

May 14, 2008

Christopher A. Amato  
Assistant Commissioner  
Office of Natural Resources  
New York State Department of  
Environmental Conservation  
625 Broadway  
Albany, NY 12233-1010

Re: EPCAL Site, Town of Riverhead, Suffolk County, New York

Dear Mr. Amato:

I am writing on behalf of Group for the East End, regarding your recent letter to Philip Cardinale, Supervisor of the Town of Riverhead. Your letter informed Supervisor Cardinale that the New York State Department of Environmental Conservation is asserting jurisdiction over the area known as the Enterprise Park at Calverton (“EPCAL Site”) under the New York State Endangered Species Act, E.C.L. § 11-0535 (“New York Act”). In your letter you note that the planned development of the EPCAL Site may result in an unlawful “take” of endangered or threatened species, and you request that the Town cease all development activities until “completion of a comprehensive assessment of all protected species and their habitat on the site.”

Group for the East End fully supports both NYSDEC’s assertion of jurisdiction over the EPCAL Site for the purpose of evaluating protected species impacts, and your request that the Town cease development activities until an assessment of protected species and their habitats is completed. Indeed, Group for the East End believes that the Town would be in violation of E.C.L. § 11-0535 if it continued to engage in development activities without first obtaining a “take” permit from NYSDEC. It is therefore incumbent upon NYSDEC to assert jurisdiction at the EPCAL Site to ensure that any potential impacts of the development on protected species are adequately considered.

The EPCAL Site lies within the Long Island Pine Barrens, a unique habitat designated for special protection by the New York State Legislature in the Long Island Pine Barrens Protection Act, E.C.L. art. 57. Among other rare qualities, the Pine Barrens combines dry upland areas, dominated by the pitch pines that give the Pine Barrens its name, with low lying wetland areas, including heath bogs and rare Atlantic white cedar swamps. The Pine Barrens host the greatest diversity of plant and animal species of any habitat in New York State, including several species that are threatened or endangered.

---

# ARNOLD & PORTER LLP

---

Christopher A. Amato  
May 14, 2008  
Page 2

The EPCAL Site itself is a habitat area for at least three protected species: the Short-Eared Owl, the Eastern Tiger Salamander, and the Northern Harrier. Each of these species could potentially be seriously harmed by the modification of their habitat that will occur if the proposed EPCAL development goes forward.

The Short-Eared Owl is the most diurnal of the northeastern owl species, and is frequently seen hunting at dawn and dusk. The owl requires open habitats for hunting and breeding, such as meadows and inland or coastal marshes. The owl has suffered annual population losses of 3.4 percent since 1966, with population loss especially severe in the northeast. Several Short-Eared Owls have been observed at the EPCAL Site this winter and in prior winters, demonstrating that the EPCAL site is being used as a wintering habitat by the owl. It is also possible that the owl is re-establishing a breeding presence in this area. Further monitoring is needed to determine the extent of the owl's use of the EPCAL Site for breeding, roosting, and wintering. NYSDEC has listed the Short-Eared Owl as endangered.

The Eastern Tiger Salamander is only found in New York on Long Island, with the majority of the population located in the eastern portions of Suffolk County. The Tiger Salamander is the largest terrestrial salamander in New York State, with adults averaging seven to eight inches in length. As members of the mole family of salamanders, Tiger Salamanders spend most of their life in burrows. They prefer sandy soils and habitats typical of the Long Island Pine Barrens uplands. Tiger Salamanders migrate annually to lower-lying breeding areas near ponds. Recent surveys of the EPCAL Site have determined that several ponds on the site are currently used by Tiger Salamanders for breeding. Ongoing research of Tiger Salamander breeding activity in the area should be continued. In addition, research must be done to identify the migratory corridors used by the Tiger Salamanders to reach their breeding sites on the EPCAL property, and these corridors must be preserved. NYSDEC lists the Eastern Tiger Salamander as endangered.

Finally, the Northern Harrier is a hawk that lives in open areas, including wet meadows, grasslands, and salt marshes. Historically, the Harrier was found throughout New York State, but its numbers have been in steady decline since the 1950s and its territory shrinking. Harriers are ground-nesting, which makes their breeding activities particularly susceptible to habitat disturbance. Harriers have been observed wintering and exhibiting courting behavior at the EPCAL Site. Further research is necessary to determine whether Harriers currently use the EPCAL Site for nesting. NYSDEC has listed the Northern Harrier as threatened.

Environmental Conservation Law section 11-0535 prohibits the "taking" of any species designated by NYSDEC as endangered or threatened. "Taking" and "take" are defined to include:

---

# ARNOLD & PORTER LLP

---

Christopher A. Amato  
May 14, 2008  
Page 3

pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting fish, wildlife, game, shellfish, crustacea and protected insects, and *all lesser acts* such as disturbing, harrying, or worrying, or placing, setting, drawing or using any net or other device commonly used to take any such animal.

E.C.L. § 11-0103[13] (emphasis added). NYSDEC has long taken the position that “all lesser acts” include modifying protected species’ habitat in a way that would harm individuals of the species and has taken steps to prevent such modification on the grounds that they would constitute prohibited “takes.” The New York courts have endorsed this approach by NYSDEC to protecting the habitat of protected species.

The first case to consider whether modification of a protected species’ habitat could constitute a taking was *State v. Sour Mountain Realty, Inc.*, 276 A.D.2d 8 (2d Dep’t 2000). *Sour Mountain* considered the effect of development actions by the defendant on a den of timber rattlesnakes, a threatened species, on an adjacent property. *Id.* at 9. Specifically, the defendant sought to erect a snake-proof fence that would have prevented the rattlesnakes from migrating across its land. *Id.* at 10. NYSDEC sued the property owner seeking an injunction requiring removal of the fence on the ground that the fence, by interfering with the snakes’ migratory behavior, constituted an illegal take. *Id.* Supreme Court granted the injunction, 183 Misc. 2d 313, 326 (Sup. Ct. Dutchess County 1999), and the Appellate Division affirmed, holding that the modification of habitat in a manner that has the potential to harm a protected species falls within the definition of “taking” under the New York Endangered Species Act. 276 A.D.2d at 13–14. The court also held that violation of the statutory prohibition on the taking of a protected species is itself sufficient to demonstrate the irreparable harm necessary for the granting of injunctive relief. *Id.* at 15.

In reaching its conclusion that harmful habitat modifications qualify as “takings” under the Act, the Appellate Division relied in part on the extensive body of case law that has developed regarding the Federal Endangered Species Act, 16 U.S.C. §§ 1531 et seq. *Id.* at 14. Among the federal cases relied on was the Supreme Court’s decision in *Babbitt v. Sweet Home Chapter of Communities for Greater Oregon*, 515 U.S. 687 (1995). In *Sweet Home Chapter*, the Supreme Court upheld a regulation of the Secretary of the Interior defining the term “harm” in the federal definition of “take” to include “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” *Id.* at 708; see also 50 C.F.R. § 17.3 The Supreme Court held that the Secretary’s definition of harm was consistent with the purpose of the Federal Endangered Species Act, and noted that comprehensive protection of endangered and threatened species also inevitably requires protection of the species’ habitat. See *Sweet Home*

---

# ARNOLD & PORTER LLP

---

Christopher A. Amato  
May 14, 2008  
Page 4

*Chapter*, 515 U.S. at 698–99. In *Sour Mountain Realty*, the Appellate Division noted that the legislative history of the New York Act indicates that the legislature intended New York’s Act to “compliment” the Federal Act. *Sour Mountain Realty*, 276 A.D. 2d at 13. The court also noted that the definition of “take” in the New York Act is somewhat broader than the definition of take in the Federal Act. *Id.* at 15.

Four years after its decision in *Sour Mountain Realty*, the Appellate Division again upheld NYSDEC’s efforts to protect the habitat of an endangered species, in this case the Eastern Tiger Salamander. In *State v. White Oak Co.*, 13 A.D.3d 435 (2d Dep’t 2004), NYSDEC sued to enjoin construction of a housing development within 1,000 feet of a pond that Tiger Salamanders used as a breeding ground, unless the developer first obtained an Endangered Species take permit from NYSDEC. Initially, Supreme Court denied the injunction, but on appeal the Appellate Division reversed. *Id.* at 437. The Appellate Division then went further and, upon searching the record, held that there was no triable issue of fact as to whether the proposed construction would constitute a taking of the salamander, and granted summary judgment to NYSDEC. *Id.* at 438.

The proposed development of the EPCAL Site presents the same potential to harm protected species by affecting their habitat as was at issue in *Sour Mountain Realty* and *White Oak Co.* The developers of the site propose to construct a sprawling conference and recreation center, including a sizeable manmade ponds and an indoor ski slope. The sheer amount of the development would harm the Short-Eared Owl and Northern Harrier by eliminating the large tracts of open space that these species require for hunting and mating and potentially preventing these species from using the site as a wintering habitat. Similarly, the construction of buildings and roadways could well interfere with the migratory corridors of the Tiger Salamander, thereby interfering with its ability to breed. These potential effects are just illustrative; much more work needs to be done before the likely effects of the proposed EPCAL development on protected species are fully understood.

Under the Appellate Division’s holdings, NYSDEC is fully within its authority to prohibit any development activities that would have these or similar effects. Modification of the EPCAL Site to prevent the Short-Eared Owl and Northern Harrier from wintering at the site is similar to the disruption of rattlesnake migration that the Appellate Division held to be a taking in *Sour Mountain Realty*. And the situation of the Tiger Salamander, which uses ponds on the EPCAL Site for breeding, is virtually the same situation as that addressed by the court in *White Oak Co.* Given the longstanding interpretation of the New York Act to prevent activities such as these that would have a negative effect on the habitats of protected species, it is beyond doubt that NYSDEC has the authority to prevent degradation of these species’ habitat.

---

# ARNOLD & PORTER LLP

---

Christopher A. Amato  
May 14, 2008  
Page 5

Although an Environmental Impact Statement (“EIS”) for the EPCAL Site has been developed by the Town pursuant to the State Environmental Quality Review Act, a crucial need still exists for NYSDEC to undertake its own independent evaluation of the effect of the proposed EPCAL development on protected species. First, the Appellate Division held in *White Oak* that the completion of an EIS does not displace NYSDEC’s authority (and indeed, its obligation) to conduct an independent review of the effects of an action on protected species. *White Oak Co.*, 13 A.D.3d at 437 (holding that the consideration of impacts on protected species in an EIS does not prevent NYSDEC from subsequently evaluating those effects under the New York Act). Second, the Town of Riverhead, which acted as lead agency in conducting the EIS, is an interested party. As the owner of a substantial portion of the EPCAL Site, the Town stands to make tens of millions of dollars from the sale of the property to the proposed developer. In these circumstances, one must be skeptical of the objectivity of the analysis contained in the EIS. Only an independent review by NYSDEC can ensure that impacts to protected species have been thoroughly and objectively considered.

If NYSDEC does determine that the proposed development of the EPCAL Site will have a negative impact on the habitat of one or more protected species, then NYSDEC must take further action to prevent those development activities, except in accordance with a Endangered Species Act permit issued by the Department. Again, the courts have consistently upheld NYSDEC’s authority to act in such circumstances. *Sour Mountain Realty*, 276 A.D. 2d at 15–16. In evaluating whether to issue any such permit, NYSDEC will have to carefully consider the potential for harm, along with New York’s strong historical commitment protecting endangered and threatened species. *See id.* at 16.

As I said at the outset of this letter, Group for the East End is extremely heartened to see that NYSDEC is taking its responsibilities under the New York Endangered Species Act seriously. We are confident that you will engage in a thorough review and take all necessary measures to ensure the continued survival of three of New York’s protected species, including the Short-Eared Owl, Eastern Tiger Salamander, and Northern Harrier. We look forward to continuing our monitoring of the EPCAL Site and our involvement in the evaluation of the impacts of the proposed development on protected species and the Pine Barrens ecosystem generally. On behalf of Group for the East End, I would like to extend our sincere thanks in your careful attention to this matter.

Sincerely,



Michael B. Gerrard