



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

3817 Luker Road  
Cortland, NY 13045



February 1, 2007

Mr. Thomas A. Shepardson  
Whiteman Osterman & Hanna LLP  
One Commerce Plaza  
Albany, NY 12260

Dear Mr. Shepardson:

This letter is in response to your January 4, 2007, letter regarding the Tharaldson Development Company's proposed Residence Inn Hotel at 124-128R Washington Avenue Extension in the City of Albany, Albany County, New York. The following comments are provided as technical assistance pursuant to the Endangered Species Act of 1973 (ESA) (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*).

### Background

Your letter addresses the U.S. Fish and Wildlife Service's (Service) recommendation that your client commit to long-term funding for restoration and management of habitat for the Federally- and State-listed endangered Karner blue butterfly (*Lycaeides melissa samuelis*). As you are aware, this suggestion is part of an overall plan we tried to help your client design to avoid potential impacts to the Karner blue butterfly from the proposed hotel and associated parking. As discussed in our October 20, 2006, letter to Mr. Daniel R. Hershberg of Hershberg and Hershberg, on August 31, 2006, Ms. Robyn Niver of this office met with you, Ms. Kathleen O'Brien, and Mr. Karl Parker of the New York State Department of Environmental Conservation (NYSDEC), Mr. Hershberg, and Mr. Terrance Gorman, representing the City of Albany. At that meeting, the Service and the NYSDEC representatives concluded that portions (approximately 1.73 acres) of the proposed project area are used by Karner blue butterflies as nectar habitat. It was explained that while it is not anticipated there would be daily use of the site by Karner blue butterflies (given the suitable breeding and nectar habitat located within the management area adjacent to the proposed project area), it is anticipated that some use will occur as it is well within the distance Karner blue butterflies are known to regularly fly (~200m) (Service 2003) and only separated from observed occupied habitat by a small strip of woods.

Therefore, the Service and NYSDEC presented you and Mr. Hershberg with two options to present to your client: design the proposed project to avoid any potential "take"<sup>1</sup> of Karner blue

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<sup>1</sup> Take is defined under the Section 3 of ESA, and includes in part, to "harass, harm, wound, or kill" a Federally-listed species. The definition of harm has been further defined to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering.



butterflies or apply for an incidental take permit from the Service and NYSDEC. Your client chose to develop a plan that would avoid any potential take of Karner blue butterflies and we have been working with you, the NYSDEC, and Mr. Hershberg since that time to develop such a plan.

The plan involved two components: deterring Karner blue butterflies from flying into an area that will become unsuitable for them after the hotel and parking lots are built, and restoring and managing habitat to compensate for the loss of 1.73 acres of nectar and grasses that is presently used by the adult butterflies. To accomplish the first goal, we understood that your client agreed to establish an 8-foot stockade fence along the southern and eastern perimeter of the property. To accomplish the second goal, we understood your client agreed to transfer 0.25 acre of the site to the NYSDEC or Albany Pine Bush Preserve Commission (APBPC) for Karner blue butterfly habitat management, to selectively remove white pine trees along the border of the project area, and to establish a fund to allow for restoration and management of 1.73 acres of habitat for Karner blue butterflies within the Pine Bush Southeast population area.

To date, we have discussed with your client (through Mr. Hershberg) three recommendations for potential funding options. The first was to make available \$10,000-\$11,000 each year for habitat restoration and management. Current average cost for basic habitat management of 1.73 acres is approximately \$1,379. However, restoration and management costs vary and the upper limit we recommended allows for more expensive treatments, such as prescribed burning, large tree removal, etc., if needed. Having the upper limit available in a given year will allow for responses to future weather events, invasive species outbreaks, etc. However, the NYSDEC, APBPC, or their representatives would only submit receipts or invoices to your client for work that was done at the site in a given year. Therefore, if no habitat work was conducted in that year, no invoices or receipts would be submitted and no payments would be made by your client. Based on conversations and electronic mails with Mr. Hershberg, we understood that your client was not interested in this type of funding mechanism and you offered a second option of providing a lump sum amount to the APBPC which would allow for annual withdrawals by the NYSDEC, APBPC, or their representatives. It is our understanding that this option was also eventually unacceptable to your client. Mr. Hershberg presented a third option to provide an annual amount (\$6,000) to the APBPC for habitat restoration and management. The APBPC would be able to keep the entire amount regardless of the work conducted for the Pine Bush Southeast population. However, we now understand that the APBPC's budgetary functions are conducted by The Nature Conservancy (TNC) and that TNC would be unable to rollover any unused funds from a given year. Therefore, we recommended an amount closer to the upper amount that may be needed in a given year (\$7,500) and recommended that this be adjusted for inflation annually (we suggested a rate of 3.5%). We now understand that none of these funding options are amenable to your client.

#### Responses to your January 4, 2007, letter

We would now like to address specific points made in your January 4, 2007, letter by section. Your statements are in italics.

#### Section I. State Environmental Quality Review Act (SEQRA) Review by City of Albany Common Council

*"By way of background, during the exhaustive environmental review process by the City of Albany Common Council..."*



We agree that your client went through a lengthy New York State environmental review process pursuant to the SEQRA for the proposed project. However, given the location of the site and potential impacts to the Karner blue butterfly, this seems reasonable. In addition, your client did not rewrite any of their environmental documents once the Service and NYSDEC provided our conclusions that the site is occupied by Karner blue butterflies. In fact, many of the measures originally proposed within the SEQRA document were designed to minimize or mitigate impacts to Pine Bush habitat in general (e.g., payment of a \$55,800 fee for management of Pine Bush lands), rather than specifically addressing impacts to a Federally- and State-listed species. The Service is not involved with mitigation for Pine Bush habitat impacts as that is a separate issue for members of the APBPC.

## Section II. USFWS Requests

*"During the over two year environmental review period by the Common Council, despite participating in the SEQRA process, USFWS did not provide comments regarding the sufficiency of these measures or suggest any mitigation."*

Here is brief summary of Service involvement with the proposed project. We initially expressed our interest in the proposed project on January 9, 2004, during conversations between Ms. Niver and Mr. Richard Nicholson of the City of Albany Department of Development and Planning (Planning Department). We received the proposed project draft scoping checklist for the Draft Environmental Impact Statement (EIS) on August 20, 2004, and provided written comments in our August 30, 2004, letter to Mr. Nicholson. We received a copy of the March 21, 2005, Draft EIS and provided comments on that document in our April 18, 2005, letter to Mr. Nicholson. In addition, we requested a site visit in our April 18, 2005, letter. On October 19, 2005, the APBPC informed us that the Final EIS was complete and the City was planning to address the issue of rezoning the site. We requested a copy of the Final EIS on October 20, 2005. On March 2, 2006, via electronic mail and in his March 22, 2006, letter, Mr. Douglas Melnick of the Planning Department requested the Service's participation in a visit of the site. We visited the project area on June 1, 2006, to assess the site's potential use by Karner blue butterflies. We visited the project area again on August 31, 2006, to discuss our findings. We provided written comments regarding those site visits, our findings, and potential avoidance and minimization measures in our September 18, 2006, letter to Mr. Melnick. It was appropriate to begin discussing potential avoidance and minimization measures for the proposed project after we determined there was potential for impacts to the Karner blue butterfly.

*"Six months after the Common Council completed their environmental review, USFWS visited the Site and requested that an 8 foot fence be constructed (in place of the proposed 6 foot fence) and extended along the entire southern and eastern boundary to deter butterflies from possibly entering the 'unsuitable habitat' on the Site."*

We disagree with this interpretation of project history. As stated above, we were actively involved in the SEQRA process as we believe that active participation in this process can only enhance the potential for compliance with Federal law (e.g., ESA). Our site visits and last letter to the Planning Department came prior to the City of Albany Planning Board's final decision approving construction of the hotel which was rendered on September 21, 2006 (received by the Service on November 13, 2006).

You are correct that the Service requested the additional fencing and height to deter Karner blue butterflies from entering the soon-to-be unsuitable habitat. However, it is important to keep in



mind that the only reason the habitat will no longer be suitable is because it will be replaced with a hotel, pavement, and automobiles.

Finally, outside of the SEQRA process, it is appropriate for the Service to provide comments to your client pursuant to the ESA. We have provided such comments to assist your client with ESA compliance and to protect our trust resources.

### Section III. Funding

*"Regarding funding, as indicated above, my client agreed to pay a substantial fee in the amount of \$55,800 to the City, consistent with other development in the Albany Pine Bush.... Notwithstanding the condition requiring payment of this fee, USFWS made an initial request in October, 2006 for payment of a fee of \$10,000 to \$11,000 annually in perpetuity."*

Through conversations among you, Mr. Hershberg, Ms. O'Brien, and Ms. Niver on October 4, 2006, and via electronic mails between Ms. Niver and Mr. Hershberg on October 5, 2006, we understood that your client was agreeable to fund habitat restoration and management for the Karner blue butterfly but would no longer pay the \$55,800 to the City for Pine Bush habitat mitigation. As stated above, the Service has no role in determining who pays for Pine Bush habitat mitigation or what that amount should be. Our job is to determine whether any Federally-listed species may be impacted from a proposed project and if so, whether there is a way to redesign projects to avoid such impacts. The Pine Bush habitat mitigation fund could be used to acquire, restore, or manage lands throughout the Albany Pine Bush and would not necessarily address impacts we considered likely to occur from the Residence Inn development.

As discussed above, we recommended that your client make approximately \$11,000 available each year but that the NYSDEC, APBPC, or their representatives would only submit invoices or receipts for the amount actually used in a given year (which could range from 0 to \$11,000).

*"Next, USFWS suggested that Tharaldson pay \$6,000 annually in perpetuity."*

During conversations among you, Mr. Hershberg, Ms. O'Brien, and Ms. Niver on October 4, 2006, you stated that your client preferred a "lump sum" payment rather than making \$11,000 available each year. On October 25, 2006, Mr. Hershberg offered this, "Tharaldson, their successors or assigns, is legally obligated to provide a fixed amount (say \$6,000) every year and puts it into an account over which an agent acceptable to USF&WS and NYSDEC (i.e., either NYSDEC or APBPC) has signature control." Ms. Niver asked in her November 8, 2006, electronic mail to Mr. Hershberg if Tharaldson was now amenable to "in perpetuity" funding. Mr. Hershberg replied in his November 8, 2006, electronic mail that they were open to this arrangement rather than the "lump sum" option.

*"This amount was tentatively agreed until a purported 'accounting/billing' issue arose with The Nature Conservancy. As a result, USFWS requested more funding in the amount of \$7,500 annually in perpetuity plus a 3.5% inflation adjustment"*

As stated above, we suggested an amount closer to the upper level potentially needed in a given year for management of 1.73 acres of habitat. We believe that funding in perpetuity is necessary to avoid impacts to Karner blue butterflies, as your client's development will result in the permanent loss of 1.73 acres of nectar habitat. In addition, Karner blue butterfly habitat is an early-successional habitat type which needs regular management to prevent encroachment by



shrubs and trees. Regular management is also needed to prevent invasive species from taking over a given site. We are certainly open to other suggestions for inflation adjustments, such as tying the adjustment to an index of inflation.

*"In a December 1, 2006, e-mail to Dan Hershberg, you indicate that funding will be used 'with a priority of fully restoring habitat along the Hill and powerline right-of-way and continuing efforts along the right-of-way towards Daughters of Sarah.' There is no reasonable nexus requiring Tharaldson to be responsible to fund the full restoration of the 'Hill and powerline right-of-way' to Daughters of Sarah in perpetuity merely because it is proposing to develop a Site where admittedly butterflies should be deterred from reaching."*

We agree that Tharaldson should not be responsible for restoration of the entire Pine Bush Southeast population area. However, Tharaldson should be responsible for either developing a project that avoids all impacts to the Karner blue butterfly (which we have been working towards with you and your client) or developing a Habitat Conservation Plan (HCP) and applying for an incidental take permit. We believe that by restoring and managing 1.73 acres of habitat for the Pine Bush Southeast population, the impact of the loss of 1.73 acres of nectar habitat within the project site will be insignificant to Karner blue butterflies. Ms. Niver's electronic mail to Mr. Hershberg restated where the management activities would occur and intended to clarify that any funding provided by Tharaldson would be used to benefit the Pine Bush Southeast population directly, rather than going to Karner blue butterfly habitat management elsewhere (e.g., Saratoga County).

*"The goal of ensuring that butterflies do not reach the Site can be accomplished by constructing the requested 8 foot fence and building the Project. This will eliminate the common nectar sources on the Site and facilitate the objective of westward migration of the butterflies."*

Again, there were two overall objectives of the plan to avoid impacts to Karner blue butterflies: deterring Karner blue butterflies from flying into an area that will become unsuitable for them after the hotel and parking lots are built, and restoring and managing habitat to compensate for the loss of 1.73 acres of nectar and grasses that is presently used by adult butterflies. Your above statements only address the former. We agree that building the project will eliminate the nectar sources on the site and that is the overall basis of our argument that impacts to Karner blue butterflies are likely.

*"It appears that USFWS has singled out my client for treatment inconsistent with other development along the butterfly corridor. Where was the USFWS when other property owners abutting the butterfly corridor sought and received approvals?"*

The Service reviews projects that come before us using existing laws, regulations, and guidance, as well as the best available information on the resources of interest. Each project is reviewed according to its own circumstance. We continue to gain information about Karner blue butterfly ecology and behavior which then influences our impact analyses. We can assure you that we have not singled out your client and we consistently review projects for potential impacts to Karner blue butterflies. We regret if our recommendations for similar projects may appear inconsistent due to the new information we have received or new policy direction we have taken.

#### Section IV. Crossgates Mall SPDES Permit



*"The requested funding exponentially exceeds the current funding arrangement with Crossgates Mall pursuant to the terms of a NYSDEC issued SPDES permit. As you know, pursuant to a 1994 SPDES permit, Crossgates, a ±100 acre and over 1 million square foot regional shopping center, is required to fund up to \$10,000 annually. It is our understanding that the actual annual funding over this time period has been merely a fraction of this amount"*

The NYSDEC uses funds provided by Crossgates for management of the occupied habitat on the Hill, within the powerline right-of-way, and areas adjacent to the right-of-way, all property owned by Crossgates. Habitat work in some years has consisted of minor habitat maintenance such as tree girdling, mowing, or herbicide application which has not used up a large portion of the funding available. In other years NYSDEC has conducted major work to establish new habitat areas by removing large trees and scraping away competing vegetation with large equipment. In these years all or the majority of the funds are used. Since some of the large scale restoration does not need to be done on a continuing basis, it is expected that once habitat is restored to an optimum level, maintenance costs remain at a low level for future years. This is a benefit we tried to communicate to your client to setting up a system similar to the Crossgates agreement.

It is also important to recognize that one of the reasons the NYSDEC has spent much less than the \$10,000 in most years is because of the lack of any ability to roll-over funds. This has restricted NYSDEC's ability to work on larger projects that cost much more than the annual provision. In addition, given the precarious situation of many Karner blue butterfly populations (including the Southeast Pine Bush population), the NYSDEC sometimes makes deliberate decisions to avoid certain management activities in a given year to avoid any potential impact to the butterflies. Finally, much of the management work at the site to date has been conducted by the NYSDEC and they are unable to charge their time to the Crossgates account. Again, the upper amount is there to provide flexibility to fund restoration and management activities as needed. It should also be pointed out that, in addition to the annual management fund, Crossgates has provided over 17 acres of its property for Karner blue management in perpetuity, 6.95 acres of it added after the 1994 mall expansion.

As we have explained, we use the best available information when reviewing projects. We previously explained to both you and Mr. Hershberg that if the expansion were proposed now, the requirements would likely be much different than those developed in 1994. For example, the cost of managing Karner blue butterfly habitat is much greater in 2007 than it was in 1994 given the increased cost of fuel, other materials, and labor. In addition, we have learned a great deal about Karner blue butterflies since 1994. Keep in mind the Karner blue butterfly had only been Federally-listed for 2 years when the NYSDEC permit was issued and the Federal recovery plan was not completed until 2003. Regardless of what was done in the past, our role is to determine whether the proposed Residence Inn project is likely to result in any impacts to the Karner blue butterfly.

*"...the goal of funding and habitat management currently exists for the 'Hill and powerline right-of-way' toward the Daughters of Sarah."*

We agree that the Crossgates fund does allow for habitat restoration and management for the Pine Bush Southeast population of Karner blue butterflies. However, under the agreement with Crossgates, this can only be used for properties owned by Crossgates (the Hill and powerline and adjacent areas). Therefore, we intend to use the additional funding provided by your client to conduct work west of the powerline to connect the Crossgates segment of the Karner blue



population with the segments in the Albany Pine Bush Preserve on properties that do not have regular funding sources. In this way the loss of the nectar to the eastern end of the population will be made up for by improved nectar at the west end. We anticipate that this improvement will draw butterflies west toward more habitat and, with the high fence, will reduce the loss of butterflies to buildings and parking lots in the east.

### Conclusions

To date, we have discussed several options with your client intended to avoid the take of Karner blue butterflies from the proposed hotel project. If your client is not interested in any of the previous recommendations of the Service and NYSDEC, and has no alternatives that will eliminate the negative impacts described above, your client should apply for an incidental take permit from both government entities. As you are aware, incidental take authorization requires preparation of an HCP, which includes analyses of impacts, anticipated take associated with the project, minimization and mitigation measures, monitoring, etc. Instructions for application for an incidental take permit and the HCP required for this application can be found at <http://www.fws.gov/endangered/hcp/index.html>. The NYSDEC does not have a formal permit application on the web; requests for that permit should be made directly to the NYSDEC Special License Unit. We strongly advise a pre-application meeting with the Service and NYSDEC permit and endangered species program staff before applications are submitted.

We would like to work with your client to come up with an approach that is acceptable to all parties. The technical assistance we have provided to date, and offer to continue to provide, is intended to design the project to avoid any take of Karner blue butterflies. Thank you for your time. If you require any additional information please contact Robyn Niver at (607) 753-9334.

Sincerely,



David A. Stilwell  
Field Supervisor

cc: Hershberg and Hershberg, Albany, NY  
S. Downs, Selkirk, NY  
APBPC, Albany, NY (Attn: N. Gifford)  
Department of Development and Planning, Albany, NY (Attn: D. Melnick)  
NYSDEC, Albany, NY (Endangered Species Unit; Attn: P. Nye/K. O'Brien)  
NYSDEC, Schenectady, NY (Attn: K. Parker)

### References Cited:

U.S. Fish and Wildlife Service. 2003. Final Recovery Plan for the Karner Blue Butterfly (*Lycaeides melissa samuelis*). U.S. Fish and Wildlife Service, Fort Snelling, Minnesota. 273 pp.