to rely on further insults to the Pine Bush.

B. The failure to develop a feasible Solid Waste Management Plan

43. Both DEC regulations (6 NYCRR § 360-1.9 (g)) and good public policy require that a municipality have a Solid Waste Management Plan before constructing and operating a solid waste management facility such as a landfill.

44. 6 NYCRR § 360-15.9 requires that such a plan "provide for the management of all solid waste within the planning unit for at least a ten-year period."

45. In 1990, the City of Albany adopted a Solid Waste Management Plan that was subsequently accepted by DEC in 1992. The City has not adopted a new Solid Waste Management Plan since 1992. Instead, it has prepared a series of modifications to the 1990 plan.

46. According to the Fourth Supplemental Draft Environmental Impact Statement prepared for the landfill expansion "[t]he NYSDEC has indicated that an approvable SWMP Modification is required for completeness of the permit application process" (emphasis added) (p.1-14).

47. Nevertheless, DEC ultimately made a determination of completeness on October 17, 2008, even though the SWMP Modification was not submitted until May 2009. A copy of the "Notice of Complete Application, Notice of Completion of SDEIS, Notice of Public Hearing" is annexed hereto as Exhibit H.

48. DEC's determination of completeness before the submission of an approvable SWMP Modification violated the requirements of 6 NYCRR § 621.6 (e) that "applications will remain incomplete until all requested items are received by the department."

49. DEC's determination to proceed with the public comment and review of the application in the absence of an approvable SWMP graphically illustrates the principal

shortcoming of the proposed landfill expansion: DEC has approved the City of Albany's fourth expansion into the Pine Bush despite the fact that the City still does not have any long-term plan for the management of solid waste.

50. Furthermore, DEC, by making a determination of completeness and closing the period for public comment, before even considering the inadequate SWMP modification that was ultimately submitted, has flauted the specific regulatory requirement that the City of Albany establish a credible and viable plan for the management of solid waste as a precondition for a new landfill permit.

51. As of 1992, the City was operating a refuse derived fuel plant (incinerator) known as the ANSWERS Plant on Sheridan Avenue in the City of Albany. This facility handled approximately 100,000 tons per year of solid waste. However, this facility was closed in 1994.

52. The 1992 SWMP set forth the City's intention to conduct a siting study to determine possible locations for a new solid waste management facility to replace the Rapp Road facility.

53. The siting study ultimately determined that the only suitable site was the so-called C-2 site, located in the Town of Coeymans.

54. Upon information and belief, the City has determined that all of the proposed sites considered pursuant to the 1992 SWMP, with the exception of C-2 site, are not viable landfill sites.

55. The City of Albany has now acquired site C-2 in the Town of Coeymans, at a cost of more than $5 million.

56. Nevertheless, the City itself acknowledges, in its September 24, 2008 Draft SWMP modification, that "after further evaluation, site C-2 would involve some extensive wetlands mitigation efforts that preclude its consideration for the short-term needs and may prove not to be feasible in the long-term... because of development constraints related to the presence of federally regulated wetlands on site C-2, the timely and cost effective development of that site may no longer be practicable prior to the exhaustion of permitted capacity at the Rapp Road landfill."

57. The Findings Statement adopted by DEC, representing DEC's SEQRA determination with respect to the proposed Eastern Expansion of the landfill, bluntly states that site C-2 is not an alternative landfill location. The Findings Statement acknowledges: "the Albany owned proposed landfill site in the Town of Coeymans is not considered viable as it is covered almost entirely with regulated state and federal wetlands requiring substantial impacts with fill and excavation." (p. 32)

58. Furthermore, in commenting on the City's September 24, 2008 Draft Solid Waste Management Plan modification request, the Findings Statement noted that the 1990 SWMP "laid the framework (criteria) for a new landfill siting study that would address the long-term needs of CRSWMP. The study was completed in 1991 and recommended pursuing site C-2 in the Town of Coeymans. C-2 is not a viable site for a landfill due to the presence of extensive wetlands." (pps. 28-29). See also p.19 "A new landfill in the Town of Coeymans is not considered viable as it is completely covered with state and federally regulated wetlands."

59. Although the City has been studying the issue since 1992, it has failed to make any provisions or plans for the disposal of solid waste other than expanding the Rapp Road

Landfill. The Sheridan Avenue incinerator was closed in 1994 and the only site that the City has found for a prospective alternative landfill has been specifically determined not to be viable.

60. In May 2009, one month before DEC issued permits for the Eastern Expansion of the Rapp Road Landfill, the City of Albany adopted a "Final Solid Waste Management Plan Modification for the Capital Region Solid Waste Management Partnership Planning Unit." A copy of this document is annexed hereto as Exhibit I.

61. The SWMP Modification acknowledged that it would not be possible to develop the C-2 site prior to the complete exhaustion of the existing capacity at the Rapp Road Landfill, and claimed that the expansion of the landfill was necessary to provide for "uninterrupted disposal capacity." In particular "[b]ecause of previously documented delays associated with the development of new long-term landfill capacity at Site C-2 in the Town of Coeymans, and because of development constraints related to the presence of federally regulated wetlands on Site C-2, the timely and cost effective development of that site may no longer be practicable prior to the exhaustion of permitted capacity at the Rapp Road Landfill." (SWMP Modification, p.2)

62. The SWMP Modification offers a history of the City's efforts to “develop new landfill capacity to serve the waste shed” (§ 2.3.8, pps. 16-17). Although petitioners maintain that this history is incomplete and inaccurate, it does document that the City has not made any efforts to consider any alternative to the expansions of the Rapp Road Landfill besides Site C-2, and that, as of 2009, Site C-2 does not appear to be a viable site for a landfill.

63. § 2.3.8 references the litigation that has been commenced, by both the Town of Coeymans and by individual residents, seeking to oppose the siting of a long-term landfill within the town of Coeymans. However, that litigation has now been concluded, and, as the SWMP Modification notes, the City now owns the site.

64. The City effectuated the purchase of Site C-2 by a series of "option agreements," which required payment of the purchase price in installments. A lawsuit challenging the use of the option agreements to acquire the site was ultimately dismissed by the Appellate Division, Third Department, of New York State Supreme Court, on the grounds of laches (Marshall et al. v. City of Albany et al., 45 A.D.3d 1064 (3d Dept. 2007)). In that case, Coeymans residents had unsuccessfully argued that the purchase should be enjoined because the City had never complied with the provisions of the New York State Environmental Quality Review Act with respect to the purchase, before committing itself to the purchase of Site C-2.

65. Although the lawsuits were defeated, the SWMP Modification acknowledges that the negative declaration for the funding of the acquisition of Site C-2, adopted in 1998, was invalidated in an earlier lawsuit against the City (Town of Coeymans v. City of Albany et al., 284 A.D.2d 830 (3d Dept. 2001)), and that the City's application to DEC for segmented review of the acquisition of Site C-2, separate and apart from the construction and operation of a landfill, was never approved. (SWMP Modification, p.17)

66. No environmental review under SEQRA was ever completed, either with respect to the acquisition of Site C-2, or with respect to the prospective use of Site C-2 as a landfill site.

67. Although the City now owns the site, the SWMP Modification specifically acknowledges "the presence of extensive federally regulated wetlands on Site C-2" (p. 16). The SWMP Modification does not state that Site C-2 will ever be a suitable landfill site, instead, it merely states "Site C-2 may be able to play a role in connection with the facility that may be developed as part of the new SWMP. That process will include input from a stakeholder advisory group and will be used to determine what role Site C-2 will play in the future of solid waste management of the planning unit." (SWMP Modification, p.17)

68. The City submitted an Aquifer Variance Report to DEC in support of its application for a variance from the requirement that a landfill can not be sited over a principal aquifer (see ¶¶ 239-243 below). In that report, the City acknowledges that, as of 2004, "approvals for the development of the entire facility could take in the range of 10-20 years as it would be necessary to implement and prove the success of mitigation prior to the regulatory agencies issuing approval for impacts." (p. 5). This Aquifer Variance Report is annexed to the Permit Application as Appendix A; this report was subsequently revised in 2009. A copy of the report that was originally submitted with the application is annexed hereto as Exhibit J. Upon information and belief, five years later, the City has not commenced the process of seeking these approvals, and has no intention of doing so in the foreseeable future.

69. In the 17 years since the initial adoption of an SWMP, the City has failed to identify any feasible option to expanding the Rapp Road Landfill. The only alternative that it ever seriously considered, Site C-2, is simply not viable.

70. Furthermore, the 2009 SWMP Modification does not indicate that any alternatives are being considered for waste disposal for the CRSWMP. The City is not considering any alternatives to Site C-2, and there is nothing to indicate that any alternatives to further landfilling, such as the construction of a waste to energy facility, transportation of the waste to other facilities, or other options, are being considered.

71. The SWMP Modification states: "[a]s part of the proposal for the Eastern Expansion, the City has agreed that it will be the final expansion of the Rapp Road Landfill and that it will prepare a new SWMP, to re-evaluate whether constructing a new, long-term landfill to serve the waste shed continues to make sense, and whether other waste management techniques are appropriate." (SWMP Modification, p.2)

72. The phrase "waste shed" is not defined in the SWMP. It is not clear which communities are in the waste shed, nor is it clear that the waste shed is limited to the CRSWMP. The critical planning document can not even tell us whether the City is simply planning to design waste capacity for a limited number of communities, or for a significantly larger community which will need significantly more waste capacity.

73. In any event, the City's promise that this will be the final expansion of the Rapp Road Landfill should be considered against the reality that the City has not identified any alternatives to expansions of the Rapp Road landfill for the past 17 years, does not have any plan in place for the point in time, in six or seven years, when the capacity of the Eastern Expansion will have been filled, and that the City may be planning to establish itself as the waste depository for a larger region or waste shed.

74. Despite its promises today, the City will not, after the Eastern Expansion is filled, have any alternative to further expansions of the Rapp Road Landfill into the Pine Bush,

especially since its only identified alternative, Site C-2, will not be ready for at least ten years, if it is ever suitable for use as a landfill site.

75. In summary, the City has not had any meaningful solid waste plan since 1992, if such a plan has ever existed. The City still does not have any credible plan and is not likely to develop one. Rather than meet the specific requirement that a SWMP "provide for the management of all solid waste within the planning unit for at least a 10-year period" (6 NYCRR § 360-115.9), the City has stumbled along without any plan for at least 17 years, and proposes to continue to expand its landfill into the Pine Bush for the indefinite future.

C. The failure to comply with SEQRA

76. The determination of DEC to grant permits for the expansion of the Rapp Road Landfill is an "action" within the meaning of SEQRA, § 8-0105 (4) (5) of the Environmental Conservation Law ("ECL") and its implementing regulation 6 NYCRR § 617.2 (b). Consequently, DEC was required to perform an environmental review pursuant to the provisions of Article 8 of the ECL.

77. DEC determined that the proposed landfill expansion had the potential of having a significant adverse impact on the environment, and therefore directed the City of Albany to prepare an Environmental Impact Statement ("EIS"). (See § 8-0109 of the ECL, and 6 NYCRR § 617.7, "Determining Significance").

78. Both SEQRA and its implementing regulations provide specific requirements for the contents of an EIS (ECL § 8-0109 (2), 6 NYCRR § 617.9 (b)). An EIS must describe the action and its environmental setting, analyze short-term and long-term impacts of

the proposed action, and describe alternatives and possible mitigation measures that minimize any potential environmental impacts.

79. The Rapp Road Landfill was the subject of an EIS in 1990. As part of the approval process for the three previous expansions, the City of Albany prepared, and DEC ultimately approved, three previous Supplemental Draft Environmental Impact Statements ("SDEIS").

80. The City defined the environmental impact statement for the latest expansion as a "Fourth Supplemental Draft Environmental Impact Statement" ("FSDEIS"), rather than as a new EIS for a new action.

81. SEQRA also requires an agency, at the conclusion of its environmental review process, to "make an explicit finding that the requirements of [SEQRA] have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental impacts revealed in the Environmental Impact Statement process will be minimized or avoided." (ECL § 8-0109 (8))

82. The Findings that are required to be made under SEQRA are a prerequisite to the approval of the action. DEC had to complete the SEQRA process and make the requisite Findings before it could proceed to issue the permits for the Eastern Expansion.

83. The FSDEIS provides a lengthy analysis of a wide range of potential environmental impacts (a copy of the Table of Contents of the FSDEIS is annexed hereto as Exhibit K).

84. The FSDEIS is supplemented by, and cross-references, a permit application, which was submitted to demonstrate compliance with specific regulatory criteria. The permit

application includes an Engineering Report, a Construction QA/QC Plan, an Operations and Maintenance Manual, a Contingency Plan, a Hydrogeologic Report, a Landfill Siting Report, a Comprehensive Recycling Analysis, a Leachate Management Plan, a Mined Land Use Plan, Financial Assurance Estimates, and a Gas Collection System Report.

85. Petitioners maintain that DEC's environmental review, including the FSDEIS, the permit application and the Findings Statement purportedly based on these documents, fails to take the requisite hard look at the following issues: 1) the impact of permanently taking an additional 15 acres of land in the Albany Pine Bush for the purposes of landfill operations, 2) the impacts upon endangered species, particularly the Karner Blue Butterfly, that reside in the Pine Bush, 3) odor problems at the landfill, 4) the failure to consider any realistic alternative to the landfill, including the "no action alternative", 5) the failure to consider possible mitigation measures, including limiting the receipt of solid waste at the landfill to the CRSWMP community, and prohibiting or restricting commercial waste haulers from outside of the CRSWMP.

86. In addition, as noted above, the environmental review process is inadequate because of the failure to provide any long-term plan for the handling of solid waste, as part of the SEQRA process.

iii. Impacts on Pine Bush land

87. § 3.4 of the FSDEIS, captioned "Albany Pine Bush Preserve," provides a brief description of the Albany Pine Bush Preserve, and references the 2002 Management Plan prepared by the Albany Pine Bush Preserve Commission. The FSDEIS recites the fact that approximately 1,850 acres are protected within the Albany Pine Bush Preserve

and states the goal of protecting approximately 4,610 acres of land "if full protection goals are met."

88. § 3.4 recognizes that:

> The Albany Pine Bush is identified as an inland pine barrens ecosystem; a globally rare community and one of only 20 such ecosystems in the world. It is generally characterized as a pitch pine-scrub oak community (see Section 3.3 for an in-depth discussion of the ecological communities) that has adapted to the dry conditions (glacial sand deposits) and periodic fires, once common to the area. The ecosystem formerly occupied a 40 square mile area between Albany and Schenectady and is a remnant of a glacial lake that extended from Glens Falls to Newburgh. …
>
> In the mid-1980's, several Environmental Impact Statements were prepared for developments in the area. One of the studies indicated that approximately 2,000 acres of fire-manageable Pine Bush must be protected in order to preserve the ecosystem (Environmental Design & Research, P.C. 1993, 2002). This remains a goal of the Albany Pine Bush Preserve Commission." (p.3-70)

89. The FSDEIS also acknowledges "the proposed Eastern Expansion includes approximately 13 acres of City-owned lands that have been identified in the [Management] Plan as recommended for full protection." (p.3-72)

90. Obviously, the permanent loss of any lands, including the 13 to 15 acres of land that will be taken for the Eastern Expansion, will make it harder to reach the 2000 acre minimum necessary to preserve the ecosystem, and the desired goal of 4610 acres.

91. The FSDEIS also acknowledges that the staff of the Albany Pine Bush Preserve Commission "have expressed their belief that a portion of [the proposed landfill area] is restorable to Pine Barrens." (p.3-73). However, the FSDEIS dismisses this concern because it believes "the predominance of sizable oaks on the upland islands, the proximity of upland directly adjacent to existing landfill operations, and the significant

wetland components suggests the intent for this land is as a buffer and habitat linkage." (p.3-73)

92. The FSDEIS acknowledges that the parcel is ranked "high for both linkage and buffer" but claims that the parcel is ranked "very low for establishment as pine barrens, Karner blue butterfly habitat and water resources." (p.3-73)

93. The FSDEIS does not contain any other analysis of the land to be converted to landfill. Although the FSDEIS acknowledges that the land was intended to be protected, it dismisses the importance of the land by saying that it is "'only' for linkage and buffer". Other than the conclusory sentence cited above, the FSDEIS does not offer any reason to dismiss the beliefs of the APBPC staff, the agency which has specific knowledge about the importance of the land, that the parcel in question should be protected.

94. Instead, § 3.4 of the FSDEIS, as well as § 4.4, attempts to rationalize the destruction of land in the Pine Bush by claiming that "the implementation of the Habitat Restoration Enhancement and Mitigation Plan will more than compensate for the conversion of the expansion area to landfill." (p. 4-2)

95. This rationalization should be compared with the rationalization offered by Commissioner Jorling in 1990 for the taking of Pine Bush land for the first expansion; justifying the otherwise outrageous destruction of Pine Bush land by stating that the destruction was necessary to fund preservation efforts.

96. The taking of the approximately 13 acres will also result in the filling of 5.35 acres of federally protected wetlands and 1,490 linear feet of stream channel. These impacts are specifically acknowledged in the FSDEIS, and again in the Findings Statement.

97. In order to expand the landfill into federally protected wetlands, the City needs to obtain a permit pursuant to § 404 of the Clean Water Act (33 U.S.C. § 1344) from the United States Army Corps of Engineers ("ACOE"). Both the United States Environmental Protection Agency ("EPA") and the Fish and Wildlife Service of the United States Department of the Interior ("FWS") submitted comments to the ACOE, opposing the issuance of the § 404 permit to the City of Albany. The comment letter of the EPA, dated February 12, 2009 is annexed hereto as Exhibit L. A copy of the letter from the FWS, dated March 4, 2009, is annexed hereto as Exhibit M.

98. EPA noted that the Albany Pine Bush was a "rare upland community type [that] once occupied about 40 square miles, but it has been reduced to fewer than 3,000 acres. Some Pine Bush habitat occurs on the city-owned landfill parcel. Given the scarcity of Pine Bush, the City was compelled to consider impacts to both wetlands and uplands during the evaluation of on site landfill expansion alternatives."

99. EPA discussed other alternative expansions that were proposed by DEC into other portions of the Pine Bush, and suggested other alternatives that would provide about four years of disposal capacity. EPA also criticized the City for failing to consider the possible use of existing New York State landfills. EPA concluded that "given our concerns that the applicant has not chosen the least environmentally damaging practicable alternative... EPA objects to issuance of a wetland permit for the Rapp Road Landfill Eastern Expansion."

100. The comments of the FWS specifically reference the high ecological value of the land to be destroyed for the landfill: "the project is situated within the best remaining example of inland pitch pine/scrub oak, which supports state and federally listed

threatened and endangered species as well as at least 45 species of greatest conservation need. Development over many years in the Albany area has degraded and fragmented remaining Pine Bush habitat. The construction of the landfill and four subsequent expansion projects over time has resulted in the loss of valuable Pine Bush habitat; however few effective mitigation measures have been implemented by the applicant. The current expansion proposal would result in the loss of another 15 acres of habitat. This area was intended to be fully protected by the 2002 Pine Bush Management Plan and Environmental Conservation Law Article 46 which the applicant endorsed."

101. The FWS, like EPA, stated that the City of Albany should evaluate the feasibility of utilizing other landfills, as well as alternatives that would have a lesser impact, but would yield fewer years of capacity.

102. The comments of the EPA and the FWS were submitted to DEC in 2009, after the comment period for the draft FSDEIS had ended. These comments were not addressed in the Final Environmental Impact Statement, which was apparently prepared in May 2009. However, these comments were discussed in the Findings Statement.

103. The Findings Statement discussed the fact that the § 404 permit from the ACOE was needed, and that both EPA and the FWS had submitted comments to the § 404 permit process. The Findings Statement also discussed the response of the City of Albany to the comments of the federal agencies.

104. The Findings Statement noted the response of the City, which defended the proposed Eastern Expansion on the grounds that it would "maintain an uninterrupted solid waste disposal services for the City and the Capital Region, maintain a revenue stream for the

City, and allow sufficient time for the City to readjust its dependency on landfill revenues and find an alternative disposal alternative." (Findings Statement, p.22)

105. Significantly, the City did not respond to the issues raised by both the EPA and the FWS regarding the value of the land that would be taken for the landfill expansion.

106. Although the Findings Statement claims that DEC "has considered, in the development of its findings and § 401 water quality certification decision, the environmental concerns raised by EPA and the FWS...," there is nothing in the Findings Statement to indicate that DEC did any additional analysis of the value of the land and the importance of the Pine Bush land that would be taken for the purposes of the landfill expansion.

107. Although DEC defends its determination to take the 15 acres of Pine Bush land by citing the needs of the City for landfill space, and the value of the land that will be restored as part of the habitat restoration plan, there is nothing in the FSDEIS, the Findings Statement, or any of the other documents submitted or reviewed as part of the permit process, that indicates that DEC has done any significant analysis of the value of the land that is to be taken. Without such analysis, DEC can not claim to have balanced the benefits of the mitigation plan against the adverse impacts of the permanent destruction of additional Pine Bush land, and DEC can not claim to have taken a hard look at the significant adverse environmental impacts that will result from the taking of this land.

iv. Impacts upon the Karner Blue Butterfly

108. One of the reasons that the Pine Bush area is unique, and represents an irreplaceable environmental resource is the presence of endangered species. The Pine Bush is

known as one of the few locations where the Karner Blue Butterfly, a federal and state endangered species, is known to exist.

109. In the last 25 years, extensive analysis has been conducted regarding how to assist the Karner Blue Butterfly in its efforts to survive. A significant amount of discussion in the Management Plan for the Pine Bush, as well as environmental impact analyses for projects that have been constructed in the Pine Bush and a number of environment permits for activities within the Pine Bush have focused on how to insure the Karner Blue's survival.

110. The Karner Blue is dependent on Blue Lupine plants, which grow in the Pine Bush. However, to ensure survival of the Karner Blue, it is also critical that adequate corridors between habitats exist and that adequate buffer areas exist for locations where Blue Lupine plants and Karner Blue Butterfly communities are known to exist.

111. The Pine Bush Preserve Commission is seeking to protect a total of 4610 acres to ensure that there will be an adequate contiguous area for the Karner Blue.

112. Upon information and belief, the 13 to 15 acres of land which are the subject of the Eastern Expansion are necessary for the Karner Blue, even though no Blue Lupine plants have been found within this parcel, and even though the parcel of land, at present, is not occupied by Karner Blue Butterflies.

113. The proposed destruction of this additional 13 to 15 acres should be viewed in the context of the three previous expansions of the landfill. The addition to the original use of Pine Bush land for a landfill, the City has now, in three previous expansions, taken over 50 acres of Pine Bush land, which are essential for the survival of the Karner Blue.

114. Even if it is true, as the City maintains, that no Karner Blue habitat will be affected by this latest expansion, it is still true that the continual expansions of the landfill have placed a significant additional strain upon the Karner Blue, and its efforts to survive.

115. Upon information and belief, there has been a significant decline in the population of Karner Blue Butterflies in the last ten years (see Albany Times Union article of October 1, 2009, annexed hereto as Exhibit N).

116. Upon information and belief, the three previous expansions of the Rapp Road Landfill have contributed to the decline of the Karner Blue Butterfly, and have increased the dangers of its extirpation.

117. Furthermore, the land to be taken for the Eastern Expansion is important because, as noted by the Albany Pine Bush Preserve Commission, it is critical for linkage and buffer, to insure a large contiguous area for the Karner Blue Butterfly.

118. Although the FEIS contains an impact assessment report on endangered species, including an assessment of prospective impacts upon the Karner Blue Butterfly (see Fourth Supplemental Final EIS, Appendix G, p.4), and even though that assessment concludes that the landfill will not impact Karner Blue Butterfly habitat, this assessment does not consider whether or not this latest project, when viewed cumulatively with the past expansions, is likely to have an adverse impact upon the Karner Blue Butterfly. Because the FSEIS does not contain such an analysis, it is inadequate.

119. Significantly, the Findings Statement, unlike the Draft and Final Environmental Impact Statements, acknowledges the existence of several patches of blue lupine at the northwest side of the existing landfill. (Findings Statement, p.24)

120. These lupine patches are approximately 1000 feet west of the disturbance limit of the overfill portion of the Eastern Expansion.

121. Furthermore, another endangered species, the Frosted Elfin Butterfly, has been identified at the site of the lupine patches.

122. The Findings Statement also advises that Karner Blue Butterflies have been known to occur in the vicinity of the Albany Pine Bush Discovery Center, more than 3000 feet to the northwest of the proposed Eastern Expansion.

123. The Findings Statement discusses, at some length, the positive benefits of the habitat restoration plan for the Karner Blue Butterfly and Frosted Elfin Butterfly. However, the Findings Statement, like the other documents, does not discuss the negative cumulative impacts of past landfill expansions, or the question of whether or not this latest expansion will contribute to those negative impacts.

124. Once again, DEC has failed to address the significance of the loss of 15 acres that is important to the Karner Blue and Frosted Elfin as part of its environmental analysis.

v. Odor Impacts

125. The Rapp Road Landfill has been the source of numerous complaints from the surrounding community, alleging odor problems.

126. The FSDEIS recognizes that landfills such as the Rapp Road Landfill can be the source of odor problems. In the past, odor problems from the Rapp Road Landfill have had a severe impact upon the surrounding community. Based upon these past impacts, petitioners maintain that it is essential that the environmental impact statement for the proposed expansion thoroughly address the issue of odor impacts, and demonstrate how such impacts will be mitigated.

127. The FSDEIS states: "since the landfill expansion area is proposed, no older monitoring data is available for the expansion. However, a series of four ambient tests for odor have been scheduled for the existing Albany landfill. Odors associated with the existing landfill may be representative of odors associated with the future expansion area since the waste acceptance rate will remain the same. The first odor sampling occurred on May 3, 2007, and the fourth and final test was conducted on January 31, 2008." (FSDEIS, p.3-103)

128. Although the text of the FSDEIS indicates that these ambient tests will be scheduled at some point in the future, it also appears that the tests have already occurred, between May 3, 2007 and January 31, 2008.

129. According to the FSDEIS, these tests demonstrated that the landfill odor impacts were "minimal based on the data obtained from each test." (FSDEIS, p.3-104). However, the FSDEIS also acknowledges that the maximum odor levels were obtained during the August 1, 2007 test event, and speculates that "reasons for the high concentrations may be attributed to one or more of the following: landfill operations, meteorology and nighttime testing."

130. The FSDEIS indicates that the odors, as measured at distances of 1,091 meters and 549 meters away from the center of the landfill (3,448 feet and 1,801 feet) represented the maximum impacts, and were below the odor detection thresholds at both of these distances for "six landfill gas components that have been identified by EPA as typical landfill gas constituents and potential odor causing compounds." (FSDEIS, p.3-11)

131. Although the FSDEIS claims that "the concentrations of these compounds are below the detection thresholds [and therefore] they should not contribute to nuisance odors,"

the FSDEIS does not explain why, in fact, odor complaints have regularly been submitted by residents of the community immediately surrounding the landfill. (FSDEIS, p.3-102)

132. The Findings Statement, noting the mitigation measures proposed by the City, found that potential impacts had been mitigated to the maximum extent practicable. Specifically, the Findings Statement stated "the Department, based on the above facts and circumstances, finds that the implementation of landfill cover disposal requirements, the effective collection of landfill gases and generation of power, requirements to prevent off site nuisance odors, divert landfill gas to flares whenever uncontrolled or unabated off-site odors are due to the gas to energy recovery facility and the authority of the Department to immediately order the reduction of solid waste accepted at the landfill will insure compliance with 6 NYCRR Part 360 and 6 NYCRR Part 211 and thereby mitigate any potential odor impacts to the maximum extent practicable." (Findings Statement, p.14-50)

133. Nevertheless, the Findings Statement does not address the proposal, contained in Save the Pine Bush's comments, that the City should be required to establish an environmental monitor, to ensure compliance with the conditions of the permit pertaining to odor problems, and to ensure that the City takes all possible measures to minimize odor problems.

134. Nor does the Findings Statement acknowledge the fact that odors from the landfill have been a continuing problem for the neighbors of the landfill, and that the Town of Guilderland and the Village of Colonie have continually expressed concern about odor

problems from the landfill, problems that will continue if landfill operations are permitted to continue for another six to seven years.

vi. Consideration of Alternatives

135. The Findings Statement of the FSDEIS purports to consider three alternatives to the Eastern Expansion: 1) expanding and/or overfilling the landfill, 2) alternative landfill sites, and 3) hauling of waste (the no-action alternative). (Findings Statement, pps.31-33)

a. Other expansions of the Rapp Road Landfill

136. The Findings Statement compares the Eastern Expansion to possible expansions of the Rapp Road landfill into the Pine Bush, including: 1) a western expansion into 24 new acres, 2) overfills of previously landfilled areas, and 3) using lands already dedicated to the Pine Bush Preserve, which would require an act of the New York State Legislature. (Findings Statement, pps.32-33)

137. All of these alternatives, like the Eastern Expansion, would have unacceptable impacts upon the Pine Bush. Although it is possible that some other expansion into the Pine Bush might be less obnoxious, petitioners do not challenge the conclusion that the Eastern Expansion is the least damaging expansion into the Pine Bush; instead petitioners maintain that DEC and the City failed to comply with SEQRA by refusing to consider alternatives to any further expansion into the Pine Bush.

b. Alternative landfill sites

138. Although the City claims to have considered alternative landfill sites, the City's landfill studies, for almost 20 years, have fixated on Site C-2 which, as noted above and as specifically stated in the Findings Statement, is not a viable site.

139. Petitioners respectfully maintain that the City's failure to identify, for almost 20 years, any alternative site besides the flawed Site C-2 within the entire Capital District indicates that the City has not made a good faith effort.

140. The City has recycled the same landfill siting study for twenty years: the sites that were considered in the current application are the same ten sites that were first considered in 1988, and were subsequently considered in 1989, 1996 and again in 1999.

141. Lewis Oliver, Esq., on behalf of Save the Pine Bush, submitted comments on the 2000 expansion of the Rapp Road Landfill. He characterized the 1999 study as "nothing more than a warmed over version of the previous 1989 study for an interim landfill in the city of Albany, considering exactly the same exact 10 sites within the city of Albany's boundaries and applying very similar criteria." (Oliver letter, p.13)

142. Mr. Oliver also characterized the 1999 report as "not really a site selection study as required by part 360 at all, but a post-hoc after the fact justification for another expansion of the city's landfill in the Pine Bush." (Oliver letter, p.14)

143. The same comment can also be made today, ten years later, about the 2007 site selection study, except that today, unlike 1999, the study can no longer be described as "warmed over," it has long since decomposed and can not be reheated and served.

144. The DEC Findings Statement does not attempt to offer any excuse for the failure to update the alternative landfill site analysis; instead merely noting the 1999 analysis in

the Third Supplemental Draft Environmental Impact Statement in 1999, and noting that these same sites were reevaluated. (Findings Statement, p.32)

145. DEC did not require the City to investigate and propose other sites, nor does DEC explain what, if any, efforts it made to ensure that the City identify prospective sites, or update its analysis from ten years ago.

146. Once again, the City has limited its selection of sites to sites located within the City of Albany, plus the Coeymans site that was selected. The City is providing services to all of the ANSWERS communities, and there is no reason provided as to why the City did not consider other sites outside of the City of Albany.

147. Indeed, consideration of such alternative sites would appear to be more necessary now than it was in 1999, since the City now knows that its desired site, in Coeymans, will not be available until after the proposed new expansion is filled, and the City will need to provide for solid waste disposal between the completion of the filling of the Eastern Expansion and the time that Coeymans is ultimately ready, if it is ever ready.

148. Therefore, DEC has failed to meet its obligations under SEQRA to consider alternative landfill sites.

c. Hauling of waste (the no-action alternative)

149. 6 NYCRR § 617.9 (b) (5) (v) specifically requires that an EIS discussion of alternatives "must include the no action alternative. The no action alternative discussion should evaluate the adverse or beneficial site changes that are likely to occur in the reasonably foreseeable future, in the absence of the proposed action."

150. Although the no-action alternative is not specifically referenced in the Findings Statement, the FSDEIS states that, if the expansion is denied, the City will have "no

options for landfilling in the region. Therefore, the only viable alternative remaining is the transport of waste to a long-haul facility." (FSDEIS, p.5-36)

151. Both the FSDEIS and the Findings Statement discuss the possibility of hauling of waste to another permitted disposal facility. The Findings Statement claims that "most landfills or waste-to-energy facilities that provide commercially available disposal capacity in New York are operating at or near their respective annual permitted capacity. The record contains data that also shows that no one landfill or waste to energy facility has sufficient additional capacity to replace the capacity of the proposed Eastern Expansion." (Findings Statement, p.31)

152. This conclusion is apparently based upon the information contained in § 5.5 of the FSDEIS, which purports to conduct a survey of existing landfills in New York State and existing waste to energy facilities. However, the information contained in the FSDEIS is not conclusive with respect to the issue of capacity to handle additional solid waste in New York State.

153. Tables 5.3 and 5.4, contained on pages 5-26 and 5-27, indicate a total estimated capacity within New York State well in excess of the existing tonnage that is received at the Rapp Road Landfill (described as 277,200 tons per year in the Findings Statement (p.31) and also in the FSDEIS (p.5-25).

154. However, as noted in the comments of EPA, the City "appeared to overlook recently approved landfill expansions at Seneca Meadows (the largest active landfill in the State), DANC (Jefferson County) and High Acres (Monroe County). There may be others. We suggest that the applicant revisit [the issue] and update the discussion of off-site waste disposal capacity."

155. This comment was echoed by the Fish and Wildlife Service: "currently, there are multiple counties and municipalities in the area sending waste to the Seneca Meadows (Cayuga County) and High Acres (Monroe County) landfills. Both of these facilities recently received approval to expand. The applicant should evaluate the feasibility of waste transfers to these other facilities instead of using the Albany facility."

156. Although the Findings Statement acknowledges the EPA and FWS discussion of possibly using other existing New York landfills, it does not contain any discussion of the issue, nor does it reference or otherwise respond to the specific assertion that these landfills have recently expanded, and have the capacity to accept waste that is presently sent to the Rapp Road Landfill.

157. It is also important to note that the no-action alternative, resulting in the hauling of waste, would not require the City to find a location to haul 277,000 tons per year of solid waste, but would only require accommodations for a small portion of that waste.

158. Currently, the City of Albany contributes between 10% and 15% of the solid waste that is deposited at the Rapp Road Landfill, or approximately 28,000 to 42,000 tons per year. According to the FSDEIS, the contribution from the City of Albany for the first six months of 2007 was 15,409.42 tons of municipal solid waste ("MSW"), representing 12% of the total received at the Rapp Road Landfill for the first six months of 2007. (FSDEIS, p.2-15, Table 2-3)

159. The FSDEIS also states that 21,048.27 tons of MSW, representing 17% of the total for the first six months of 2007, was received from municipal drop-off stations within the ANSWERS or CRSWMP communities.

160. Therefore, it appears that closure of the Rapp Road Landfill would result in a need for approximately 29% of the 277,000 tons of MSW received on an annual basis to be hauled to on alternative location. This represents a need for haulage of approximately 80,330 tons per year.

161. The balance of the MSW that is received at the Rapp Road Landfill is received from private waste haulers. The FSDEIS states that most of this waste is local in origin, but there is no way of knowing how much of the other 71% of the waste is actually received from local sources, and how much is received from private waste haulers seeking to take advantage of the Rapp Road Landfill's relatively low commercial price for tipping of municipal solid waste.

162. The no-action alternative, requiring the hauling of all of the waste that is presently received at the Rapp Road Landfill, would therefore require the City of Albany and other communities in CRSWMP to make arrangements for the hauling of approximately 80,330 tons per year. The private haulers who presently pick up waste, even waste generated within the CRSWMP communities, would have the responsibility of finding alternative facilities to accept the waste that they collected.

163. The FSDEIS acknowledges that "there may also be other MSW deliveries from local communities that are not part of the ANSWERS communities, but which find the facility conveniently situated and competitively priced." (FSDEIS, p.2-15). This statement illustrates one of the main problems with the continued operation of the Rapp Road Landfill. Rather than being operated as a facility to handle the genuine need of the ANSWERS communities for solid waste disposal, it is being operated as a revenue source by the City of Albany, at the expense of the Pine Bush.

164. A fair consideration of the no-action alternative would require the City to analyze the feasibility of providing for hauling 80,330 tons of waste to alternative facilities, and the costs involved. Because such an analysis was not conducted, DEC has not taken a hard look at the no-action alternative, and its SEQRA analysis is fatally flawed.

vii. Failure to adopt mitigation measures

165. SEQRA regulations specifically require that "adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable" 6 NYCRR § 617.11 (d) (5).

166. The Findings Statement identifies a number of mitigation measures that were adopted by DEC with respect to the Eastern Expansion. In particular, the permit that was issued requires the City to implement a Habitat Restoration Plan, which will restore approximately 255 acres of land in the Pine Bush, and requires the City to set aside a fee in the amount of $10 per ton of solid waste to provide for the funding for this plan.

167. In effect, DEC is permitting the City to destroy more acres of the Pine Bush in exchange for adopting a program of restoration for the remainder of the Pine Bush. Upon information and belief, this is the same Faustian bargain that Commissioner Jorling adopted in 1990, when he permitted the initial expansion of the landfill into a then pristine area of the Pine Bush, in exchange for the funding for the creation of the Pine Bush Preserve.

168. However, DEC did refuse to adopt other mitigation measures, some of which were proposed by petitioners during the public review process, which could have provided

specific mitigation for the environmental harm that will be caused by the Eastern Expansion.

169. Initially, DEC could mitigate the harm, and minimize the danger that the City, when it runs out of landfill space in 6 1/2 years will apply for a fifth expansion of its landfill, by adopting certain measures to maximize the longevity of the landfill, by minimizing the amount of waste that will be deposited at the Rapp Road site.

170. Petitioners, in their comment letter on the FSDEIS, specifically suggested mitigation measures that could be adopted:

> These measures should include, at a minimum, restricting the tipping of waste to residents of the ANSWERS wasteshed. This can be accomplished by either prohibiting private waste haulers, or by requiring them to certify that all of the waste that they are depositing originated within the wasteshed. In addition, the Department should consider requiring the City: 1) to stop accepting waste from State sources, 2) to stop utilizing its landfill on behalf of the entire ANSWERS and limit waste disposal to the city of Albany, 3) reducing the limit of waste that can be received below the current limit of 1050 tons per day, or requiring that a certain portion of the waste be sent to other landfills that can accommodate it. Under no circumstances should the City be permitted to continue to utilize the landfill as a revenue source by permitting entities to deposit waste that have no connection to the wasteshed. (Comment letter, p.15)

171. It is particularly important to realize that restrictions on the amount of waste received at the landfill are critical to mitigating the impact of the landfill, and maximizing its longevity.

172. The City apparently intends to expand its recycling program, to minimize waste generation. Nevertheless, even if its recycling is increased dramatically, it will not mitigate the impact of the use of the Eastern Expansion if the City merely utilizes the

landfill, to the maximum extent of its capacity, to receive waste from commercial haulers.

173. It is the City's dumping of 277,000 tons per year of municipal solid waste at the Rapp Road Landfill that causes environmental harm. That harm is the same whether that waste is received from commercial waste haulers, (at a financial profit to the City) or whether it is received directly from municipalities. While recycling is beneficial for the environment, recycling will not mitigate the significant adverse environmental impacts unless it actually reduces dumping at the landfill; if the waste that is recycled (and therefore not dumped in the landfill) is simply replaced by waste from commercial sources, the adverse environmental impacts caused by the landfill will be unchanged.

174. DEC could have, but ultimately did not, require mitigation measures such as:

a. requiring the City to raise its tipping fees, so that the Rapp Road Landfill would become a destination of last resort for commercial waste haulers,

b. imposing a stricter timetable upon the City for the development of a viable Solid Waste Management Plan, which would ensure that a long-term solution would be in place sooner rather than later, and certainly well before the expiration of the estimated 6.5 years of additional landfill capacity, and

c. requiring that the City fund an independent environmental monitor, to ensure compliance with the conditions of the permit, and, in particular, to take all necessary actions with respect to potential odor problems that may arise.

175. These mitigation measures were specifically proposed in Save the Pine Bush's comment letter.

176. However, DEC did not address Save the Pine Bush's proposed mitigation measures, and did not offer any reason why these conditions were not imposed as part of the final permits that were issued.

D. The failure to conduct an adjudicatory hearing

177. Section 70-0119 (1) of the Environmental Conservation Law directs the Department of Environmental Conservation to conduct a hearing "where any comments received from members of the public or otherwise raise substantive and significant issues relating to the application and resolution of any such issue [that] may result in denial of the permit with the imposition of significant conditions thereon...". This language is substantially restated in the implementing regulation, 6 NYCRR § 621.7 (b).

178. DEC regulations provide for two types of hearings: 1) a "legislative hearing," which is defined as "a proceeding provided by § 621.8 of this part which provides an opportunity for the public to make unsworn statements, based on fact or belief, for consideration by the department in its review of applications for permits" (6 NYCRR § 621.2 (p)) and 2) an "adjudicatory hearing," which is defined as "a trial type proceeding which provides the opportunity for an Administrative Law Judge to hear a case and recommend a decision to the commissioner on the basis of evidence, including direct testimony and cross-examination. . . . The commissioner renders a decision based on the record of hearing and applicable law." (6 NYCRR § 621.2 (a))

179. 6 NYCRR 621.8 (d) states "the determination to hold an adjudicatory public hearing shall be based on whether the department's review raises substantive and significant issues relating to any findings or determinations the department is required to make pursuant to the Environmental Conservation Law, including the reasonable likelihood

that a permit applied for will be denied or can be granted only with major modifications to the project because the project, as proposed, may not meet statutory or regulatory criteria or standards. In addition, where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in the dialogue the permit application, or the imposition of significant conditions thereon, the department shall hold an adjudicatory public hearing on the application."

180. The standards for adjudicable issues are set forth in 6 NYCRR § 624.4 (c) which provides:

> (c) Standards for adjudicable issues.
>
> (1) Generally applicable rules. … an issue is adjudicable if:
>
> (i) it relates to a dispute between the department staff and the applicant over a substantial term or condition of the draft permit;
>
> (ii) it relates to a matter cited by the department staff as a basis to deny the permit and is contested by the applicant; or
>
> (iii) it is proposed by a potential party and is both substantive and significant.
>
> (2) An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ.
>
> (3) An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.
>
> (4) In situations where the department staff has reviewed an application and finds that a component of the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that

component to demonstrate that it is both substantive and significant.

(5) If the ALJ determines that there are no adjudicable issues, the ALJ will direct that the hearing be canceled and that the staff continue processing the application to issue the requested permit.

181. The City's application for a permit had been submitted in July 2007, and had been subjected to two rounds of comments by DEC Staff, with responses to the comments submitted by the City's consultant Clough Harbour and Associates, on April 3 and June 30, 2008.

182. DEC did not make its determination to accept the application until the fall of 2008, and the public was not advised that the application had been complete until DEC issued a Notice of Complete Application on October 6, 2008, 15 months after the application had been submitted. The public was initially given only a 30 day period to submit comments, until November 7, 2008.

183. The DEC Notice of Complete Application did not advise the public of the necessity of submitting issues that were "significant" or "substantial" as a precondition to conduct an adjudicatory hearing.

184. Furthermore, it would be difficult for any members of the public, including environmental organizations like Save the Pine Bush, to retain experts, have the experts review the masses of application material, and identify the relevant issues with sufficient specificity to DEC's purpose in the short comment period that was allowed.

185. The comment period was subsequently extended until December 15, 2008.

186. DEC conducted a public hearing on December 3, 2008, and received written comments through December 15, 2008. These comments, including both oral and written

comments submitted by petitioners, raised a variety of issues which were properly adjudicable.

187. On December 5, 2008, Save the Pine Bush counsel Peter Henner wrote to Angelo Marcuccio, the Environmental Analyst responsible for the processing of the City's permit application and SEQRA review. In his letter, Mr. Henner made two requests: 1) an extension of the deadline for the submission of written comments, from December 15, 2008 until January 31, 2009, and 2) that DEC commit to schedule an adjudicatory hearing to provide Save the Pine Bush and the public at large with an opportunity to present evidentiary material to an independent Administrative Law Judge pursuant to 6 NYCRR Part 624 pertaining to whether the permits should be denied or modified, or whether additional permit conditions should be imposed.

188. Mr. Henner noted that he had requested additional documents relevant to the landfill by a Freedom of Information Law request, which was still pending as of December 5, 2008, and that, even if his request for an extension until January 31 was granted (which it was not), the public would have only had four months to review the application, compared to the 15 months that DEC reviewed it.

189. Mr. Henner's letter of December 5, 2008 also noted that DEC had refused to conduct an adjudicatory hearing with respect to the 2000 expansion of the landfill, and cited the difficulty of persuading a court to address the technical issues that should be the subject of a full review by an agency ALJ, before the agency made its final decision. He specifically stated:

> The experience of the litigation in 2000 demonstrates that the public can only have a meaningful opportunity to be heard with respect to the technical issues if it has an opportunity to present them to an independent Administrative Law Judge

who will be able to consider the technical merits of the issues. Department decisions as to environmental issues, especially technical issues pertaining to landfill regulations, are entitled to judicial deference. Because such decisions are likely to be upheld by the courts, it is critical that the decision-making process be open and transparent, and that the public must have an opportunity to have their concerns fairly considered. DEC should not hide behind the deference that might be given to an administrative agency to shield a particular applicant from public criticism and to prevent environmental organizations from having their concerns considered.

The notice of a complete application did not specify that the public comments must raise significant and substantive issues. It is not clear, from the notice, whether the comments to be submitted must meet the standards to raise adjudicatory issues set forth in Part 624 in order for Staff to determine to conduct an adjudicatory hearing. Instead, the public may be lulled into believing that their comments will be considered under a general standard, without having to meet specific criteria to warrant an adjudicatory hearing. The public may also believe that DEC will provide a further opportunity to raise issues with the specificity required to require an adjudicatory hearing. However, if DEC Staff simply decides, as it did in 1999-2000, that it does not want to conduct an adjudicatory hearing by whatever standard Staff decides to use, the public will be deprived of an opportunity to have their issues fairly heard.

In order to avoid this danger, and to ensure DEC processes are transparent and fair, and in order to have the relevant decision with respect to the issues made by an independent ALJ, who will consider the technical issues involved in this permit application, Save the Pine Bush respectfully urges DEC to commit itself to conduct an adjudicatory hearing, and to give any interested parties the opportunity to raise issues at an issues conference, in accordance with the provisions of 6 NYCRR 624.4.

Based upon the experience in 2000, it appears that the Department may dismiss any issues that we may raise, and refuse, without reason or explanation, to conduct an adjudicatory hearing. Although Save the Pine Bush will identify the issues, including the propriety of the variances that the City of Albany is once again seeking, we are very concerned that our request will fall on deaf ears, as it did in 2000. This is especially true since, given the shortness of time, it will be very difficult for our comments to achieve the same level of specific detail, to incorporate expert opinion, and to elaborate on the basis of our opposition to the project and the grounds which would require the Department to deny the permit or to impose significant conditions upon it. These problems can and should be resolved by making it clear that interested parties will have an opportunity to subsequently file petitions for party status in the context of an adjudicatory proceeding under Part 624.

(Henner letter, pps.3-5)

190. Ten days later, in its December 15, 2008 comment letter, Save the Pine Bush repeated the request that DEC conduct an adjudicatory hearing, and to permit "an administrative law judge to make the determination of whether we have identified issues for formal adjudication." (Comment letter, p.5)

191. Save the Pine Bush identified specific regulatory requirements of Part 360, and requested an opportunity to make a formal offer of proof, including the identification of competent expert testimony, before an Administrative Law Judge, to establish the existence of adjudicable issues.

192. The following issues were identified in Save the Pine Bush's comment letter:

a. The failure to submit an adequate solid waste management plan, as required by 6 NYCRR § 360-1.9 (g). 6 NYCRR § 360-15.11 (a) states that DEC may not determine that an application to construct or operate a solid waste management

facility is complete “until the department approves a modified plan” describing the changes to the plan. As of December 15, 2008, the applicant had not even submitted its final Solid Waste Management Plan modification and, as noted in ¶¶ 46-48 above, the failure to submit an adequate Solid Waste Management Plan was grounds to reject the application as incomplete, and certainly would constitute grounds to deny the proposed permit for failure to comply with the regulatory criterion.

b. Whether DEC should grant a waiver from the requirement of 6 NYCRR § 360-1.7 (c) which prohibits the siting of landfills over principal aquifers.

c. The City was required to submit a site selection study, pursuant to 6 NYCRR § 360-2.12. Save the Pine Bush sought to raise the issue of whether or not the site selection study, which, as noted in ¶¶ 138-143 above, is the same site selection study that had been utilized for more than 20 years, was adequate under the regulatory requirement.

d. Whether the construction or operation of the Eastern Expansion would violate the requirements of 6 NYCRR § 360-1.7 (a) (2) (iii), which prohibits the construction or operation of a landfill "in a manner that causes or contributes to the taking of any endangered or threatened species or to the destruction or adverse modification of their critical habitat."

e. Whether the application demonstrates compliance with 6 NYCRR § 360-2.15 (k) which prohibits slopes greater than 33% on the landfill. Save the Pine Bush, relying upon its expert consultant, believes that the final slope of the landfill will be as great

as 42%, raising a significant danger of slope failure, with the possibility that the landfill may collapse.

f. Whether the City's Leachate Management Plan, specifically required by 6 NYCRR § 360-2.3 (k) and § 360-2.7 (b) (9), is adequate. Save the Pine Bush maintains that the plan is inadequate because it does not require analysis of the leachate prior to its disposal in municipal sewer systems, and because the plan to treat leachate, if necessary, by mobile air strippers, raises serious concerns about noise and air pollution which were not addressed in the application. Furthermore, Save the Pine Bush maintained that the application and the Engineering Report submitted in support of the application did not adequately address the contingencies in the event of a breach in the secondary containment system, and did not describe how leachate would be recovered in the event of a breach of the liner itself.

g. Save the Pine Bush noted that the City was seeking a variance of the requirement of 6 NYCRR § 360-2.17 (d) which requires an intermediate cover of 12 inches of compacted cover material. The City is seeking to use a material called "Posi-Shell" which supposedly works as an odor suppressant. Save the Pine Bush sought to adjudicate questions with respect to standards for the application of "Posi-Shell" and whether the use of Posi-Shell was adversely impacted by snow removal machinery. Since odor problems actually have occurred, Save the Pine Bush believes that the viability of this supposed odor suppressant, which required a variance from the Part 360 regulations, was an adjudicable issue.

h. The contingency plan required by 6 NYCRR § 360-2.10 fails to address important operational issues including: 1) loss of electrical power, 2) access into confined

spaces for monitoring and maintenance, 3) protection and control of explosive landfill gas, 4) handling of unauthorized waste, 5) release of toxic materials into the environment, 6) contamination of private water supply sources, 7) overflow of the leachate tank in the event of unusually high accumulations of leachate, 8) description and location of alarm systems, and 9) inoperable leachate pumps. Furthermore, a Construction Contingency Plan, referenced in § 2.3 (I) of the Quality Control Plan was missing. This plan is needed to address issues that might arise during construction as a result of excessive odors, or in the event of a spill.

i. The Environmental Monitoring Plan does not contemplate monitoring of the existing surface water quality of the drainage ditch that runs into Rensselaer Lake, despite the fact that, in 2005, DEC discovered solid waste and/or leachate running into surface waters, and it is essential to determine background levels for water quality. Save the Pine Bush also argued that more frequent monitoring of the leak detection layer was needed than the semiannual monitoring proposed in the Monitoring Plan.

j. The seismic analysis, specifically required by 6 NYCRR § 360-2.7 (b) (7) is inadequate, because it failed to show conformance with the relevant criterion, USGS MF2120.

(Comment letter, pps. 6-14)

193. In addition, Save the Pine Bush requested that DEC impose additional permit conditions "to ensure that the City: 1) complies with its obligations to conduct meaningful solid waste planning, …, 2) complies with the regulatory criteria, …3) takes appropriate steps to ensure the protection of local residents, the community, and

the environment," (Comment letter, p.14) and/or 4) minimize the amount of waste that is deposited at the Rapp Road site to maximize its longevity (see ¶¶ 170-173 above).

194. If Save the Pine Bush had the benefit of additional time, it would have raised additional issues, particularly with respect to the Air Pollution Control Permit ("Air Permit"). A copy of the Air Permit is annexed hereto as Exhibit O.

195. Save The Pine Bush believes that a variety of modifications are required for the Air Permit. Specifically:

a. The Air Permit does not provide for ambient air monitoring for air toxics, especially near residential areas or for an environmental health risk assessment, based upon the results of such monitoring.

b. Item 44.1 of the permit requires that the City design and implement a collection and control system only if the emission rate for Non-Methane Organic Compounds ("NMOC") exceeds 50 megagrams per year, or 55 tons per year. Save The Pine Bush believes that this rate is excessive and could result in toxic air emissions because landfill gasses contain volatile organic compounds, including organic halogens. The threshold for the implementation of a collection and control system design should be set significantly lower than an NMOC emission rate of 50 megagrams per year.

c. Item 44.1 does not specify temperature, residence time, or combustion efficiency for landfill flares that are designed as part of a collection and control system. Furthermore, Item 44.1 does not require testing for air toxics and products of incomplete combustion at these flares. Incomplete combustion can result in

emissions of dioxins and furans, which may have serious public health consequences.

d. Item 44.1 specifies that the collection and control system reduce NMOCs by 98%. This limit is insufficient because it will not eliminate products of incomplete combustion such as dioxins and furans. Landfill gas contains organic halogens such as dichloromethane, tetrachloroethylene and vinyl chloride, and these will be emitted if the control limit is only 98%.

e. The landfill gas oxygen content monitoring provision is insufficient because it fails to test for the presence of organic compounds that are specifically described in DEC Air Guide One for Air Toxics.

f. Item 50.2 requires the air pollution collection system to be operated so that the methane concentration is less than 500 ppm above background at the surface of the landfill. This limit of 500 ppm is excessive, and the City should be required to adhere to a lower limit, both to minimize health risks, and also to minimize odors.

g. Item 76 authorizes various "regulated processes" as control devices for air pollution at the landfill including high compression landfill gas engines. However, the discussion of these devices does not mention controls for nitrogen oxides ("NOX"), gas adsorption controls to remove volatile organic compounds, and organic halogens prior to combustion. High compression engines generally have significant NOX emissions, which can contribute to ozone in the atmosphere, and can also form toxic emissions such as dioxins and furan if organic halogens are in the landfill gas.

h. Item 76 does not specify combustion efficiency or emission test for toxic air contaminants, especially dioxin and furans. Emissions can be expected from both flares and landfill gas engines.

196. Furthermore, if the matter had been properly noticed for an adjudicatory hearing under Part 624 and if the public had been advised of the need to submit issues and offers of proof that met the standards for adjudicable issues, Save the Pine Bush would have had the opportunity to make a formal submission of all of the above issues, including the air permit issues, supported by identified experts.

197. However, the public in general, and Save the Pine Bush in particular, were never given the opportunity to present such issues for adjudication.

198. Some of the issues that Save the Pine Bush raised are highly technical in nature, and should properly be addressed in an adjudicatory hearing before an Administrative Law Judge experienced in receiving and evaluating such evidence.

199. For such issues, Save the Pine Bush maintains that the proper remedy for DEC's erroneous determination to grant the permits is to remand the matter to DEC, with instructions to conduct an adjudicatory hearing.

200. For example, Save the Pine Bush maintains, for the reasons set forth in its comment letter, that the application fails to demonstrate compliance with the maximum slope requirement contained in 6 NYCRR § 360-2.15 (k), which imposes a maximum slope of 33% for final landfill grades. (Comment letter, p.12)

201. This issue is not directly addressed in the Findings Statement. However, the City, in its response to public comments contained in the Fourth Supplemental Final EIS, responds to Save the Pine Bush by stating that Save the Pine Bush analysis is incorrect and that

the drawings submitted in support of the application actually comply with the regulatory criteria. (Fourth Supplemental Final EIS, pps.2-17-18.) A copy of the response to public comment section of the Fourth Supplemental Final EIS is annexed hereto as Exhibit P.

202. Save the Pine Bush understands that the Court, confronted with this dispute, is likely to defer to DEC's interpretation. The Court presumably does not have the technical expertise to evaluate the drawings itself, and, even if it did, the Court is not likely to credit the comment of Save the Pine Bush over the review by the technical experts for the City, apparently by DEC.

203. However, this dispute demonstrates Save the Pine Bush's argument that an adjudicatory hearing should have been held, where Save the Pine Bush could have presented expert testimony with respect to this dispute, and an Administrative Law Judge, based upon the record, could have made an evidentiary finding which could then be judicially reviewed.

204. DEC continued to review the application and Environmental Impact Statements from January 2009 until June 25, 2009, when DEC issued the permits and SEQRA Findings Statement.

205. During that time, DEC sent a significant amount of correspondence to the applicant, received responses from the applicant, received and apparently considered the comments from the Environmental Protection Agency and the Fish and Wildlife Service, as well as other documents pertaining to the § 404 permit to be issued by the US Army Corps of Engineers, and finally, in May 2009, received the modification for the Solid Waste Management Plan.

206. Apparently, there was enough additional material, either in the comments received from the public, DEC's further review of the application, or from other sources, that warranted an additional six months for DEC to finalize the SEQRA process (for approving and filing the Final Environmental Impact Statement, and preparing the Findings Statement).

207. Nevertheless, the DEC concluded "after an EIS and an extensive public review process including a legislative public hearing it has been determined that under the provisions of 6 NYCRR 621.8 (b) no substantial or significant issues have been raised warranting an adjudicatory public hearing and all statutory and regulatory criteria and standards for approval and permit issuance have been met." (Findings Statement, p.6)

208. DEC considered the application and the EIS from April 2007 until its final adoption in June 2009. Although the Findings Statement refers to an "extensive public review process," the public was only able to participate in this review for 3 ½ months, from October 6, 2008 through December 15, 2008.

209. DEC did not respond, either in the Findings Statement, or anywhere else, to the specific request that it conduct an adjudicatory hearing as raised in Mr. Henner's letter of December 5, 2008.

210. Although the Final Environmental Impact Statement did, as required by 6 NYCRR § 617.9 (b) (9), offer some responses to the comments submitted by Save the Pine Bush and other members of the public (including the substantive issues raised in Save the Pine Bush's comment letter), it did not explain why those issues were not substantive or significant, or did not warrant an adjudicatory hearing.

211. Save the Pine Bush had only a limited opportunity to submit public comments during the short public comment period. Nevertheless it submitted comments which raised "substantive" and "significant" issues for adjudication. However, DEC Staff's decision that the issues were not "substantive" and "significant" deprived petitioners of an opportunity to be heard with respect to their arguments and foreclosed any recourse to DEC administrative appeal procedures.

212. Although DEC accepted the FEIS submitted by Clough Harbour on behalf of the City, including its responses to the issues raised by petitioners, DEC did not offer any explanation as to why the disagreements between petitioners and the City should not be referred for an adjudicatory hearing.

213. Save the Pine Bush should not be required to accept the conclusions and findings of these studies, but is instead entitled to offer conflicting evidence with respect to these technical issues at a formal adjudicatory hearing.

214. An Administrative Law Judge, upon review of technical submissions made with respect to Save the Pine Bush's proposed issues, might make a determination that Save the Pine Bush's concerns are not sufficient to raise substantive significant issues as those terms are defined by the Part 624 regulations (governing the conduct of adjudicatory hearings). If so, Save the Pine Bush would have the opportunity to appeal such a determination to the Commissioner of the Department of Environmental Conservation in accordance with Part 624. Under such a scheme, Save the Pine Bush would have the opportunity to submit environmental concerns, have them reviewed for evidentiary sufficiency, and have a full right to pursue administrative appeals. (See

procedures for the conduct of an "issues conference" (6 NYCRR 624.4 (b) and (c)) and appeals from rulings of ALJs (6 NYCRR § 624.8)).

215. However, NYDEC Staff, by making a determination to issue a permit without providing an opportunity for an adjudicatory hearing, has deprived Save the Pine Bush of an opportunity to be heard with respect to these issues, a right specifically contemplated and required by ECL § 70-0115 and by 6 NYCRR § 621.7.

E. Failure to comply with regulatory criteria

216. Save the Pine Bush respectfully maintains that the permits that were issued by DEC, particularly the permit to construct and operate a landfill pursuant to 6 NYCRR Part 360, should be overturned because of the failure of the City to demonstrate compliance with the substantive regulatory criteria.

217. Save the Pine Bush, in its comment letter, described the City's failure to comply with a number of specific criteria in Part 360, pertaining to the failure to submit an adequate Solid Waste Management Plan, the adequacy of the site selection study, siting a landfill which would contribute to the taking of an endangered species, maximum slope requirements, the adequacy of the Leachate Management Plan, Contingency Plan, Environmental Monitoring Plan and whether the seismic analysis conformed with the relevant criteria. (These shortcomings are summarized in ¶ 189 above, describing the issues that should have been referred for an adjudicatory hearing.)

218. Although many of the failures to comply with the regulatory criteria of Part 360 that Save the Pine Bush alleges cannot be resolved without further technical review, four failures of DEC to comply with regulations can be adjudicated by this Court as questions of law without remand to DEC to conduct formal adjudicatory hearings, the:

1) failure to adopt an adequate solid waste management plan, 2) inadequacy of the landfill siting study, 3) takings of endangered species, and 4) granting of a variance to site a landfill over a principal aquifer.

i. The City does not have a Solid Waste Management Plan that complies with Part 360

219. 6 NYCRR § 360-1.9 (g) and § 360-15.9 require that an applicant to construct a solid waste management facility have a Solid Waste Management Plan that provides for management of all solid waste within the planning unit for at least ten years (see ¶¶ 43-75 above).

220. The SWMP Modification that was ultimately submitted to DEC in May 2009, seven months after the application had been deemed complete and five months after the conclusion of the public comment period, fails to meet this criteria.

221. Instead, the plan simply states that the City will, at some point in the future, develop such a plan.

222. The Plan makes a vague reference to the possibility that Site C-2 in Coeymans will somehow "play a role" even though many of the documents submitted in support of the application demonstrate that Site C-2 is totally unsuitable for landfill purposes, and will not be ready, if it ever is, for at least "10 to 20 years." The failure to have a SWMP that meets the requirements of the regulations warrants the invalidation of the Part 360 permit.

223. DEC can only issue a permit for the expansion of a solid waste management facility if the applicant, in this case the City of Albany, can "demonstrate that construction of the

proposed facility is consistent with the local solid waste management plan in effect for the municipality." (6 NYCRR 360-1.10 (a))

224. Here, the City has not submitted a valid plan, and even if it had, the apparent intention to simply extend the Rapp Road Landfill into the Pine Bush for another 6.5 years is not consistent with such a plan.

ii. The City has failed to conduct a proper landfill siting study

225. The application fails to demonstrate compliance with the specific requirements of 6 NYCRR § 360-2.3 (i) which requires the preparation of a landfill siting study in accordance with § 360-2.12.

226. 6 NYCRR § 360-2.12 requires that an applicant for landfill expansion that does not "exhibit [certain] characteristics" must submit a site selection study in order to justify the selection of the nonconforming site.

227. In particular, a landfill site selection study is required if a new landfill or an expansion of an existing landfill is located in an area that meets the criteria of § 360-1.7 (a) (2) or is located over a principal aquifer (see § 360-2.12 (a) (1) (i) referencing landfill siting restrictions in § 360-2.12 (c) (1) and imposing restrictions on landfills sited over principal aquifers).

228. 6 NYCRR § 360-1.7 (a) (2) prohibits the siting of solid waste management facilities "in a manner that causes or contributes to the taking of any endangered or threatened species or to the destruction or adverse modification of the critical habitat."

229. Because the Eastern Expansion may contribute to the taking of the Karner Blue and Frosted Elfin butterflies, and because it is located over a principal aquifer, the City was

required to conduct a site selection study. This site selection study is summarized in the Alternatives Section of the FSDEIS, and is discussed in ¶¶ 138-148 above.

230. The site selection study fails to comply with the regulatory criteria of Part 3560, in addition to failing to comply with the requirements of SEQRA.

231. § 360-2.12 (b) (2) (i) requires that "the site selection process must be comprehensive and must identify and evaluate a reasonable range of alternative sites which are feasible considering the capabilities and objectives of the applicant."

232. The site selection study performed by the applicant fails to meet this criteria. The City failed to consider any sites outside of the City of Albany, with the exception of Site C-2 in Coeymans, and has failed to consider any new possible sites for its landfill for almost 20 years.

233. The City continues to focus its alternative selection on a site, C-2, which it knows will not be viable for at least 10 to 20 years, if ever. As a result, the site selection process continually reaffirms the conclusion that there are no alternatives to continued expansions into the Pine Bush. The Court can determine, as a matter of law, and without reference to any technical materials, that the City's failure to consider any new sites indicates that its site selection study is not comprehensive, and the City has not identified a reasonable range of alternative sites.

234. Accordingly, Save the Pine Bush respectfully urges the Court to invalidate the Part 360 permit because of the failure to comply with the regulatory requirements of § 360-2.12.

iii. Taking of endangered species

235. The Court can also determine, as a matter of law without the necessity of a technical hearing, that the expansion of the landfill will "cause or contribute to the taking of any

endangered or threatened species or to the destruction or adverse modification of their critical habitat," in violation of the regulatory requirement of 6 NYCRR § 360-1.7 (a) (2) (ii).

236. As noted in ¶¶ 108-118 above, the land that will be taken for the Eastern Expansion has been identified as important to the survival of the Karner Blue Butterfly, because this land is needed as linkage and buffer area.

237. Obviously, the taking of this land for landfill purposes will, in fact, adversely impact the Karner Blue Butterfly.

238. As Save the Pine Bush noted in its comment letter "the City is seeking to do something that is specifically prohibited by the regulations: expand a landfill in an area known to be a habitat for an endangered species." (Comment letter, p.11)

iv. DEC improperly granted a variance to site a landfill over a principal aquifer

239. Save the Pine Bush also maintains that DEC improperly granted a variance from the regulatory requirements that a landfill should not be located over a principal aquifer, and for use of daily cover.

240. Although the Department's authority to grant a variance from the regulatory prohibition against the siting of landfills over principal aquifers has been judicially upheld, Save the Pine Bush nevertheless maintains that DEC's determination to grant such a variance constitutes an abuse of discretion.

241. Save the Pine Bush noted in its comment letter that the Rapp Road Landfill "is known to have already contributed to the pollution of groundwater that is migrating towards Rensselaer Lake and towards potential public water supplies for the City of Albany." (Comment letter, p.8).

242. DEC has determined not to declassify the aquifer that underlies the Rapp Road Landfill. Therefore, DEC has determined that this aquifer still has some value as a water resource. Until and unless DEC determines to declassify this aquifer, it should not grant a variance to site a landfill over it.

243. Save the Pine Bush maintains that DEC should not have granted a variance from the regulatory requirements of 6 NYCRR § 360-1.7 (c) because the variance is contrary to DEC's determination that the aquifer warrants protection.

F. The City's use of bond money to pay the tipping fee surcharge violates the New York State Constitution

244. Special condition 34 of the permits for the Eastern Expansion requires the City of Albany to "set aside a habitat restoration plan implementation and maintenance fee in the amount of ten ($10) dollars per ton of solid waste accepted at the facility." (Permit, p.19). The City of Albany, as the owner and operator of the Rapp Road Landfill, will be responsible for paying the $10 per ton fee.

245. Upon information and belief, the purpose of this fee is to fund the habitat restoration plan which was included in the permit as a mitigation measure.

246. The $10 fee included as a permit condition raises the cost of depositing waste at the landfill. If this fee was paid by the users of the landfill, it would have the impact of forcing the users of the landfill to pay for the actual cost of depositing waste.

247. However, if the City chooses to pay the fee out of its own pocket rather than require the private waste haulers to pay it, the City will, in effect, be subsidizing the waste haulers.

248. As noted above, approximately 71% of the waste received at the landfill comes from private sources (exclusive of the approximately 29% that is collected by the City and received from municipal waste transfer stations).

249. Upon information and belief, these private waste haulers are in the business of accepting waste from paying customers, for a fee, and utilize the Rapp Road Landfill, rather than other waste disposal options because it provides a cheaper disposal option.

250. If private waste haulers were required to pay the $10 surcharge, and deposited less waste in the landfill because of the extra cost, the life of the landfill would be extended, and damage to the Pine Bush would be lessened.

251. On July 15, 2009, the Albany Common Council adopted six ordinances authorizing the issuance of bonds in a total of $13,845,000, for expenses related to the landfill expansion or for land acquisition associated with the landfill expansion project. A copy of the minutes of the July 15, 2009 special meeting as annexed hereto as Exhibit Q.

252. Upon information and belief, one of the purposes of these bonds was to subsidize the private waste haulers by paying the $10 per ton fee so that private waste haulers would continue to utilize the Rapp Road Landfill.

253. The Albany Times Union published a news article, on July 1, 2009, describing the debate pertaining to the issue. A copy of this article is annexed hereto as Exhibit R.

254. Councilman James Sano, Chairman of the Council Finance Committee, who proposed all six of the bonding resolutions that were adopted by the Council, was quoted by the Times Union as questioning what would happen if higher tipping fees drove customers away from the landfill.

255. The article also states that the City's attorney, Ruth Leistensnider, "acknowledg[ed] concerns that if the City were to raise tipping fees the private haulers and municipalities might take their business elsewhere."

256. These comments illustrate that the City intended and intends to subsidize the continued dumping in the Pine Bush, despite the environmental hardship caused by such dumping, and despite the fact that such dumping will shorten the life of the landfill.

257. By providing a subsidy to the private haulers, the City is, in effect, making a gift of public monies to fund private companies' dumping of waste at the landfill.

G. Plaintiffs are not guilty of laches

258. On June 29, 2000, Save the Pine Bush and a number of individual petitioners commenced an Article 78 proceeding challenging the third expansion of the Rapp Road Landfill, which had been approved on February 29, 2000.

259. The petition was brought on the last day of the four-month limitations period, and fixed an August 11, 2000 return date. The Appellate Division, Third Department ultimately characterized this as "a delay of over five months from the issuance of the project permit to Supreme Court's first opportunity to consider the merits of the proceeding." Save the Pine Bush v. New York State Department of Environmental Conservation, 289 A.D.2d 636, 639 (3d Dept. 2001)

260. The petition was dismissed by Supreme Court on October 25, 2000. Save the Pine Bush filed a Notice of Appeal on November 22, 2000 and was ultimately granted two extensions of time, until June 22, 2001, to perfect its appeal.

261. The Appellate Division noted that, in the 20 month period between the issuance of the permit and its decision, the City had completed Phase One of the expansion, had "taken

substantial steps toward satisfaction of a Department mitigation measure requiring the City to purchase the 60-acre Fox Run Estates Mobile Home Park… at a cost of $3,2000,000" and had contracted for $1,500,000 to relocate a gas to energy facility. (289 A.D.2d at 634)

262. The Court also noted that petitioners never sought a preliminary injunction with regard to the City's work or moved for a stay of any portion of Supreme Court's judgment during the pendency of the proceedings.

263. Even though Save the Pine Bush complied with all applicable statutes of limitation, the Petition was nevertheless dismissed on the grounds of laches and mootness because of the lapse of time between the issuance of the permit and the date when Save the Pine Bush presented the merits of its claim.

264. In the instant case, DEC issued its permit on June 25, 2009, and petitioners filed the instant proceeding on October 19, 2009, within the four-month statute of limitations.

265. Respondents may once again argue laches, on the basis of what the City may have done in the four months since the issuance of the permits, and because the City claims to be facing a crisis, where it says that it will run out of landfill space by November 2009.

266. Save the Pine Bush respectfully maintains that the circumstances pertaining to the instant Petition are radically different than the circumstances that pertained in 2000 with respect to the third landfill expansion, and that the instant Petition is not barred by laches.

267. "Because laches is a purely equitable defense, it will not serve to bar recovery in an action at law commenced within the limitations period. As such, unless the legal right

is barred by the Statute of Limitations, the equitable remedy is not barred by the doctrine of laches. Ecumenical Task Force v. Love Canal Area Revitalization Agency, 179 A.D.2d 261, 265 (4th Dept. 1992) . See also Soule v. Town of Colonie, 95 A.D.2d 979, 980 (3d Dept. 1983), reversing dismissal of lawsuit on grounds of laches, despite substantial work done by respondent, because Article 78 proceeding challenging negative declaration was timely.

268. Furthermore, Save the Pine Bush should not be barred under the equitable doctrine of laches where respondents themselves are responsible for the fact that the Petition could not be filed until shortly before the City's alleged deadline to commence operation of the Eastern Expansion.

269. It is important to remember that the City submitted its application for a permit in April 2007. DEC did not make a determination of completeness until October 2008.

270. After the short public comment period ended on December 15, 2008, DEC took an additional 6 1/2 months, until June 25, 2009, before making its SEQRA findings and issuing the relevant permits for the Eastern Expansion.

271. During those 6 1/2 months, DEC and the City reviewed a number of documents, including the Solid Waste Management Plan, which was not submitted until May 2009, and comments from two federal agencies, which, because they were submitted after the close of the public comment period, were never subjected to public comment and review.

272. Even though DEC was obviously aware of the need to take action in order to enable the City to start construction and operation of the landfill prior to November 2009, DEC nevertheless took 6 1/2 months to complete its review.

273. The fact that the permits were not issued until shortly before the deadline for the construction of the expanded landfill is due to the dilatory tactics of respondents, not Save the Pine Bush.

274. Save the Pine Bush, with far fewer resources than respondents, proceeded as diligently as it could to commence this proceeding. Nevertheless, because of the volumes of material, including materials that were never made available to the public during the public comment period (Save the Pine Bush received these documents pursuant to a Freedom of Information Law request), it was not reasonable to expect petitioners to have to accelerate the preparation of this Petition much faster than the statutory four-month limit.

275. In addition, the Army Corps of Engineers has not yet issued the requisite permit under § 404 of the Clean Water Act to permit the City of Albany to fill in the wetlands in the area designated for the Eastern Expansion.

276. It is possible that the City may have done some preliminary work for portions of the land that are included in the proposed Eastern Expansion. However, upon information and belief, the City has not begun depositing waste on this land.

277. Upon information and belief, the City is not taking any action with respect to the portions of land included in the Eastern Expansion that are presently wetlands, which will need a wetlands permit from the Army Corps of Engineers.

278. Upon information and belief, the City has not taken the same type of actions or made the same type of commitments that it made during the 20 month period between the issuance of the permit for the third expansion of the landfill and the ultimate conclusion of that lawsuit.

279. Furthermore, this proceeding is plainly not moot, because the Court can grant relief enjoining further actions in the area designated as the Eastern Expansion, and grant relief with respect to the regulatory issues involved in the DEC permits and, more importantly, with respect to the City's failure to adopt an adequate Solid Waste Management Plan, and other issues raised in this Petition.

280. Petitioners are also seeking a preliminary injunction, enjoining the City from taking any additional action with respect to the construction and operation of the Eastern Expansion.

As and for a First Cause of Action (failure to follow Uniform Permit Procedures)

281. Petitioners repeat and reallege each and every allegation set forth above, with the same force and effect as if set forth in full herein.

282. The New York State Legislature has found and declared: "(1) it is the intent of the Legislature to assure the fair, expeditious and thorough administrative review of regulatory permits... (4) it is the intent of the Legislature to encourage public participation in government review and decision making processes and to promote public understanding of all government activities." ECL § 70-0103

283. DEC, pursuant to § 70-0107 of the ECL, has adopted rules and regulations to govern the review of applications for permits for solid waste management facilities and other regulated activities. These regulations are codified in 6 NYCRR Part 621 and Part 624.

284. DEC violated the rules and regulations that govern the processing of applications for permits for the Eastern Expansion of the Rapp Road Landfill, by: 1) refusing to conduct an adjudicatory hearing in accordance with Part 624 after petitioners raised

substantive and significant issues in the public comments (see ¶¶ 177-215 above), and 2) processing the application for a Part 360 permit even though, as a matter of law, it was incomplete because of the failure to submit a modification for the Solid Waste Management Plan prior to the determination of completeness (see ¶¶ 46-50 above).

285. Because of the failure of DEC to follow and apply the procedures set forth in the rules and regulations, DEC's ultimate determination to issue permits for the Eastern Expansion was a determination "made in violation of lawful procedure [and] was arbitrary and capricious [and] an abuse of discretion" and should be invalidated pursuant to CPLR 7803 (3).

As and for a Second Cause of Action (failure to take a hard look under SEQRA)

286. Petitioners repeat and reallege each and every allegation set forth above with the same force and effect as if set forth in full herein.

287. It is well-established that an agency, before undertaking an action, must take a "hard look" at the relevant areas of environmental concern, Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400 (1986), H.O.M.E.S. v. New York State Urban Development Corp., 69 A.D.2d 222, 232 (4th Dept.1979), Aldrich v. Pattison, 107 A.D.2d 258 (2d Dept. 1985).

288. The term “environmental” is defined by the SEQRA statute to mean "the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL § 8-0105 (6)

289. Areas of environmental concern are analyzed in the Environmental Impact Statement. "The EIS, the heart of SEQRA, clearly is meant to be more than a simple disclosure statement…. Rather, it is to be viewed as an environmental "alarm bell" whose purpose is to alert responsible public officials to environmental changes before they have reached ecological points of no return." Town of Henrietta v. Dept. of Environmental Conservation, 76 A.D.2d 215, 220 (4th Dept. 1980)

290. In the instant case, the environmental analysis contained in the Environmental Impact Statement and reviewed in the Findings Statement fails to comply with the "hard look" test because DEC has:

a. failed to consider realistic alternatives to the landfill, including a full evaluation of the no-action alternative (see ¶¶ 149-164 above),

b. failed to mitigate environmental impacts to the maximum extent practicable, because DEC has refused to even consider, and did not adopt, reasonable mitigation measures, including the mitigation measures specifically identified by Save the Pine Bush in their comments (see ¶¶ 165-176 above),

c. failed to consider the existing odor problems at the landfill, and the fact that they are likely to continue if the Eastern Expansion is approved (see ¶¶ 125-134 above), and

d. failed to evaluate the impact of taking and the permanent destruction of an additional 15 acres of land in the Pine Bush, despite the fact that this land is critical for the survival of an endangered species, the Karner Blue Butterfly (see ¶¶ 108-118 above).

291. An Environmental Impact Statement must consider alternatives to the proposed action (ECL § 8-0109 (2) (d)). The consideration of alternatives "should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed. The range of alternatives must include the no action alternative. The no action alternative discussion should evaluate the adverse or beneficial site changes that are likely to occur in the reasonably foreseeable future, in the absence of the proposed action." 6 NYCRR § 617.9 (b) (5) (v) (emphasis added)

292. "One of the major purposes of any FEIS is to suggest and discuss alternatives to the proposed action so as to aid the public and governmental bodies in assessing the relative costs and benefits of the proposal", Coalition for Responsible Planning v. Koch, 148 A.D.2d 230 (1st Dept. 1989), appeal denied 75 N.Y.2d 704 (1990), see also Shawangunk Mountain Environmental Association v. Planning Board of Gardiner, 157 A.D.2d 273 (3d Dept. 1990).

293. Respondents failed to consider any alternative landfill site, besides the C-2 site, which has already been rejected (see discussion of alternative landfill sites in ¶¶ 138-148 above). Because the City did not consider all reasonable alternative sites, the City did not comply with the requirement to take a hard look at alternatives.

294. SEQRA specifically requires the consideration of the "no-action" alternative. In this case, the no-action alternative would imply that the landfill would be closed, and that the City would make alternative arrangements to deposit waste.

295. DEC failed to take a hard look, as part of its SEQRA findings, at the alternative suggested by two federal agencies, the Environmental Protection Agency and the United States Fish and Wildlife Service, that the City could choose not to expand the

Rapp Road Landfill, and instead utilize other landfills in New York State, including the recently approved expanded landfills at Seneca Meadows in Cayuga County, High Acres in Monroe County, and DANC in Jefferson County (see ¶¶ 154-156 above).

296. Section 8-0109 (1) of the ECL requires that "agencies shall use all practicable means to realize the policies and goals set forth in this article, and shall act and choose alternatives which, consistent with social economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including the effects revealed in the Environmental Impact Statement process." The requirement that an agency mitigate identified environmental impacts is repeated in ECL § 8-0109 (8).

297. The requirement that identified adverse environmental impacts be mitigated is also restated in the regulatory requirements for an EIS, 6 NYCRR 617.9 (b) (5) (iii) (b).

298. Upon information and belief, DEC failed to consider, and, in any event, did not adopt specific mitigation measures which could have mitigated the impact of the landfill.

299. Specifically, DEC did not adopt mitigation measures, including the mitigation measures proposed by Save the Pine Bush, which would have reduced dumping in the landfill, and/or extended the life of the landfill by restricting the quantities of waste that would be deposited (see ¶¶ 169-176 above).

300. DEC also failed to consider the impacts, including the cumulative impacts, of continually taking Pine Bush land for landfill purposes. These impacts include the impacts on an endangered species, the Karner Blue Butterfly.

301. Because DEC failed to comply with the hard look requirement of SEQRA, it cannot, as a matter of law, make the requisite determination that environmental impacts have been mitigated to the maximum extent practicable.

302. Consequently, the determination to issue permits for the construction of the Eastern Expansion is a determination "made in the violation of lawful procedure [and] was arbitrary and capricious [and] an abuse of discretion" and should be invalidated pursuant to CPLR 7803 (3).

As and for a Third Cause of Action (failure to comply with regulatory criteria)

303. Petitioners repeat and reallege each and every allegation set forth above with the same force and effect as if set forth in full herein.

304. 6 NYCRR § 360-1.1 (b) states, in relevant part "all solid waste...must be disposed of in a manner consistent with [Part 360]." Part 360 sets forth detailed requirements for solid waste management facilities, including landfills.

305. § 360-1.10 authorizes DEC to "issue a permit to authorize the construction of a new solid waste management facility or expansion of a facility only if the application's engineering and hydrogeological data and construction plans and specifications required by this part substantiates that the proposed facility meets the requirements of the ECL and this part; demonstrate an ability to operate in accordance with the requirements of the ECL and this part; demonstrate consistency with the New York State solid waste management plan in effect at the time of application; describe how the proposed facility is consistent with a state solid waste management policy identified in § 27-0106 of the ECL, and for applications submitted by or on behalf of a

municipality in a planning unit after April 1, 1991, demonstrate that construction of the proposed facility is consistent with the local solid waste management plan in effect for the municipality."

306. The permits for the proposed Eastern Expansion that were granted by DEC do not comply with a number of regulatory criteria set forth in Part 360. In particular:

a. the City does not have a Solid Waste Management Plan that complies with Part 360, as specifically required by § 360-1.9 (g) and 360-15.9 (see ¶¶ 43-75 above),

b. the City has failed to conduct a proper landfill siting study as specifically required by § 360-2.3 (i) and § 360-2.12 (b) (2) (see ¶¶ 138-147 above),

c. the proposed landfill contributes to the taking of a threatened and endangered species and the destruction or adverse modification of its habitat, in violation of § 360-1.7 (a) (2) (i) (see ¶¶ 108-118 and 235-238 above),

d. DEC should not have granted a variance from the regulatory requirement of § 360-1.7 (c), which prohibits the siting of a landfill over a principal aquifer (see ¶¶ 239-243 above),

e. DEC should not have granted a variance from § 360-2.17 (d), pertaining to the use of Posi-Shell as an intermediate daily cover on the landfill (see ¶ 192 (g) above),

f. the landfill proposes slopes greater than 33%, in violation of § 360-2.15 (k) (see ¶ 192 (e) above),

g. the Leachate Management Plan, required by § 360-2.3 (k) and 360-2.7 (b) (9) fails to require analysis of leachate, as specified in the regulation (see ¶ 192 (f) above),

h. the Contingency Plan required by § 360-2.10 fails to address important operational issues (see ¶ 192 (h) above),

i. the Environmental Monitoring Plan is inadequate because it does not require monitoring of the existing surface water quality of the drainage ditch that runs into Rensselaer Lake (see ¶¶ 192 (i) above), and

j. the seismic analysis, specifically required by § 360-2.7 (b) (7) fails to demonstrate conformance with the relevant criterion, USGSMF 2120 (see ¶ 192 (j) above).

307. The determination to issue a permit under 6 NYCRR Part 360 for the construction of the Eastern Expansion was a determination "made in the violation of lawful procedure [and] was arbitrary and capricious [and] an abuse of discretion" and could be invalidated pursuant to CPLR 7803 (3).

As and for a Fourth Cause of Action (gift of public monies in violation of Article 8, §1 of the New York State Constitution)

308. Petitioners repeat and reallege each and every allegation set forth above with the same force and effect as if set forth in full herein.

309. Article 8 § 1 of the New York State Constitution states, in relevant part, "no... city... shall give or loan any money or property to or in aid of any individual, or private corporation or association... nor shall any... city... give or loan its credit to or in aid of any individual, or public or private corporation or association or private undertaking..."

310. On July 15, 2009, the Albany Common Council authorized the issuance of bonds for the purposes of landfill expansion.

311. One of the purposes of the bonds that were approved on July 15, 2009 was to pay the $10 per ton surcharge imposed under permit condition 34, which would otherwise have been paid by individuals and by private entities that utilize the landfill.

312. Upon information and belief, the City intended to provide a subsidy to private entities to utilize the landfill, by paying a portion of the fees and expenses that are associated with the use of the landfill.

313. Upon information and belief, such a subsidy violates the provisions of Article 8, § 1 of the New York State Constitution

As and for a Fifth Cause of Action (payment of attorneys' fees under the State Equal Access to Justice Act)

314. Petitioners repeat and reallege each and every allegation set forth above with the same force and effect as if set forth in full herein.

315. Article 86 of the CPLR, known as the "New York State Equal Access to Justice Act" authorizes certain parties who are successful in actions and proceedings against the State of New York to recover "counsel fees and other reasonable expenses in certain actions against the State of New York." (CPLR 8600)

316. CPLR § 8601 specifically directs a court to award attorneys fees to a "prevailing party" in an action against the state, "unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust." § 8602 (d) defines parties that are eligible to recover attorneys' fees pursuant to Article 86.

317. Save the Pine Bush is a “party” for the purposes of Article 86 of the CPLR because it is an organization described in § 501 (c) (3) of the Internal Revenue Code of 1954, and is exempt from taxation under § 501 (a) of the Code. (CPLR § 8602 (d))

318. If Save the Pine Bush prevails in the instant proceeding, it is entitled to recover attorney’s fees and other expenses pursuant to Article 86 of the CPLR, the New York State Equal Access to Justice Act.

RELIEF

Petitioners seek judgment:

1. Ordering, adjudging and decreeing that the permits issued by the New York State Department of Environmental Conservation on June 25, 2009 are annulled and invalidated;
2. Enjoining the City of Albany from taking any action authorized by said permits, including any actions with respect to the clearing of land, construction of a landfill, or operation of or any landfilling activities, including the receipt of waste, on the lands designated for the Eastern Expansion;
3. Ordering, adjudging and decreeing that the New York State Department of Environmental Conservation must, as a precondition to any consideration of the applications of the City of Albany for the necessary permits to construct and operate a landfill in the Eastern Expansion, or to otherwise expand the Rapp Road Landfill, to formally notice the applications for an issues conference and a possible adjudicatory hearing pursuant to the provisions of 6 NYCRR Part 624;
4. Declaring that the Part 360 permit issued by the New York State Department of Environmental Conservation, as promulgated on June 25, 2009, does not comply with the specific criteria of 6 NYCRR Part 360, because the City of Albany did not adopt a proper Solid Waste Management Plan, did not conduct an adequate study of alternative sites, and otherwise failed to comply with the regulatory criteria of Part 360;
5. Remanding all regulatory issues to an Administrative Law Judge to conduct an adjudicatory hearing in accordance with Part 624, except for those matters which the Court can resolve as questions of law;

6. Ordering, adjudging and decreeing that the City of Albany cannot utilize the proceeds of any bonds that it may have approved for the purposes of payment of the $10 per ton fee imposed by Permit Condition 34;
7. Declaring that the City of Albany cannot pay the $10 per ton fee imposed by DEC Permit Condition 34, and that such fee must be paid by the users of the landfill, rather than by the taxpayers and residents of the City of Albany;
8. Awarding petitioners attorneys' fees against the New York State Department of Environmental Conservation pursuant to Article 86 of the CPLR;
9. Awarding petitioners the costs and disbursements of this proceeding;
10. Together with such other and further relief as to the Court may seem just, proper and equitable.

DATED: October 19, 2009
Clarksville, New York

Yours, etc.,

Peter Henner, Esq.
Attorney for Petitioners
P.O. Box 326
Clarksville, NY 12041-0326
Telephone: (518) 768-8232