

The Forum

NEWYORKSTATEWETLANDSFORUMNEWSLETTER

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IMPACT OF SUPREME COURT DECISION IN KOONTZ ON IN-LIEU-FEE CONDITIONS

Kathleen M. Bennett, Esq., Bond, Schoeneck & King, PLLC

On June 25, 2013, the United States Supreme Court issued a decision that should concern every agency that conditions its land use permits on in-lieu-fee mitigation requirements. In *Koontz v. St. Johns River Water Management District*, No. 11-1447, slip op., 570 U.S. ____ (2013), the Supreme Court, in a 5-4 decision, held that in-lieu-fee conditions that require a property owner to spend money on public or mitigation projects may also amount to an impermissible regulatory taking. Property owners and property rights activists are touting the decision as a huge victory – the impacts of which could be far reaching.

The landowner in *Koontz* owned a 14.9-acre parcel of real property composed largely of state jurisdictional wetland. Under Florida law, dredging or filling a wetland requires a permit. The law further provided that applicants for a permit must “offset the resulting environmental damage by creating, enhancing or preserving wetlands elsewhere.” The landowner applied for a permit to develop 3.7 acres of his property and, as mitigation, offered the permitting agency a conservation easement on the remaining 11-acres of his property. The permitting agency found this offer of mitigation to be inadequate and concluded that the landowner could either develop 1 acre and encumber the remaining 13.9 acres with a conservation easement or develop 3.7 acres and pay for improvements to agency-owned land several miles away. The landowner found the demands excessive and argued that they amounted to unconstitutional taking without just compensation.

Supreme Court jurisprudence long ago established that an agency could condition approval of a permit on the dedication of property to the public only if there was an “essential nexus” and “rough proportionality” between the property demanded by the agency and the costs of the applicant’s proposal. See *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*. However, never before had the Supreme Court extended the “essential nexus” and “rough proportionality” test to monetary exactions, such as in-lieu-fee arrangements. Yet, that is exactly what the Supreme Court held in *Koontz* – any condition that requires the payment of money in-lieu of encumbering the property (and thereby diminishing its economic value and usefulness) with a conservation or other easement, with public park or recreational space or by creating wetlands or other undevelopable natural areas must have an essential nexus with the property and be roughly proportional to the development’s expected impacts, otherwise the in-lieu-fee requirement is at risk of being found unconstitutional.

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The year 2014 is the 20th Anniversary of the incorporation of the NYS Wetlands Forum – come celebrate with us!

April 29 and 30, 2014
Radisson Hotel Rochester Riverside
Rochester, New York

Save the date!



New York State Wetlands Forum

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Mission

The New York State Wetlands Forum is a non-advocacy corporation comprised of individuals and groups with diverse backgrounds, interests and viewpoints regarding wetlands and their science, use and management. Incorporated in 1994, the Forum is a 501(c)(3) not-for-profit organization. Its purpose is to improve communication among people interested in wetlands; call attention to and objectively discuss local, statewide, regional, national and global wetland issues as they relate to New York State; improve its members' knowledge and understanding of wetlands; and, make available information about wetlands to its members and the general public.

MESSAGE FROM THE CHAIR

To start off, a big thank you to all the supporters and members of the NYS Wetlands Forum. Considering the economic difficulties that the state and country continue to struggle with, we had a great turnout in Lake George for the 2013 Annual Meeting. For those of you who were unable to join us, the meeting questionnaire results and pictures included in this newsletter will help to fill you in on all the events. We received an overwhelming response from members interested in contributing newsletter articles, moderating at future meetings, and assisting with various committees. If you were unable to attend this year's meeting but would like to volunteer your time, please visit the Forum's website (www.wetlandsforum.org) to complete a copy of the Volunteer Form.

Another well-deserved thank you is owed to Melissa Toni, who has chaired the Forum over the past three years. Her hard work and go get 'em attitude have been inspiring and very beneficial to this organization. I hope I can fill her shoes! We are lucky to retain Melissa on the Board of Governors as a member at large. At the 2013 Annual Meeting we also said good-bye to two long-standing Board members: Michael Fishman and Joseph McMullen. The energy and dedication that these two individuals have put forth over the years should certainly not go unacknowledged. Given the departure of Mike and Joe from the Board, Chris Einstein and Aimee Rutledge have been appointed to fill the vacancies. Introductions to these newest Board members are included within this newsletter – be sure to read all about them!

The Forum Board has already started the planning process for the 2014 Annual Meeting. The Mohonk Mountain House will unfortunately be under renovation during April 2014, so we are looking to the Rochester area to host the 2014 meeting – the 20th Anniversary of the incorporation of the NYS Wetlands Forum! We hope to celebrate this important Forum milestone with you in 2014 by adding a few new features to the program. In the meantime, enjoy your member newsletter and remember to periodically visit the website for information updates and other tidbits.

Enjoy the summer season!

Johanna Duffy



MEET CHRISTOPHER R. EINSTEIN

Chris Einstein is a graduate of the State University of New York College of Environmental Science and Forestry with 20 years of experience in wetland delineation, permitting and mitigation and land use planning. Chris has spent most of his career employed with CHA Companies, where he currently manages the Ecology Group.



In his free time, Chris serves as a Scoutmaster and church trustee and enjoys swimming, camping, hiking and fishing with his kids.

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MEET AIMEE N. RUTLEDGE

Aimee N. Rutledge, PWS, CPESC, CPSWQ, graduated from the University of Rhode Island (URI) with a B.S. degree in Environmental Management. Mrs. Rutledge's passion for wetland science



started with a wetland course at URI taught by Professor Frank Golet, who inspired her to pursue a career focused on wetlands and the environment. She is from Rhode Island, worked at Pare Corporation and was an active participant of the RI Association of Wetland Scientists (RIAWS). Mrs. Rutledge has over 13 years of experience, including the past six (6) years at Sterling Environmental Engineering, P.C., where her experience involves a wide range of engineering and environmental projects in the fields of solid waste management, site development, water and wastewater facilities, transportation, structural, planning and environmental permitting.

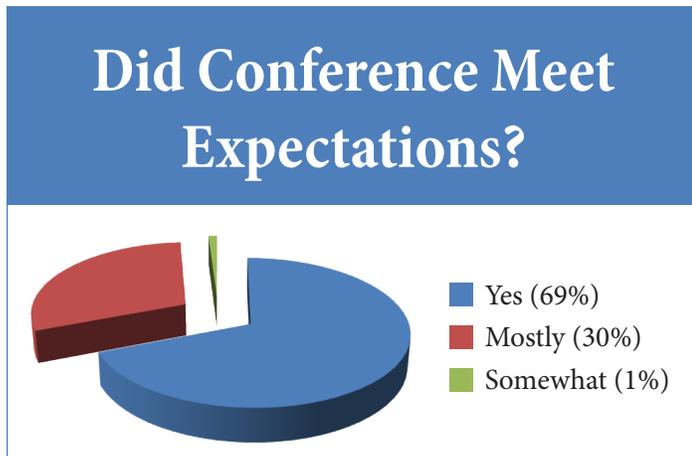
Mrs. Rutledge is certified and is proficient in wetland delineations, ecological/habitat assessments, wetland restoration/mitigation, environmental impact statements and wetland permitting and is frequently called upon to provide expertise in enforcement cases involving stream and wetland disturbances requiring restoration and close coordination with local and Federal agencies and property owners. She has performed numerous inland and coastal wetland delineations in New York, Rhode Island and Massachusetts utilizing delineation methods and guides/manuals established by the States and United States Army Corps of Engineers (ACOE).

Mrs. Rutledge is an aspiring Adirondack 46er and enjoys hiking, kayaking and being outdoors during her free time. She is also passionate about conservation, wildlife and the community, and has volunteered with Sustainable Saratoga, North Country Wildlife Care and Rebuilding Together.

SURVEY RESULTS ARE IN: 2013 CONFERENCE A SUCCESS!

Charlotte Brett, *Conservation Connects*

Thank you to all conference attendees who completed surveys! We received 76 completed surveys (out of 164 attendees), resulting in a 46% response rate. The raffle prizes provided by Kurt Weiskotten and Ed Franz surely helped! You provided a lot of great ideas and feedback that will help us in planning future conferences. Following are highlights of what we heard from you.



Most attendees were satisfied with the conference, but some felt the lodging and accommodations were lacking. The off-season booking at Lake George meant that local restaurants and bars were mostly closed, including those in the conference hotel; a disappointment to many guests. Comments indicated that attendees would be happy with either a bustling in-town location with amenities in walking distance or a remote setting with an all-inclusive conference center that meet the needs for entertainment, eating, and drinking outside of scheduled program hours.

Shout-Out to Stand-Out Speakers

Survey responses showed a well-rounded appreciation for the quality of speakers and diversity of topics covered in conference sessions. Ninety-four percent of speakers, representing every session, were recognized for giving presentations that really stood out! Thank you to all of our speakers for a job well done!

Mallory Gilbert (*Wetland Consultant*) wins the honor for most mentions for his presentation on “Principles of Wetland Creation and Restoration: 30 Years and Lessons Learned.”

The **Invasive Species Management** session, moderated by **Fran Reese** (*Reese Environmental Consulting*), wins the honor for most mentions as a standout session. Speakers were **Nathan Carlton** and **Ben Zimmerman** (*Applied Ecological Services*), **Christopher Scheiner** (*Independent GIS Specialist*), and **Brendan Quirion** (*Adirondack Chapter of The Nature Conservancy*).

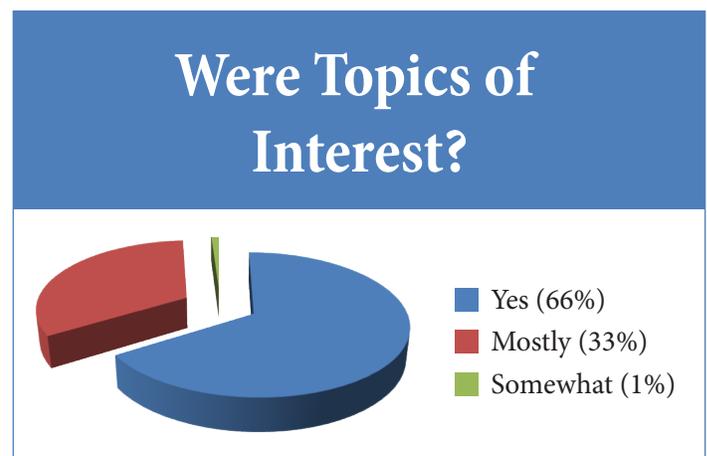
Other honorable mentions for multiple acknowledgements include **Tom Langen** (*Clarkson University*), **Patrick Raney** (*SUNY ESF and Upper Susquehanna Coalition*), **Kinga Stryzowska** (*Ph.D. Candidate, Clarkson University*), **Jim Curatolo** (*The Wetland Trust*), **Bernie Carr** (*Terrestrial Environmental Specialists*), and **Joe McMullen** (*Environmental Consultant*).

Get Us Outdoors

Many people appreciated **Joe McMullen’s** outdoor Plant ID Tour and **Kurt Weiskotten’s** Bird Walk for the opportunity to learn as well as the pleasure of getting outdoors. Survey respondents identified that more opportunities to get outdoors would be welcomed.

More Federal Agencies and Academics Wanted

Many commenters would like presenters to more evenly reflect the public, private and civic/academic sectors. A feeling that the conference was consultant-heavy and that more agency involvement – particularly from the Corps – and academic involvement from top schools in the state would improve the quality of the experience was broadly shared. The diminished federal agency involvement at this year’s conference was largely due to the sequester; agency personnel and Forum Board members were just as disappointed as conference-goers that funding cuts had this impact. The Forum is actively working on ways to increase academic involvement in the conference via the developing grant program, which will be in place next year.



NYSDEC ISSUES NEW GENERAL PERMIT FOR WORK IN PREVIOUSLY DISTURBED ADJACENT AREAS

*Jonathan Gray, Summer Law Clerk,
Bond, Schoeneck & King, PLLC*

The New York State Department of Environmental Conservation recently issued General Permit GP-0-13-001, allowing owners of currently disturbed (already-developed) land within the 100 foot Adjacent Area of State Regulated Freshwater Wetlands to conduct certain approved activities on the developed land. Before this permit, owners of currently disturbed land within the adjacent area could not modify or develop the land without an individual permit. Now, owners of currently disturbed land may quickly gain approval for the common activities enumerated in the permit, which are:

- demolishing or removing existing structures;
- constructing driveways, parking areas, and additions to existing structure limited to 1,000 sq. ft. within the adjacent area;
- installing garages, decks, porches, sheds, pools, utility lines and other accessory/appurtenant structures of less than 1000 sq. ft. basal area within the adjacent area;
- replacing in-kind, in-place existing accessory/appurtenant structures, roads and associated utilities; and
- installing appropriate stormwater runoff controls.

However, these activities must not take place within 50 feet of the wetland boundary, and must not disturb more than one quarter of an acre of land. Currently disturbed land includes any existing structures, and paved or landscaped area that does not have natural vegetation.

Owners of currently disturbed land may apply to conduct any of the above activities by filling out and submitting two signed copies of the Request for Authorization to the Regional Permit Administrator, including a site location map, project plans that detail the nature and extent of the planned activities, three representative color photographs depicting the site of the proposed activity, and the Permission to Inspect Property Form. The Request for Authorization and Permission to Inspect Property forms are available on the DEC website, or from the Regional Permit Administrator. If the planned work does not fall within one of the above activities, the owner may still apply for an individual permit from the DEC. Work on the planned activity may begin once the applicant receives the signed Project Authorization from the DEC.

Once the work has commenced, the permittee is responsible for taking the necessary precautions to ensure against all erosion, contamination, invasion of non-native vegetation, and pollution of the wetlands during the approved activity. Such precautions may include maintaining erosion controls, storing exposed soil in approved containers, using clean fill, cleaning all construction equipment of mud, seeds and vegetation, cleaning up all construction debris, ensuring all concrete is poured in watertight or waterproof forms, and ensuring no discharges from pools.

The permit is effective from May 29, 2013 to April 30, 2018.

IMPACT OF SUPREME COURT DECISION

Continued from page 1

While the majority stated that its decision “does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners,” the dissent expressed concerns over the ability to distinguish between lawful mitigation payments and unlawful monetary exactions. Writing for the dissent, Justice Kagan noted, “[O]nce the majority demands that a simple demand to pay money – the sort of thing often viewed as a tax – can count as an impermissible ‘exaction,’ how is anyone to tell the two apart?”

Widely touted as a victory for property owners, the decision is likely to encourage property owners to resist or legally challenge any monetary exactions or in-lieu-fee arrangements which they believe are unreasonable. The decision will most certainly impact local governments and other regulatory agencies that frequently impose in-lieu-fee mitigation conditions on land use approvals, wetland permits or other environmental permits. In fact, the decision arguably exposes the entire in-lieu-fee mitigation provided used by both the Army Corps of Engineers and the New York State Department of Environmental Conservation in connection with the issuance of wetland development permits. However, whether the decision will result in more approvals/permits without any conditions and, therefore, less mitigation or in more outright denials of approvals/permits remains to be seen. In either case, the impacts are likely to be widely felt by all citizens.

AMENDMENTS TO SEQRA AND ITS ENVIRONMENTAL ASSESSMENT FORMS

*Scott Regan, Summer Law Clerk,
Bond, Schoeneck & King, PLLC*

The New York State Environmental Quality Review Act (“SEQRA”) was originally adopted to ensure that the environment was given equal consideration with social and economic factors during discretionary decision-making. SEQRA requires all projects or activities proposed or funded by, and all discretionary approvals issued by a state agency or local government, to undergo an environmental impact assessment as prescribed by the regulations. More specifically, SEQRA compels the governmental entity responsible for undertaking the project to identify and mitigate any significant, adverse environmental impacts of the activity that it is proposing, funding or permitting. In 2012, the New York State Department of Environmental Conservation (“DEC”) proposed a number of amendments to the SEQRA regulations (6 NYCRR 617) to streamline the SEQRA process without sacrificing meaningful environmental review.

The purpose for proposing each individual proposed amendment varies, sometimes expanding and other times narrowing the scope of the regulatory requirements. However, the general tenor of the amendments is one of practicality and progress. In large part these amendments seek to implement the State’s public policy of promoting development, especially at under-utilized sites, while ensuring that the substance of SEQRA’s environmental protections are not lost. These amendments may leave much to be desired in terms of effectively streamlining review of sustainable projects, as intended, but they represent a good first step in that direction.

For example, the DEC has proposed to substantially broaden the list of Type II actions, which are not subject to SEQRA review. Specifically, the proposed additions to the Type II list include:

- land transactions related to activities already listed as Type II actions;
- dispositions of land by agencies at public auction;
- reuses of commercial or residential buildings not requiring a change in zoning or use variance;
- lot line adjustments and area variances not requiring a change in allowable density;
- minor subdivisions involving less than ten acres and not requiring connection to utilities or the construction of new roads;

- recommendations of a county or regional planning entity made following referral from an action pursuant to section 239-m or 239-n of General Municipal Law;
- previously disturbed sites with existing infrastructure within existing municipal centers, depending on population levels;
- upgrades of existing buildings to meet new energy codes;
- installations of rooftop solar energy arrays and cellular antennas or repeaters on existing structures; and
- brownfield site cleanup agreements.

Many of these additions are designed to incentivize development in areas where the need is great and the suite of potential environmental issues is limited or would be handled under existing local land use reviews. The others generally clarify existing practices, make the text more consistent with the overall intent of SEQRA, or help agencies to focus their time and resources on those projects likely to have significant adverse impacts on the environment.

Some of the other amendments include:

- requiring public scoping, which is currently an optional procedure, for all Environmental Impact Statements;
- requiring the adequacy of review of a resubmitted Draft Environmental Impact Statement be based on a written description of the deficiencies;
- revising the timeline for completion of a Final Environmental Impact Statement to make it more realistic and more certain;
- adding a parking space threshold for communities of less than 150,000 persons to capture more commercial and industrial construction; and
- reducing the thresholds for residential subdivisions so that more residential construction projects fall within SEQRA’s Type I actions.

In sum, these SEQRA amendments seek to reduce the burden on agencies where the impacts are known to be limited while modestly expanding SEQRA’s reach where the impacts can be expected to be substantial. As of June 13, 2013, these amendments have not been promulgated.

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NEW YORK STATE WETLAND FORUM ANNUAL CONFERENCE STREAM RESTORATION FIELD TRIPS

Kevin VerWeire – HDR Engineering, Inc.

As part of a successful 2013 NYSWF Annual Conference, attendees had the opportunity to learn about and discuss stream restoration projects with Kevin Verweire and John Roebig from HDR Engineering, Inc. The pair led a field trip to some large scale stream restoration sites in Saratoga County. The focus of the field trip was on the stream restoration that was completed as compensatory mitigation for construction of the PanAm Southern Capital District Intermodal and Automotive Facility. As part of the project permit requirements, the U.S. Army Corps of Engineers required both on-site and off-site stream mitigation to offset impacts from the relocation of 2,900 feet of a perennial to intermittent tributary to the Anthony Kill. In response to this Corps requirement HDR Engineering, Inc. developed a Stream Mitigation Plan that included

stream and riparian restoration adjacent to the impact site and at two off-site locations. The Stream Mitigation Plan included the restoration of 2,000 feet of perennial stream at the impact site, 1,100 feet of perennial stream and riparian habitat located on the Sweeney Farm property in the Town of Malta, and 2,700 feet of riparian restoration located on the Hayner Farm in the Town of Halfmoon.

During the field trip attendees had an opportunity to walk the stream mitigation sites, discuss project challenges and successes, and share ideas for similar projects. Discussions during the field trip focused on the Natural Channel Design approach used for the project, permitting challenges, functional assessments, stream restoration construction techniques, and invasive species management. Kevin and John received positive feedback and wish to thank everyone for attending. Regularly scheduled field trips that are a part of the NYSWF annual conference provide great opportunities to interact and learn from your peers, so everyone is encouraged to attend or submit ideas for future field trips.

AMENDMENTS TO SEQRA AND ITS ENVIRONMENTAL ASSESSMENT FORMS

Continued from page 8

In addition to the proposed regulatory amendments, the DEC has adopted revised model environmental assessment forms (“EAFs”) that are similarly designed toward encouraging sustainable development. EAFs are used by an agency to assist in determining the significance or non-significance of a proposed action and its potential impact on the environment. This is the first substantial update of the EAFs in nearly two decades. In general, revisions to the forms incorporate areas of environmental concern that have arisen since the existing forms were last promulgated, such as climate change, smart growth, use of renewable energy, and brownfield redevelopment, while also updating the forms’ structures, including the introduction of various electronic features, to make them easier to use.

By and large, the new forms are more detailed, ask more involved questions to determine the environmental consequences of a proposed action, and require a developer to gather more information to present to a lead agency. In particular, these new EAFs require information about State energy code compliance, the use of mass transit, the availability of biking or pedestrian facilities, greenhouse

gas emissions, the use of green infrastructure, whether a brownfield site will be remediated, and the quantity of energy to be used. Still, it is the hope of the DEC that most applicants will be able to successfully complete, and municipalities will be able to accurately review, these new EAFs without help from an outside consultant.

Although, the Full EAF is longer and more thorough, and, as a result, more burdensome, the DEC hopes that its use will streamline the review process of Type I actions by reducing the back-and-forth between the agency and developer as a result of inadequate or insufficient information. However, its effect could be an even greater reliance on the improved Short EAF for unlisted actions.

To ease the transition to the use of these new EAFs, the DEC has developed companion workbooks to both the Full and Short EAF. These workbooks contain background information, built-in links to spatial data, and additional guidance intended to guide project developers and agency reviewers with the preparation of an EAF.

Full adoption of the new EAFs was first scheduled for October 1, 2012, but has been twice postponed to provide time for development of the companion workbooks. The forms are now scheduled to go in effect October 7, 2013.

The Forum

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