



Save the Pine Bush

June/July Newsletter

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Virtual Vegetarian/Vegan Lasagna Dinner

Wednesday, June 17, 2020, at 7:00 p.m.

Judith Enck

Environmental Policy Expert • Senior Fellow at Bennington College
will speak about

Clearing the Air

Clean air is a fundamental human right, but is often not provided in low income communities and communities of color. We saw that with the operation of the Albany ANSWERS garbage incinerator and currently see it with major air pollution problems with the Lafarge Cement plant in Ravena (the southern tip of Albany County) and the Cohoes hazardous waste incinerator (the northern tip of Albany County) These sources of air pollution affect the health and the environment of the entire region. Tune in to hear former EPA Regional Administrator Judith Enck discuss the latest development on the Norlite incinerator and Lafarge Cement plant and the urgent need for the Albany County Legislature to pass "Local Law B", also know as the Clean Air bill. We all have a role to play in getting this important bill adopted.

Judith Enck is a dynamic community leader who has spent her entire career working to protect public health and the environment, She is a Senior Fellow and Visiting Faculty member at Bennington College, where she teaches classes on plastic pollution and is the President of Beyond Plastics. Beyond Plastics works with community leaders on issues related to plastic pollution and trains college students to become informed and active on environmental issues. Appointed by President Obama, she served as the Regional Administrator of the U.S. Environmental Protection Agency overseeing environmental protection in NY, NJ, 8 Indian Nations, Puerto Rico and US Virgin Islands.

People can join using their computers or phones. **Join the call to test connection and chat between 6:00 and 7:00 p.m. The program begins at 7:00.** Dial-in number (US): (712) 770-4104; use the access code: 878906#. The online meeting ID: lynnejackson9. Join the online meeting: <https://join.freeconferencecall.com/lynnejackson9>

See you online at 6:00! • Everyone is welcome! • Easy to Join!

No Save Pine Bush Hike

However, the Pine Bush is open for social distancing hikes and walks. The Discovery Center and outdoor rest rooms are closed. But, the ecosystem is open to visitors. Please practice social distancing, and take precautions for ticks, and enjoy the great outdoors

www.savethepinebush.org

Save the Pine Bush Comments on the DEIS

Christopher M. Walker, Legal Intern for the The Pace Environmental Litigation Clinic wrote comments for the proposed project. Here is an excerpt from his comments sent to the Guilderland Planning Board. You can view the complete comments and the appendices online at: http://www.savethepinebush.org/Cases/Crossgates_Expansion/index.html

The Pace Environmental Litigation Clinic submits the following comments on behalf of our client, Save the Pine Bush, in response to the proposed Draft Environmental Impact Statement ("EIS") on the Rapp Road Residential/Western Avenue Mixed Use Redevelopment Projects ("The Project") submitted to the Town of Guilderland's Planning Board on February 19, 2020, by the project sponsor Rapp Road Development, LLC. Collectively, Commenters represent over 690 members and online activists in New York State.

The project sponsor has made it painfully clear they do not care about the protecting the unique Albany Pine Bush Environment. The EIS is woefully deficient in methodology, containing almost no substantive scientific proof to support their sweeping conclusions that support their baseless claims. The project proponent on March 26, blatantly violated the SEQRA process by clear-cutting almost the entirety of site 2. This was clearly an attempt to cut down the trees on the site before the April 1, moratorium on tree cutting due to northern long-eared bat roosting. Thereby, the project proponent violated one environmental regulation to evade another environmental regulation. Lastly, it was discovered that the project sponsor did not include an important wetland report that the EIS relied on for its conclusions. The non-inclusion of the report is seemingly deceptive, especially when the report indicates the possibility of a wetland on site 2, the same site that was just clear-cut. The project sponsor is playing fast and loose with environmental regulations, trying to subvert the process at every opportunity, and it's up to the Planning Board to uphold and enforce these regulations, especially when Guilderland is steward of one

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of the last remaining inland pine barrens in the United States.

Summary of Evidence Submitted with These Comments

In support of these comments, we also submit several technical memorandums (Appendixes A-M) authored by experts in their respective fields. Appendix F is authored by Dr. Cynthia Lane of Ecological Strategies LLC, she is one of the foremost experts on the Karner Blue Butterflies. Her accreditations include writing papers, reports, books and best management practices for the conservation of the federally endangered Karner Blue Butterfly. Dr. Lane identified that the EIS's methodology was insufficient to support the EIS's findings, and that the mitigation efforts proposed either have no impact on the conservation of the Karner Blue Butterfly, or fail to state a valid connection in the conservation of the Karner Blue Butterfly. Appendix A is authored by Dr. J. Curt Stager, the endowed chair of Paleoecology Department of Natural Sciences at Paul Smith's College. Dr. Stager reviewed several soil and vegetation samples both directly on site and those identified in the EIS and they indicate that the project is indeed an Albany Pine Bush ecosystem. Appendix B, authored by Zamurs and Associates, LLC, experts in conducting environmental analysis for air quality, climate change and sustainability, found that the EIS did not conduct adequate air quality analysis up to the standards set by the New York State Department of Environmental Conservation ("NYSDEC"). Furthermore, they confirmed that the EIS was woefully deficient in studying the potential impact the project will have on climate change. Appendix C, produced by Dr. Erik Kiviat of Hudsonia, an environmental research and conservation institute, not only identified the soils and vegetation of the project sites as Albany Pine Bush, but also found the methodology used by B. Laing Associates in producing the EIS to be scientifically flawed. Dr. Jeffrey Corbin, a professor of biological sciences at Union College, authored Appendix D, which states that the vegetation and soils located on the project sites denote the land as Albany Pine Bush. Moreover, Dr. Kiviat concludes that there is a high likelihood of success in converting the land into fully managed Albany Pine Bush. Lastly, Zachary Davis, a conservation biologist and contemporary master's student pursuing a degree in Ecology, authored Appendix E, and Dr. Starkloff, an expert in ornithology, authored Appendix I, identifying the inexplicable absence of any discussion on how to mitigate the harms the project will pose to the fragile threatened bird populations of the Albany Pine Bush. Please see the other Appendixes for further research backing

the individual claims. These expert reports prove that the prepared EIS is painfully inadequate and thus incapable of providing either the Guilderland Planning Board ("The Board"), or the public with an ability to make an informed decision on the project's actual potential impacts to community of Guilderland.

SEQRA's Purpose and Impact on the Project

The New York State Legislature through the State Environmental Quality Review Act ("SEQRA") has given the Town of Guilderland Planning Board the responsibility of "steward[] of the air, water, land and living resources, and... an obligation to protect the environment for the use and enjoyment of this and all future generations." N.Y. State Environmental Quality Review Law § 617.1(b) (McKinney 2020). Per the court in *Matter of Coca-Cola Bottling Co. v Bd. of Estimate*, 72 NY2d 674, 679 (N.Y. 1988) "SEQRA's fundamental policy is to inject environmental considerations directly into governmental decision making." SEQRA requires a "strict compliance with [its] review procedures," failing to meet SEQRA's standards opens up the entire review process to legal review. *Merson v McNally*, 90 N.Y.2d 742, 750 (N.Y. 1997). And at "[t]he heart of SEQRA is the [environmental impact statement] process." *Citizens Against Retail Sprawl v. Giza*, 280722 N.Y.S.2d 645, 649 (N.Y. App. Div. 4th 2001).

SEQRA does not provide a provision for judicial review, and so review is guided by the standard for inadequate agency actions, namely arbitrary and capricious review under a C.P.L.R. 7803(3) action. See, N.Y. C.P.L.R. 7803(3) (McKinney 2020); *Matter of Nash Metalware Co. v. Council of N.Y.*, 836 N.Y.S.2d 487, 487 (N.Y. Sup. Ct. N.Y. Cty. 2006). Based on the below factual allegations it is apparent that "the procedure used to prepare the EIS [] violate[d] mandated procedures [and] rel[ied] on improper methodology of information collection." Id. Nevertheless, even if the EIS was properly prepared the "Planning Board [is] required to take a hard look at all of the relevant and identified concerns" when making a decision on the adequacy of an EIS. *Matter of Cade v Stapf*, 937 N.Y.S.2d 673, 675 (N.Y. App. Div. 3d 2012). Based on the evidence in this public comment, detailing the issues and concerns not adequately addressed in the EIS, the Planning Board of Guilderland has failed to take an adequate hard look at the EIS. Therefore, to avoid potential arbitrary and capricious litigation challenges after the SEQRA process has finished, Save the Pine Bush strongly recommends that all inadequacies be resolved during this SEQRA review process. These inadequacies include insufficient surveying for the Karner Blue Butterfly, existence of an

Albany Pine Bush ecosystem, the presence of other threatened species, impacts of traffic and pesticides, the presence of wetlands, the impacts on climate change and air quality, and the use of improper methodologies, and implementation of inadequate mitigation measures to address these issues. The deficient preparation, development and implementation of the EIS, by the project proponent, leaves no other choice but for the Guilderland Planning Board to require the project proponent to remedy their EIS's deficiencies.

Project Sponsor's Clear Cutting

On March 26, the project sponsor, citing its own reports from the EIS for support, started to clear-cut the trees on site 2. Their report stated no harm would come from the clear-cutting and that no scrub oak nor pine bush would be affected, and therefore clear-cutting would have no negative effects on the environment. Even if this was true, which it is not, this was a clear violation of SEQRA. (See, N.Y. State Environmental Quality Review Law § 617.3(a) (McKinney 2020) "A project sponsor may not commence any physical alteration related to an action until the provisions of SEQR have been compiled with."). Thankfully, the Board posted a cease and desist order, and the clear-cutting was halted, but not before the damage was already done to site 2. It was evident that the clear-cutting was done to evade another environmental regulation the New York State Department of Environmental Conservation's moratorium on tree cutting which starts on April 1, instituted to protect the Northern Long-Eared Bat, a bat which the EIS claims could never even live on site 2. These actions put the project proponents' motives in question, and demonstrate a clear willingness by the project sponsor to violate environmental laws and regulations.

Concealed Wetland Report

Wetlands are one of the most highly protected types of ecosystems in not only New York, but also the United States having clear regulatory protections under the Clean Water Act and NYSDEC regulations. So when, Dr. Kiviat made the alarming discovery that the project proponent relied on a wetland report when making its environmental findings, but failed to attach that wetland report to the EIS when the project proponent submitted it to the Board, it provides another incident of the project proponent trying to deceptively circumvent environmental regulations. If there is a wetland it may require a permit under Article 24 of the Environmental Conservation Law. (See, N.Y. Environmental Conservation Law Implementing Regulations § 663, 664, 665 (McKinney 2020)). Furthermore, the report was not provided to the public until April 15, after it was specifically asked for by Save the Pine Bush.

The report indicated a possible wetland on

site 2, a “large south-north ditch... was delineated as a wetland []; the tributary ditch from Rapp Road to the western side of the south- north ditch may be part of this wetland but was not included in the delineation nor did the wetland report [] explain how the non-wetland status of the tributary was determined.” (Appendix C, 4). Moreover, the EIS “identified a histosol, which is a highly organic wetland soil that would have taken centuries or millennia to form.” Id. Dr. Kiviat does not “know the exact spot in the ditch where this soil boring was done or whether it’s representative of a larger area. [And he hypothesizes that] [t]here may be a buried histosol that remains from a formerly larger wetland, and it is possible that this wetland could be restored.” (Appendix C, 4-5). Moreover, the EIS’s Appendix F states “No wetlands or hydrologic features [presumably meaning surface waters] occur on-site or adjacent to the site,” however the EIS surveys list the bog deltoe and the black duckweed moths, common wetland moth species. (Appendix C, 8). Dr. Kiviat posits four possible explanations “1. There is indeed at least one wetland, vernal pool, or pond on or adjoining Site 1; 2. The two moths in questions were attracted to the collecting light or dispersed onto the site from wetland nearby; 3. These species can use non-wetland habitats; or 4. The two species were misidentified.” Id. “Because these two moths are usually found in or near wetlands or ponds, there may be an unreported small wetland or temporary pool on Site 1, perhaps hidden by dumped logs and slash.” Id. The fact that the applicant hid the report, fails to provide methodology on how they concluded there were no wetlands, and fail to account for the contradiction between the wetland moths and there conclusion that there are no wetlands on the project sites raises serious questions as to the existence of an important wetland on the Project sites, that needs to be addressed by the applicant.

Existence of Albany Pine Bush Soil

One of the most important indicators that the project sites can be restored to a proper Albany Pine Bush ecosystem is the presence of unique soils that are naturally occurring in the Albany Pine Bush. The EIS, which contains the environmental study conducted by B. Laing, “describes well-drained sandy and sandy-loam soils that are typical of the Albany Pine Bush Preserve including Colonie and Enora soil types” (Appendix D, 1). The soil accounts in the EIS are corroborated by the “USDA Soil Conservation survey for Albany County (USDA 1922), the soils on sites 1-3 mostly belong to the Colonie (sandy loam) and Elnora (loamy fine sand) Series along with closely related types such as Granby and Stafford [soils].” (Appendix A, 1). Dr. Stager, Dr. Kiviat and Dr. Lane all agree that the soil on the sites are

BUY LOCAL, GROW LOCAL

An Online Resource and Public Awareness Campaign

Background: As early as the end of March some of us in PAUSE (People of Albany United for Safe Energy) noticed that greenhouse gas emissions were going down around the world due to Covid 19. We thought this was a very good thing but knew unless direct action was taken to keep them low they’d pop right back up again. This pandemic has brought to the fore our vulnerability to the just-in-time global supply lines. The usual abundance at the supermarket became thin pickings. Local shops became shuttered and were in jeopardy of never opening again. Municipal revenues took an immediate hit from lowered taxes and increased demand on services. Question: What could PAUSE do to help? Answer: Start an online directory and public awareness campaign. We call it **Buy Local, Grow Local**.

Buy Local: Buy Local is a special online directory. It’s purpose is to serve under supported businesses and agricultural resources in the Capital Region. We aim to match users with the businesses they seek with an emphasis on sustainable and locally responsible establishments. While the focus is on sustainable and socially responsible businesses we also wish to include any small business within the four Capital District counties - Albany, Rensselaer, Schenectady, Saratoga.

Grow Local: Because of sheltering in place we realize that we can’t always depend on national and global supply chains for our food. That’s why lots of people are looking to grow their own, in a spirit reminiscent of the Victory Gardens of World War I and World War II when American families grew 40% of the vegetables they ate. Luckily we have plenty of wonderful resources in the Capital Region to help! Whether you want to make a raised bed, join a community garden, compost your food scraps, learn how to preserve what you grow, try beekeeping, raising chickens or other DIY food skills, our website can help you find the local support and mentoring you need. And please support our farmer’s markets and local farms! The Grow Local side of our website will featured sustainable organizations, and a link to a list of local farms and farmer’s markets.

Here are the basics:

Who: County and municipal officials along with local businesses and BIDs, food pantries, garden and agricultural organizations, and environmental groups

Where: Capital Region of Albany, Rensselaer, Saratoga and Schenectady counties

What: Buy Local, Grow Local: an online resource and public awareness campaign

When: Before a return to business as usual after the Covid-19 crisis

Why: 1) Support local business owners and workers, and increase local business revenue. 2) Enhance each community’s resilience to crises through local goods and food production. 3) Lower greenhouse gas emissions caused by shipping products/food long distances. 4) Encourage sustainable and socially responsible business practices.

Can you help? Yes, indeed. The website needs to be populated with businesses and farms before we can open it up to users. As soon as the website is built I will need YOU to help us with outreach to locally owned shops that you favor. If you’re willing to help, please contact Sandy at ssteub@gmail.com. Additionally, we need to hire a professional website designer because the demand for high traffic and flexibility is great. Whatever you can contribute, please go to our Facebook fundraiser page under Buy Local Grow Local fundraiser. If you aren’t on facebook or would rather send a check, please email me and I’ll send you the address. Any of these contributions to Buy Local, Grow Local will be very much appreciated.

indeed Colonie and Enora, the typical soils found in the Albany Pine Bush. (See, Appendix A; C; F). “All of these soil types are widespread in the Albany Pine Bush and are capable of supporting... the classic community of pitch pine and scrub oak [] as well as the lupines necessary to support the Karner Blue Butterfly.” (Appendix A, 1).

The EIS claims “whatever qualities the original soils had, especially in comparison to the Albany Pine Bush, have been lost/disturbed since at least the 1960’s” due to extensive pig farming and human activity. (EIS, 7). However, “the reports [] did not show any actual soils data to support the statement that soils had been extensively modified by farming and that the

Poorly Drained [] and Somewhat Poorly Drained [] soils no longer existed onsite.” (Appendix C, 6). Dr Stager and Dr. Kiviat both agree that the conclusions reached by the EIS are “incorrect,” the soils are still that of the Albany Pine Bush and rigorous testing of the soils is still needed. (See, Appendix A, 1; C, 13). Furthermore, the EIS suggests that the pig farm “disturbances disqualify [the project] from classification as potential pine bush habitat. In fact, such physical disturbances do not at all preclude development of [pine bush scrub oak] communities in these kinds of soils.” (Appendix A, 2). Alterations of soil by human activity does not make the land

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unsuitable habitat for organisms of conservation need. (See Appendix C, 5-6).

The EIS suggests that the vegetation on the site indicates that the soil is no longer capable of supporting Albany Pine Bush ecosystems. (EIS, pg 36-9) Notwithstanding, Dr. Stager states that “[t]he secondary growth woodland and open meadow vegetation that is currently on Site 1... is not there because of soil conditions... but rather because of the legacy of human activities on the site,” because “vegetation community composition [] is not solely a product of soil type, but more often due to the legacy of human activity on a given site.” (Appendix A, 1).

In other words, the current vegetation on Sites 1-3 is not primarily due to some quality of the soils that would be inappropriate for [pitch pine scrub oak] and other pine bush assemblages, but is instead due to how they have been managed, neglected, or otherwise affected by human activity. Restoration of heavily disturbed sand barren ecosystems is widespread and often successful despite former land use and soil disruptions of the sorts experienced on site 1-3.

(Appendix A, 2; See Appendix F, 8 “numerous successful restoration efforts of degraded and disturbed sites in both the Pine Bush and across North America are well documented.”; Appendix C, 6 These sites have potential for the restoration of pine barrens... [or] the study area in its current condition may be more valuable for ecosystem services (including habitats for biodiversity).”; Appendix D, 2 “the existence of the unique soils of the proposed development area mean is the key determinant of restoration potential, not present-day vegetation composition.”). The experts all agree that the soil is Albany Pine Bush soil and

the fact that the land has had human activity on it does not preclude the project from being restored to a proper pine bush scrub oak ecosystem.

Inept Plant Survey

The EIS’s survey for plant species is substantially lacking. “[U]rban woodlands provide important ecosystem services by storing carbon, absorbing stormwater, shading and evapotranspiration (which cool[s] the local environment in summer), and providing healthful amenity value to human residents.” (Appendix C, 6). A comment letter provided by the Albany Pine Bush Commission (“the Commission”) on January 25, 2019 says that “the site likely contains a portion of Pitch Pine-Scrub Oak Barrens.” (Appendix G, 2). And it is unnerving that “the removal of substantial areas of woodland habitat as a result of the proposed development has not been adequately addressed in the [EIS], nor has the cumulative impact of these habitat changes in combination with the many other land use projects proposed or being undertaken in Guelderland and neighboring towns.” (Appendix C, 6).

The lack of a certain plant species, as well as the absence of the methodology used to conduct the surveys indicate that the surveys in the EIS are faulty. First, “Table 1 in Appendix F [of the EIS] is a list of plants identified on Site 1. The list is short, contains a single grass and no sedge species, and is not a complete flora of the site.” (Appendix C, 8). Dr. Lane agrees that “it is unusual for so few grasses and no sedge species were seen and reported” (Appendix F, 5). Further proof that the survey is insufficient is the lack of plant survey methods. (See, Appendix C; F). “The use of transects is mentioned, but no information about the width of transects, the intensity of sample effort, etc. Therefore, it cannot be determined whether a rare plant survey was conducted, and what subset of the flora the tables providing species lists for the three sites represents.” (Appendix

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New York State Primary – June 23**

F, 5; Appendix C, 5). And “[u]nless a rare plant survey was done, and during the correct time of year, especially for species that are cryptic and/or ephemeral, it is not possible to state that no rare plants occur on site.” (Appendix F, 5). The fact that the EIS does not contain an accurate representation of the methodology used, and common species expected to be found on the site are absent from the report, the survey was either conducted fraudulently, and the methodology removed to hide their misconduct, or the survey was performed incompetently and would require being done correctly. Until a proper survey is completed, we cannot know the extent both rare, and Albany Pine Bush species live on the sites.

Animal Surveys

The EIS’s surveys for animal life contain both improper methodologies and a complete lack methodologies at the same time making the conclusions reached by the surveys unsubstantiated. The Karner Blue Butterfly is a federally listed endangered species, and requires the utmost protection. The EIS claims that project site 1 does not have any Karner Blue Butterflies, or Frosted Elfin Butterflies another insect species of great conservation need. (EIS, pg 48-51). However, a comment letter prepared by the Commission contradicts this claim and states the site likely contains Karner blue butterfly and frosted elfin...

Read the rest at www.savethepinebush.org. Other comments include much more on the animals, air quality, climate change, mitigation and other issues.

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