

The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

CONTENTS

Environmental Agencies Seek to Implement Bush National Mitigation Plan 1

Message from the Chair 2

House Bill Seeks to Clarify, Narrow Definition to Improve Regulatory Consistency 2

Plant Quiz 3

Environmental Organizations Say Many Areas Unprotected as Result of 2003 Guidance 3

Army Corps Issues Advance Notice of Proposed Rulemaking to Address Historic Resources 3

Excerpts From White House Fact Sheet on President Bush’s Wetlands Strategy 4

Engineers Earn Professional Development Credits At Wetlands Forum Conference - A First in New York 4

Dreams Park CEO Agrees to Settle Wetlands Issue 5

Bush Announces Initiatives for Protecting More Land Under Existing Reserve Program 5

EPA, Corps Guidance Could Be Modified as Part of Larger Effort to Improve Program 6

President Announces Plan for Preserving 3 Million Acres of Wetlands 6

Call for Papers 7

ENVIRONMENTAL AGENCIES SEEK TO IMPLEMENT BUSH NATIONAL MITIGATION PLAN

Experts from three federal agencies updated mining industry officials Sept. 30 on federal efforts to implement the Bush administration’s National Mitigation Action Plan for wetlands preservation.

Under Section 404 of the Clean Water Act, a permit is required for the discharge of any material into waters of the United States, including wetlands. Mining and other development activities should first avoid the filling of wetlands, but where such losses cannot be avoided, Section 404 permit holders can be required to provide compensatory mitigation. This includes restoration, creation, enhancement, or preservation of wetlands.

In 2001, reports from the General Accounting Office and the National Research Council highlighted a number of shortfalls in the program. In particular, the Research Council report found that the U.S. Army Corps of Engineers did not have adequate data on the status of compensation wetlands.

The report said the program was falling short of its “no net loss” goal for wetlands function.

“The federal agencies are moving forward very aggressively to address issues about consistency and to clarify what’s expected in this process,” [said] Ben Tuggle, chief of the U.S. Fish and Wildlife Service’s Division of Habitat and Resources Conservation.

Plan Included 17 Items

In response, the Bush administration drafted a National Mitigation Action Plan in late 2002 for more than a dozen federal agencies involved in wetlands preservation. It included a list of 17 priority items to be implemented by 2005.

A representative of the Army Corps told mining officials about recent efforts to update the agency’s mitigation guidance. The Corps is also developing guidance for using on-site mitigation versus off-site mitigation when compensating wetlands loss.

The emphasis now is on environmentally preferable mitigation,

whereas before the emphasis was on on-site mitigation.

The Fish and Wildlife Service, which advises the Army Corps on a number of Section 404 permitting decisions, “has never really embraced the concept of acre for acre” of on-site mitigation. According to the Service, they have always been of the view that the real value is in restoring the ecological health of an entire watershed.

Watersheds Preferred Over Sub-Districts

More of the Corps district offices are assigning wetland project managers according to watershed areas, rather than subdistricts. “Both the [National Research Council] and GAO reports found that some of our mitigation sites had not even been built,” the Corps representative said. “We are trying to improve this. But if you notice how many permits we issue, tracking mitigation in the world of shrinking federal dollars is a difficult challenge.”

The Corps approved more than 85,000 Clean Water Act permits in fiscal year 2003. In addition to tracking guidance, the Corps will soon complete specific Section 404 guidance for wetlands defined as “difficult to replace.”

A representative from EPA’s Office of Water also talked about EPA changes to protocols for completing stream assessments. The Mitigation Action Plan calls for new guidance when considering stream impacts under Section 404.

In May 2004, the EPA released a compendium of stream assessment protocols that have been used by federal and state agencies, as well as by the private sector. EPA compiled several common characteristics and recommended some attributes that should be contained in a stream protocol.

EPA said the protocols can help reduce observer bias by providing well-defined procedures for objectively measuring stream attributes and should include quantitative data as much as possible.

New York State Wetlands Forum

Board of Governors

Christine DeLorier, *Chair*
U.S. Army Corps of Engineers, NY District
Kevin M. Bernstein, *Vice-Chair*
Bond, Schoeneck & King, PLLC
Joseph McMullen, *Treasurer*
Terrestrial Environmental Specialists, Inc.
Virginia L. Ursitti, *Secretary*
Watts Engineers
Teresa M. Bakner
Whiteman Osterman & Hanna
Sandra Doran
US Army Corps of Engineers, Buffalo District
Diane C. Kozlowski
US Army Corps of Engineers
Paula Marshman
NYS Department of State, Coastal Management
Anne Secord
US Fish & Wildlife Service
Richard C. Smardon
State University of New York
College of Environmental Science and Forestry
Elizabeth A. Seme, Inc., *Administrative Assistant*
Kerry Girard, *Accountant*
Edwards, Williams, McManus, & Ricciardelli, P.C.

Electronic Account Manager

Christine DeLorier

Forum Newsletter Staff

Editor

Kevin M. Bernstein

Typing and Layout

Katharine Moody

Proofreading

Jennifer Daly

Mission:

The New York State Wetlands Forum is a non-advocacy group 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

— Christine Delorier

Another summer has passed, and it went by too quickly for me. I did enjoy time fishing, boating and resting at my family's cabin on Upper Saranac Lake, but didn't swim too much. It was cold up there! I hope that each of you had just as nice of a summer as I did.

I want to extend my appreciation to everyone that participated in and attended our 10th Annual Conference and Membership Meeting that took place in Rochester last spring. Your involvement made our conference a wonderful success, and we are using the suggestions from your evaluations to help plan our 11th Annual Conference. The date and location for the conference have been selected and a call for papers is included in this newsletter. Paula Marshman, a fellow board member and employee with the New York State Department of State, has graciously volunteered to be the Program Chair for this conference. Volunteers wanting to develop sessions or be session moderators are always welcomed.

The Forum is here for all members and we want to ensure that your expectations are being met. Your active involvement in the organization is encouraged whether it's participating in our events, volunteering your time, or writing a newsletter article. The latter is especially encouraged since we plan on producing more newsletters per year in the future. You can write an opinion piece, a technical or legal article, or even write a profile on a fellow Forum member. We also encourage you to provide suggestions on how the Forum can serve you better. Please do so by contacting me or by writing to us through our website at www.wetlandsforum.org. I know that this is exactly what I wrote in a prior address to you, but I thought it was important for me to reiterate it. Your Board of Governors is committed to making the Forum everything you want it to be and more. The more we hear from you, and the more you contribute, the better the Forum is for everyone. If you are not a member of the Forum, or forgot to renew your membership, please join us. The more the merrier!!!

I hope to see everyone at the next conference. Until then, enjoy the beautiful autumn weather and have a wonderful holiday season!

HOUSE BILL SEEKS TO CLARIFY, NARROW DEFINITION TO IMPROVE REGULATORY CONSISTENCY

The definition of wetlands would be clarified and narrowed to provide more regulatory certainty under legislation introduced in the House July 15. Rep. Richard Baker (R-La.) introduced the Federal Wetlands Jurisdiction Act of 2004 to define clearly which waters would be protected under the federal Clean Water Act.

Specifically, under the bill, protections would be extended to all navigable waters, including the territorial seas; areas that are connected hydrologically to navigable waters through "a continuous, naturally occurring surface connection," including perennial or intermittent streams; and all wetlands adjacent to these areas.

Excluded from Clean Water Act protections under the Baker bill would be "isolated" wetlands that are not adjacent to actually navigable waters or non-navigable tributaries; areas covered periodically by "sheet flow," which is normal runoff from precipitation; areas connected to jurisdictional waters by ephemeral waters, ditches or pipelines, and municipal separate stormwater systems and other point sources regulated under the Clean Water Act, as well as the connections themselves; groundwater; and "fastlands," defined as those areas located behind levees built for commercial, industrial, or residential purposes.

Needed to Clear Up Uncertainties

Rep. Baker said he introduced the bill to clear up uncertainties created by the Supreme Court's decision in *SWANCC*. "The result of that decision has led to a range of judicial decisions that are not consistent across the nation, and the uncertainty has caused tremendous difficulty for my constituents and, I am sure, for property owners across the nation," Baker said in a statement. "In fact, it's safe to say that there are literally hundreds of agency interpretations of these matters because the corps and EPA have essentially allowed individual personnel to make their own judgments on a case-by-case basis."

No Action Likely in Election Year

It is unlikely that the bill will go anywhere in Congress during an election year because the Republicans would not want to be accused of trying to roll back Clean Water Act protections for wetlands. Several industry groups issued statements indicating support for Baker's bill.

PLANT QUIZ

— by Bernard P. Carr
Terrestrial Environmental Specialists, Inc.

This year's plant quiz at the spring 2004 Wetlands Forum Conference and Meeting centered around those woody plants that have opposite branches. To remember which are opposite, botanists use the mnemonic device of MADCAPHORSE, which stands for maple, ash, dogwood, the *Caprifoliaceae* family (Viburnums and Honeysuckles), and horse chestnut.

Silver maple (*Acer saccharinum*) was one of the specimens that tripped up many contestants. Silver maple is characterized by its multiple, deep red, rounded buds that cluster near the end of the branch.

Green ash (*Fraxinus pennsylvanica*) was used, as it is a common wetland tree, although it is frequently confused with white ash, an upland species. Since this was a wetland quiz, most participants answered this correctly. The leaf bud scar seen on white ash is rounded upward into a crescent shape; this characteristic smile makes land owners happy when their property contains a well-drained upland woods filled with white ash rather than a green ash wooded lot that prefers those poorly drained wetland areas.

Two common dogwoods in New York have red stems, red-osier dogwood (*Cornus sericea*) and silky dogwood (*Cornus amomum*). One of the key characteristics is the pith color on mature specimens. Our quiz sample had a dark pith, which is characteristic of silky dogwood. Red-osier has a white pith, and also has large lenticles and a stout stem.

The toughest specimen was a representative of the *Caprifoliaceae* family. This specimen was cranberry (*Viburnum trilobum*). Most folks incorrectly identified this as elderberry (*Sambucus canadensis*), a closely-related species in the same family. This ornamental specimen was eliminated from my backyard this year. It had been attacked by the viburnum leaf beetle and we decided to remove it. I would call this wetland forum quiz taker's revenge.

Two herbaceous specimens were also included. The easiest specimen was the fertile frond of sensitive fern (*Onoclea sensibilis*). All participants correctly identified this species.

A sedge was introduced to provide a tie-breaker. Unfortunately, this fairly common northern sedge, Tuckerman's sedge (*Carex tuckermanii*), was not correctly identified. One of its key characteristics is that its achene (seed) is bent over at its middle - similar to those old thick steel beer cans that were almost impossible to bend in your hands. Jerry Jenkins nicknamed this Texas Beer Can Sedge because only a tough Texan could bend those steel beer cans.

We had two winners this year, Kurt Weiskotten of the NYS Department of Transportation and Richard Futyma of the LA Group. Both were awarded a bottle of wine, thanks to the Wetland Forum and Christine DeLorier.

ARMY CORPS ISSUES ADVANCE NOTICE OF PROPOSED RULEMAKING TO ADDRESS HISTORIC RESOURCES

Kathleen M. Bennett

On September 27, 2004, the U.S. Army Corps of Engineers (the "Corps") issued an Advance Notice of Proposed Rulemaking to solicit additional comments on how the Corps' permit application process should be revised to address the protection of historic property. The Corps previously requested comments in 2002. The Corps' regulations (33 CFR part 325, Appendix C) currently contain procedures to address the National Historic Preservation Act ("NHPA") provisions that are applicable to all Federal agencies. However, the NHPA was amended in 1992 and its implementing regulations (36 CFR part 800) were amended in both 2000 and 2004. As a result, the Corps' regulations must be revised to address these amendments. The Corps' stated goal is to revise its permit procedures to afford appropriate protection of historic properties, while providing an efficient and timely review of permit applications.

After considering the comments it received in 2002 and the 2004 regulatory amendments to 36 CFR part 800, the Corps identified four options for updating its permit application processing to address historic properties.

1. Revise Appendix C to incorporate the current requirements and procedures at 36 CFR part 800.
2. Revoke Appendix C and use 36 CFR part 800, subpart B when reviewing individual permit applications, and utilize Federal agency program alternatives at 36 CFR 800.14 for general permits.
3. Revoke Appendix C and use 36 CFR part 800, subpart B for all individual permits and general permits.
4. Revoke Appendix C and develop non-regulation alternative procedures in accordance with 36 CFR 800.14.

The Corps is seeking comments on the appropriateness and feasibility of these options and recommendations for the preferred option. In addition, the Corps invites suggestions for other options not identified above. Finally, the Corps is seeking comments on how to effectively consult with other interested parties during the rulemaking process.

Comments must be submitted on or before November 26, 2004.

ENVIRONMENTAL ORGANIZATIONS SAY MANY AREAS UNPROTECTED AS RESULT OF 2003 GUIDANCE

The Bush administration's 2003 directive on regulating isolated wetlands has led to the development of thousands of acres without Clean Water Act permits, four environmental organizations said in a report Aug. 12. The study, *Reckless Abandon*, says the U.S. Army Corps of Engineers and the Environmental Protection Agency have failed to protect significant areas under the policy, from a 150-mile-long river basin in New Mexico to 4,000 acres of swamplands in northern Florida.

The report is based on Freedom of Information Act requests submitted by Earthjustice, the Natural Resources Defense Council, the National Wildlife Federation, and the Sierra Club.

"The implementation of the Bush administration's policy has effectively left all of these waters—and many, many more—without the Clean Water Act to protect them," the report says.

A spokeswoman for the White House Council of Environmental Quality disputed the report's findings. She said the case studies are based on "a narrow set of selected facts" and cover a miniscule amount of acres in comparison to President Bush's recent proposal to restore and protect 3 million acres of wetlands. "These groups are in denial of the president's Earth Day proposal to improve 1 million acres of wetlands, to restore 1 million acres at risk." Environmental groups have questioned how the President's policy would be better than existing law.

EXCERPTS FROM WHITE HOUSE FACT SHEET ON PRESIDENT BUSH'S WETLANDS STRATEGY

Released April 22, 2004

Restore, Improve, and Protect: Through a combined effort, the Departments of the Interior, Agriculture and Transportation, EPA, Army Corps of Engineers, and NOAA will, over the next five years:

- Restore and create at least 1 million acres of wetlands;
- Improve the quality of at least 1 million acres of wetlands;
- Protect at least 1 million acres of wetlands.

The benefits of these outcomes will be enhanced by further efforts to improve associated uplands and river habitat so that, for example, ducks not only will have the wetland they need for food, but good dry land habitat nearby for nesting.

Better Tracking of Wetland Programs:

- Complete the next National Wetlands Inventory by the end of 2005, instead of the current 2010 due date, and move to more frequent reviews beginning in 2006;
- Improve interagency coordination on remote sensing and ground level data collection on gain, loss, and quality;
- Gain further experience and develop useful protocols for measuring wetland outcomes.

Enhance Local Collaboration:

- The Bush Administration places a premium on and is implementing cooperative conservation efforts as a better way to achieve and sustain success.
- The Department of the Interior today announced a new tool for working in cooperation with local landowners to protect wetlands through a simplified process in the Prairie Pothole region of the Northern Plains states.

Moving to an Increase in Wetland Acres and Quality from No Net Loss policy.

Wetlands benefit fish and wildlife, reduce flooding, improve water quality, and provide fishing, bird-watching, hunting, and educational opportunities to millions of Americans. The lower 48 states currently contain 100 million acres of wetlands.

- In January 2001, the U.S. Fish and Wildlife Service released its National Wetlands Inventory which found that the rate of wetland losses had dropped dramatically to an estimated annual net loss of 58,500 acres of wetlands, down from an estimated 290,000 acre annual net loss during 1975 to 1984, and an estimated 458,000 acre annual net loss during 1955 to 1974.
- Today, the U.S. Department of Agriculture released its National Resource Inventory of non-federal lands in the lower 48 states covering the period 1997 to 2002, which found agricultural land accounted for a net gain of roughly 26,000 wetland acres per year.
- The President successfully expanded and enhanced the incentive and partnership programs for restoring, improving, and protecting wetlands as a first step in putting the Nation on a path to increasing wetlands. Most significantly, this effort included securing historic funding for 2002 Farm Bill conservation programs that over 10 years would deliver \$40 billion of conservation funds, reauthorizing the NAWCA partnership programs, enhancing fish and wildlife partnership programs and developing new, cooperative conservation programs.
- The President's FY 2005 budget requests more than \$4 billion for conservation programs that include wetlands, notably the Farm Bill Wetlands Reserve Program, Conservation Reserve Program, Conservation Technical Assistance Program, Wildlife Habitat Incentives Program, and Environmental Quality Incentives Program (\$1.4 billion more than FY 2001 enacted); \$54 million for the North American Wetlands Conservation Act Grants Program (\$14 million more than FY 2001 enacted); \$50 million for the Partners for Fish and Wildlife Program (\$13 million more than FY 2001 enacted) and \$13 million for the Coastal Program (\$3.7 million more than FY 2001 enabled).

The increases in these and other programs included in the Initiative will leverage significant additional matching funds from state, localities, the private sector, and conservation, recreation, and sportsmen organizations.

- In order to protect against losses in the regulatory permitting program for impacts caused by highway construction or private development, the Administration initiated a new Mitigation Action Plan to achieve and monitor success of restoring wetlands to offset any necessary loss. In December 2003, the President reiterated his commitment to assuring no net loss, following a Supreme Court ruling that removed federal regulatory protection of certain isolated wetlands. His FY 2005 budget includes an additional \$5 million to help states address the gap created by the Court.

ENGINEERS EARN PROFESSIONAL DEVELOPMENT CREDITS AT WETLANDS FORUM CONFERENCE - A FIRST IN NEW YORK

— Joseph M. McMullen, Terrestrial Environmental Specialists, Inc.

As of January 1, 2004, practicing Professional Engineers (P.E.s) in New York must acquire professional development hours to maintain their certification. Such development hours can be provided by conferences or training sessions that are formally accredited by the Practicing Institute of Engineering, Inc. (PIE).

Seeing a need and the opportunity to reach more engineers at our conferences, the Wetlands Forum formally applied to the PIE for accreditation for two sessions at our Spring 2004 Conference held in Rochester. Accreditation was received for the Wetlands Restoration/Mitigation Case Studies and the Phase II Stormwater Regulations sessions. The sessions were well received and a total of 2.5 professional development hours were received by participants.

What was most interesting about the accreditation for the two sessions were the Course numbers assigned by the PIE. The course numbers were PS000001 and PS000002 - *the first and second courses ever accredited in New York.*

DREAMS PARK CEO AGREES TO SETTLE WETLANDS ISSUE

— Jim Austin

HARTWICK SEMINARY - Dreams Park CEO Louis Presutti has agreed to fund the creation of new wetlands in an effort to avoid enforcement action by the U.S. Army Corps of Engineers for a violation of wetlands regulations that are part of the federal Clean Water Act.

In a fax message to the Corps' office in Albany Tuesday evening, Presutti stated that "...the Dreams Park has agreed to contribute substantial sums to non-profit agencies to be used to purchase, create and maintain wetland areas in Otsego County."

Corps' spokesman George Casey said Wednesday morning that his agency is currently considering the proposal, but had not finalized negotiations with the youth baseball camp.

"If we can reach a settlement, we do not need to proceed with the U.S. Attorney," he said.

Casey said the creation of new wetlands to offset those that had been filled is one method the agency uses to resolve violations.

Last week, the Corps notified the Cooperstown Dreams Park that it intended to refer a wetlands violation at the park to the U.S. Attorney's office to begin the process of initiating a civil action.

The action came following a failed attempt to resolve the matter outside of court.

Casey said Tuesday the violation involved Burdett Brook, which runs through the park, but he would not discuss details of the violation except that it involved the placement of fill material in the waters of the United States in an amount that required prior authorization from the Corps. The violation, he said, occurred over multiple years and was discovered during a site visit to the Dreams Park last November.

According to the Corps' letter, representatives of the federal agency met with Presutti and his staff in mid-July to discuss how the violation could be resolved. Almost two weeks later, Presutti sent a letter to the Corps outlining his proposal for resolution, but it did not satisfy the Corps.

"...the proposed plan set out in that letter does not adequately address the primary issues raised by this office, and would not constitute an appropriate basis for an agreement to settle the enforcement concerns of this office," the agency stated.

The letter went on to explain the Corps' intent to turn information over to the U.S. Attorney's office for enforcement action, but that action is now on hold.

In his fax Tuesday, Presutti stated that the Park was unaware of any alleged wetlands violation until November when agency representatives visited the park. They had, he wrote, complied with the site plan process established by the town of Hartwick.

"During each site plan review, the proposed construction activities were subjected to the state's environmental review process and each time a negative declaration was received. Our licensed engineer and the town's environmental legal counsel were likewise unaware at any time that any proposed construction activities would violate federal regulations administered by the Corps."

But the Dreams Park's most recent expansion plan, which includes construction of ten new clubhouses, four lighted ball fields, concession stand, storage and maintenance buildings, a bath house, an addition to existing clothing and souvenir center and an emergency access road to Route 28, was still under review at the time Presutti learned of the violation last November.

Concerns about wetlands violations were brought up by Otsego 2000 director Martha Frey during a public hearing on the expansion plan in February when the board approved the application.

Although he was aware of the violation during the review of his expansion plan, Presutti did not reveal to the town planning board that the Corps of Engineers found that fill had been placed in a wetland without prior authorization from the agency.

The Dreams Park CEO declined to comment beyond his faxed statement.

BUSH ANNOUNCES INITIATIVES FOR PROTECTING MORE LAND UNDER EXISTING RESERVE PROGRAM

On August 4, President Bush announced three initiatives aimed at conserving and restoring wetlands and wildlife habitats, including one to encourage early re-enrollment into a Department of Agriculture-managed, voluntary conservation program for wetlands on farm land.

More than 20 million acres of farm land protected under contracts entered into under the Conservation Reserve Program are scheduled to expire in 2007 and 2008, according to the administration. Several million more are set to end in 2009 and 2010.

The initiative will direct USDA to begin immediately re-enrolling and offering contract extensions for all of these contracts.

The Conservation Reserve Program, originally authorized under the 1985 Farm Bill and reauthorized recently under the 2002 Farm Bill, is a voluntary program that provides incentive to landowners to protect environmentally sensitive land from agricultural production by establishing protective covers over it or making it into a habitat for wildlife. Since its inception, the program has helped reduce soil erosion by more than 40 percent and restored 1.8 million acres of critical wetlands, according to the administration.

Re-enrollment

Under the early re-enrollment initiative, farmers with land currently under contract would be given the opportunity to enter into a new, 10- or 15-year contract. USDA also will initiate a plan for "maintaining and expanding the benefits of the program in the future, working closely with" interested groups, such as farmers, wildlife organizations, and communities.

Currently, 16 million acres under contract are scheduled to expire in 2007, another 6 million will expire in 2008, 4 million in 2009, and 2 million in 2010.

The administration also said a request for public comment on various aspects of the Conservation Reserve Program will be published soon in the *Federal Register*. USDA sponsored a general sign-up for the program of up to 80,000 acres from Aug. 30 to Sept. 24 at local USDA offices, according to the administration.

EPA, CORPS GUIDANCE COULD BE MODIFIED AS PART OF LARGER EFFORT TO IMPROVE PROGRAM

Guidance to help regulators determine the reach of federal Clean Water Act protections may be modified as part of a broader effort by the Bush administration to address concerns raised by a General Accounting Office (GAO) report, recent court decisions, and congressional testimony on the regulation of wetlands, an Environmental Protection Agency official said April 28.

Although no commitment has been made to revise the guidance, it is “a piece of the picture being analyzed,” the agency official, who did not want to be identified, told BNA. “It’s conceivable that it could be updated and modified” to address concerns described by some at a March 30 hearing before a House subcommittee as the inconsistent application of wetlands regulations.

GAO released a report March 4 stating that the criteria used by the U.S. Army Corps of Engineers to determine whether wetlands are subject to Clean Water Act protections are unevenly interpreted and applied. The conclusions in the GAO report were based on a survey of the 16 corps districts.

At the March 30 House Transportation and Infrastructure Subcommittee on Water Resources and Environment hearing, Corps officials said they would continue the work launched by GAO and survey all 38 districts to see how decisions are being made regarding whether a water body falls within the jurisdiction of the Clean Water Act. EPA is assisting in that effort.

Agencies Working to Improve Transparency

The agencies also are working to improve the transparency of their decisionmaking so that the public and regulated community know what to expect in jurisdictional determinations, the official said. The guidance issued in January 2003 has been criticized by environmental advocates who say it does not provide enough protections to isolated wetlands and that up to 20 million acres of wetlands could be at risk. Industry groups said the guidance does not do enough to clarify which wetlands are covered by the Clean Water Act, especially after recent conflicting court decisions on jurisdictional issues.

The question of whether certain isolated, intrastate, nonnavigable waters are covered by the Clean Water Act was thrown into flux in 2001, when the Supreme Court invalidated the migratory bird rule that had been used to assert federal jurisdiction. Essentially, the

rule stated that the presence of migratory birds was enough to claim federal jurisdiction because people would travel over state lines to birdwatch or hunt, which involved spending money and thus triggered commerce clause considerations (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)).

However, the Court did not address other commerce clause factors, such as whether the waters are used for recreation, shellfishing, or other activities that might invite interstate commerce. Since the *SWANCC* decision, several challenges to federal jurisdiction over certain waterbodies have made their way through the federal courts, and most have come down on the side of a narrow interpretation of the *SWANCC* ruling.

On April 5, the Supreme Court said it would not hear three cases challenging federal assertion of jurisdiction under the Clean Water Act over wetlands that are hydrologically connected to navigable waters (*Rapanos v. United States*, U.S., No. 03-929, 4/5/04; *Deaton v. United States*, U.S., No. 03-701, 4/5/04; *Newdunn Associates v. U.S. Army Corps of Engineers*, U.S., No. 03-637, 4/5/04).

Dozen Cases Elevated to Headquarters

The 2003 guidance directed field offices to elevate questions of whether isolated, intrastate, nonnavigable waters are covered to headquarters where the decision may be made based on how a federal court with jurisdiction over that region has ruled.

The EPA has said that only about a dozen cases have been elevated. In about half of those, the waters were determined to be navigable-in-fact, meaning they are covered by Clean Water Act protections. The other cases raised “(a)(3) questions,” meaning they had some connection to the commerce clause factors spelled out in the Corps’ regulations at 33 CFR 328.3(a)(3). Of those, three were determined to be jurisdictional, and one was not.

Ben Grumbles, the acting EPA assistant administrator for water, has said that the regulatory program at EPA and the Corps is not the appropriate vehicle for achieving gains in wetlands acreage. Rather, Clean Water Act regulations are designed to protect what is already in place. The gains can better be made through the incentive programs administered by the Department of Agriculture and the Department of the Interior, he said.

PRESIDENT ANNOUNCES PLAN FOR PRESERVING 3 MILLION ACRES OF WETLANDS

President Bush announced a new policy initiative on April 22 (Earth Day) to create, improve, or preserve at least 3 million acres of wetlands over five years to increase overall wetland acreage and quality. The White House Fact Sheet on President Bush’s Wetland Strategy is shown below.

Bush emphasized the important role of wetlands by saying, “Up to half of all North American bird species nest or feed in wetlands. About half of all threatened and endangered animals use wetlands.”

Also on April 22, Secretary of Agriculture Ann Veneman announced that, according to the National Resources Inventory, U.S. farmers and ranchers produced a net increase of 131,400 acres of wetlands from 1997-2002. Veneman said most of the increases occurred in the Corn Belt and Delta States, where farmers and ranchers have created, maintained, or enhanced numerous wetlands through conservation programs such as the Wetlands Reserve Program, Conservation Reserve Program, and the Conservation Reserve Enhancement Program.

Bush said, while “the old policy of wetlands was to limit the loss of wetlands,” his will be a “new policy and a new goal for our country” that builds more on limiting losses and expanding and increasing wetland acres.

‘Major, New Shift in Policy.’

Calling the President’s announcement “a major, new shift in policy when it comes to the protection, improvement, and restoration of the nation’s wetlands,” James Connaughton, Chairman of the Council on Environmental Quality, said that the goals of this initiative will be met by a combination of funding commitments from “government officials and private citizens.”

To accomplish this objective, which Bush called a “realistic goal,” will involve the restoration of at least 1 million acres of wetlands over the next five years; improving the quality of another 1 million acres of existing wetlands through the Interior Department’s public/private Partners for Fish and Wildlife Program; and protection of 1 million acres of wetlands currently at risk of degradation.

‘Operating Around the Margins’

Environmental groups questioned how the President’s policy would be better than existing law. The policy announced April 22 is “operating around the margins by protecting a few acres here and there,” while individual districts are allowed to not enforce the law, according to the NRDC.



CALL FOR PAPERS

New York State Wetlands Forum, Inc.
2005 Annual Conference and Meeting

“Wetlands in New York – Mapping, Management, Mitigation and More”

Queensbury Hotel, Glens Falls, NY
(www.queensburyhotel.com / 800-554-4526)

APRIL 6 & 7, 2005

This eleventh annual meeting of the New York State Wetlands Forum is expected to once again examine a variety of wetland-related issues and developments, and how these issues have impacts both state-wide and regionally. We anticipate having breakout sessions on regional issues within our state. Abstracts are sought on numerous topics [additional topics will be added], including:

- Wetland Mapping
- Watershed Considerations
- Wetlands and Landowner Rights
- Invasive Species
- Cultural Resources and Wetlands
- Wetland Mitigation and Monitoring
- Wetland Assessment
- Development in Wetlands
- Hazardous Waste Cleanup in Wetlands
- Case Law Developments
- Regional Wetland Concerns
- Legislative and Regulatory Updates
- Permitting Case Studies
- Wetland and/or Stream Restoration
- Upper Hudson River/Lake George/
Lake Champlain Wetland or Aquatic
Resource Issues
- Water Quality and Wetlands
- Energy and the Environment
- Fish and Wildlife Passages/Corridors
- Effects of Dam Removal

THIS IS YOUR MEETING. Make it interesting by participating through a presentation of the work or projects in which you have been involved. If you have an idea for a field trip, or would like to host one, please E-mail or mail it to Christine Delorier (address below.)

PRESENTATION/POSTER SESSION: Please submit an abstract and audiovisual needs for either a presentation or poster. Abstracts submitted for consideration must include the title, author(s), address(es) and concise description of the topic in 250 words or less in the following format:

TITLE. Author¹ and Author². Address¹, phone number, fax number, email address. Address².
Abstract. *Audiovisual needs.*

Submit an abstract via E-mail or mail to:
Christine Delorier, US Army Corps of Engineers
1 Bond Street, Troy, NY 12180
Christine.Delorier@usace.army.mil; 518-273-7420; Fax: 518-273-2055

DEADLINE IS JANUARY 15, 2005

COOPERATING PARTIES: The Forum is seeking cooperating parties to assist with dissemination of the Call for Papers and updates as they become available. There is no direct financial obligation to be a cooperating party. Please contact Christine Delorier for additional information.

EXHIBITOR/SPONSOR: Exhibitors and sponsors have the opportunity to advertise their goods and services to the conference participants via floor and table space for displays and also through advertisements in the conference brochure. Space is limited so please inquire and reserve now by returning the registration form or by contacting: **Kevin Bernstein, Bond, Schoeneck & King, PLLC, One Lincoln Center, Syracuse NY 13202, kbernstein@bsk.com, 315-218-8329.**

For Topic and Meeting Updates visit <http://www.wetlandsforum.org>



Who are we?

The New York State Wetlands Forum (NYSWF) is a non-advocacy organization comprised of individuals and groups with diverse backgrounds, interests and viewpoints regarding wetlands and their science, use, and management. Incorporated in 1994, the NYSWF is a 501(c)(3) not-for-profit organization whose 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 member's knowledge and understanding of wetlands;
- make available information about wetlands to its members and the general public.

Membership Benefits:

Membership in the NYSWF will entitle you to:

- bi-annual newsletter;
- announcement of meetings and workshops pertaining to wetlands in NYS;
- invitations to join other people interested in discussing wetland issues at meetings and field excursions throughout New York State;
- serve on NYSWF committees working to advance wetland knowledge in NYS;
- reduced registration fees at meetings.

Please Join Us!

Name: _____

Affiliation: _____

Address: _____

City: _____ State: _____ Zip +4 _____

Telephone: _____ Fax: _____ E-Mail: _____

Annual Dues Enclosed \$35.00 Individual Membership \$15.00 Student Membership \$100.00 Corporate Membership
(Corporate Membership allows membership for up to 4 people from a single organization. Please list names and addresses on reverse)

Please mail to: NYSWF, P.O. Box 1351, Latham, NY 12110 EIN 14-1723859

PResort Std.
 US Postage
 PAID
 Permit No. 30
 Latham, NY 12110

The Forum
 A publication of
 NEW YORK STATE WETLANDS FORUM, INC.
 POST OFFICE BOX 1351
 Latham, NY 12110-1351