

The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

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EPA AND ARMY CORPS ISSUES JOINT GUIDANCE REGARDING THE AGENCIES' JURISDICTION UNDER SUPREME COURT DECISION

— Kathleen M. Bennett and Candace J. Gomez, Bond, Schoeneck & King, PLLC

On June 5, 2007, the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) issued joint guidance for their field offices to clarify regulatory jurisdiction pursuant to the Clean Water Act (“CWA”) following the Supreme Court’s decision in *Rapanos v. United States*. The guidance only addresses the interpretation of the term “waters of the United States” under § 404 of the CWA and expressly reserves judgment on how it will be interpreted under other provisions of the CWA, such as § 402 which regulates discharges of pollutants from point sources into regulated waters. The agencies hope that the guidance will result in jurisdictional determinations and permit actions that are consistent with the Court’s decision.

Background

The CWA prohibits the discharge of dredged or fill material into “navigable waters” without a permit. “Navigable waters” is defined broadly as “the waters of the United States, including the territorial seas.” The Corps, which issues permits for the discharge of dredged or fill material into navigable waters, interpreted “the waters of the United States” expansively to include tributaries within the “ordinary high water mark” and wetlands adjacent to those tributaries, even if the wetlands are separated by “man-made dikes or barriers, natural river berms, beach dunes and the like.”

The *Rapanos* decision had been widely anticipated by developers and environmentalists as one that might establish a clear test for defining a jurisdictional wetland. However, the Court failed to reach a majority opinion on the correct test to apply under the CWA. Instead, the Court’s 4-1-4 split failed to offer clear guidance for defining a jurisdictional wetland. In a plurality opinion authored by Justice Scalia, four Supreme Court justices concluded that

the agencies’ regulatory authority should extend only to “relatively permanent, standing or continuously flowing bodies of water” connected to traditional navigable waters, and to “wetlands with a continuous surface connection to” such relatively permanent waters. Justice Kennedy authored a concurring opinion in which he presented a different standard for evaluating CWA jurisdiction over wetlands and other bodies. Justice Kennedy concluded that wetlands are “waters of the United States” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as navigable. In other words, Justice Kennedy would still require a “significant nexus” between the wetlands and navigable waters for regulatory jurisdiction to exist.

Jurisdictional Guidance

Relying on Justice Kennedy’s concurring opinion, together with the views espoused by Justice Scalia’s opinion, the EPA and Corps formulated the following principles with respect to CWA jurisdiction.

The agencies will continue to assert jurisdiction over traditional navigable waters, wetlands adjacent to traditional navigable waters, non-navigable tributaries of traditional navigable waters that are relatively permanent where the tributaries typically flow year-round or have continuous flow at least seasonally (e.g., typically three months), and wetlands that directly abut such tributaries.

The agencies will decide jurisdiction based on a case-by-case, fact-specific analysis to determine whether there is a significant nexus with a traditional navigable water for non-navigable tributaries that are not relatively permanent, wetlands adjacent

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**New York State
Wetlands Forum, Inc.
2008 Annual Conference
And Meeting**

**Conference Information
and Call for Papers**

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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

Wetlands in our Changing Landscape

First and foremost, let me say I am honored to have been elected Chair of the NYS Wetlands Forum. My appreciation is extended to the Forum Board and other members for their support.

I am also happy to say our spring 2007 conference in Lake Placid was a remarkable success. We had a record-setting 197 two-day attendees. Whether it was the beautiful Adirondack atmosphere, the varied subjects covered by guest speakers, Dr. Ross Whaley as our keynote, or the desire to embarrass Kevin Bernstein on his birthday, I'm not sure. Though speaking just for myself, it was a toss up between the break time coffee and pastries furnished by Environmental Design and Research, P.C., and the cocktail hour sponsored by The Chazen Companies. (Just joking, though I have to admit these and other member contributions do help ensure an excellent conference.)

Obviously, I was unable to attend every conference session last spring. But those I did attend were quite impressive. Overall feedback was very positive as well. Completed surveys provided a good deal of interesting information. All 61 respondents said the conference met their expectations. (Does that mean everyone knew Terrestrial Environmental Specialists would clean house in our Competition? Congratulations to Bernie Carr for taking first place!) Of course, what may have been too technical for some, may have been too general for others. But with a mix of topics covering a range of detail apparently we provide something meaningful for everyone. The majority favored a 2008 conference location within the Finger Lakes region. Good news! We heard you!

This coming spring we're shooting for the Waterloo Holiday Inn. So mark your calendars for April 9 and 10, 2008. A call for papers is going out now, and I'm certain we will again have several great speakers. Likewise, field trips are shaping up nicely. Let's just hope "Montezuma's Revenge" is not something we have to worry about! Speaking of Montezuma....

Mr. Tom Jasikoff, Director of the US Fish and Wildlife Service Montezuma National Wildlife Refuge, will be our 2008 keynote speaker. Tom has been in the forefront of wetland management for many years and of late has overseen some particularly impressive projects at Montezuma. Tom's wit and wisdom, not to mention musical talent, is always appreciated. Having a nationally recognized individual, who also very much represents the local area, is a real honor.

I think our 2008 conference theme, "Wetlands in our Changing Landscape," is also quite apropos. Have you heard the one about the polar bear that walked into a bar? He needed some ice. I just made that up and I know it's not funny. Sorry, but from the global to the local, the times—they are a changin'. (I made that up too :-)

Big news at DEC! Did you hear the one about the woman that walked into the Division of Fish, Wildlife, and Marine Resources Director's office? It's none other than Patty Riexinger, former DEC Wetlands Program Manager, and long-time Forum supporter. What changes Patty's promotion and subsequent backfill bode for DEC should be on our radar as well. Seems we need a forum to discuss some of these events.

And where better to discuss these landscape-altering events than Waterloo, New York? I know you know the area is famous for wetlands, what with Montezuma right down the road. But did you know Waterloo was the birthplace of tile drainage in America? Open ditching of wetlands was well established in our nation's early history. But it was not until 1835 that John Johnston of Geneva, New York reportedly imported the first tile drain to America. He then contracted with Benjamin Whartenby, an earthenware manufacturer in Waterloo, NY, to mass produce clay tile for his farm and others. The story of Johnston's success quickly spread through influential agricultural journals until tile drainage became an extremely significant and popular landscape altering practice nationwide. A century and a half later, in the name of wetland restoration, we're now paying to plug those same drains. Go figure.

With regard subjects apart from the annual conference, the NYS Wetland Forum is likewise making good progress. My previously-stated goals of expanding student membership, updating the web site, and continuing to improve communication on and understanding of wetland issues pertinent to New York State are well underway. I think we have already more than tripled our student membership over last year! Make that quadrupled! Heck, at the risk of sounding like a braggart, I could say we've increased student membership by a multiple of 100. Of



Kevin Bliss

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NEW YORK'S EXPLOITABLY VULNERABLE PLANT SPECIES LIST – A NEED FOR A DEFINITION CHANGE

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

[Reprinted with permission from the New York Flora Association Bulletin Spring, 2006.]

New York has a Protected Plant Law – Environmental Conservation Law § 9 1503, and associated regulations under 6 NYCRR Part 193.3. The law protects certain plant species, which are currently listed in four categories: endangered, threatened, rare, and exploitably vulnerable. I like the law. I even like the categories and I agree with most of the species listed in the regulations under these categories. I like the definitions used for endangered, threatened, and rare species. They are fine. I hate the definition for exploitably vulnerable species. In a kind botanical world, this definition would be politely described as abysmal. It should be changed. Let me explain why. I will start at the beginning.

In 1974, New York passed the New York Protected Plant Act. It stated that “*no one may knowingly pick, pluck, sever, remove or carry away, without the consent of the owner thereof, any protected plant.*” It was a piece of milestone legislation that protected the removal of certain plants from a landowner’s property without their permission. It protected landowner rights and recognized that plants are the property of the landowner. A common legal right carried through to today - where the plants belong to the landowner; while animals, on the other hand, belong to the state. Why? Because our laws are based on English law, where the landowner owns the plants, but the animals are owned by the King. That is why the state (king) can regulate the taking of animals, but not the taking of plants on one’s own property.

The 1974 Protected Plant Act established two things: 1) the list of plant species protected under the Act; and 2) the legal penalty for taking a protected plant or plant part from someone’s property without their permission.

Let me address the latter penalty item first. The penalty established in 1974 was a \$25 fine for the taking of a protected plant or plant part from a landowner’s property without their permission. Setting a monetary value for each protected plant was a good idea, and a \$25 fine in 1974 was very appropriate. Unfortunately, although the categories of protected plants under the original Act have been significantly changed, and the list of plants under these categories were changed a few times, the monetary fine of \$25 has never been changed. The \$25 fine

established in 1974 is still the same today in 2006, 32 years later. A reasonable person might suggest that the penalty be increased after 32 years. A penalty of \$50 for the removal or harm to each protected plant would be more appropriate today.

The plants listed in the original 1974 Protected Plant Act were in just one collective category of “*Protect Plants.*” At that time there was little understanding of rarity categories. As a matter of fact, the species list developed under the original Act had little to do with rarity. Those listed were showy species (including all native orchids, cardinal flower, Trilliums, etc.), species collected for landscaping and Christmas decorations (all native ferns but three, all clubmosses, flowering dogwood, winterberry holly, etc.), and other species that were subject to indiscriminate collecting (bloodroot, bayberry, sundews, trailing arbutus). Of course, within these collective categories there are endangered, threatened, and rare species. But, the original list targeted showy species. Essentially no aquatic species were included and no nondescript species, like grasses, sedges, or rushes. Today’s Act includes over 150 species in these latter groups alone.

Dick Mitchell and Chuck Sheviak described the original list very well in their 1981 publication *Rare Plants of New York* (Mitchell and Sheviak 1981). They did propose a list of true rarities in this publication, but their comment on the original list was as follows.

The list should not be mistaken for a rare plant list, though some rarities are protected by it. Rather, it lists wild flowers and other plants (such as Dogwood, Azaleas and Trilliums) which are frequently gathered indiscriminately for

flower arrangements, cultivation, or for momentary pleasure, and are then discarded. It was intended to discourage the gathering of plants on State and private land without permission.

In 1989, subsequent to Dick’s 1981 publication, the Protected Plant Law was changed. The law itself was changed by slightly modifying the taking clause and recognizing not just one collective category of Protected Plants, but different categories of rarity. For the first time, the law and associated regulations (6 NYCRR 193.3) defined protected plants in four categories: endangered, threatened, rare, and exploitably vulnerable. It was a very appropriate change.

The 1989 change to the law established definitions for each of the categories, with the definitions for endangered, threatened, and rare species generally following the New York Natural Heritage Program’s rarity classes of S1, S2, and S3, respectively. The problem that the change to the law faced was what to do with the plant list developed in the original 1974 Protected Plant Act. They didn’t want to abandon it, but it really wasn’t a list of species that would fit in any of these rarity categories. So, they kept the original list intact and developed a new category – **Exploitably Vulnerable**. And, they developed a brand new definition to go with it.

Exploitably Vulnerable plants were (and are) defined as: “*native plants likely to become threatened in the near future throughout all or a significant portion of their ranges within the state if causal factors continue unchecked.*” This definition is the root of the problem. Except for a few rarities in the exploitably vulnerable list

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ABOUT THE NEW YORK FLORA ASSOCIATION

Joseph M. McMullen, Flora Association Board Member

The New York Flora Association (NYFA) is a non-profit organization established to promote the study and understanding of New York’s plants. It was originally formed in 1990 by Dr. Richard S. Mitchell, our most recently retired State Botanist, and Dr. Robert Zaremba, a botanist of The Nature Conservancy.

A major effort sponsored by the NYFA is the development of the Atlas of Plants in New York. This Atlas provides a wealth of information on the distribution and habitat of plants growing within the State. The NYFA also sponsors field trips and botany training workshops during the year. Notice of these field trips and other articles of botanical interest are published in their quarterly newsletter.

If you are interested in learning more about the New York Flora Association, please visit their web site at: <http://www.nyflora.org>.

WETLANDS PLANT IDENTIFICATION FIELD REVIEW CLASS – A GREAT SUCCESS

A wetland plant identification field class was led by Joe McMullen at the Stanley J. Hamlin Wildlife Management Area (Clay Marsh) in the Town of Clay, Onondaga County on September 28, 2007. Participants greatly appreciated the class, which was sponsored by the NYS Wetlands Forum. Because of the overwhelming response to the class, there was not enough room to accommodate everyone.

The class reviewed common wetlands and adjacent upland plants. It was directed at those with a beginner's knowledge of plant identification. Basic plant classification and plant structures used to identify plants were reviewed. Helpful plant identification field guides were discussed, as well as plant indicator status rankings, and the use of plant species in wetland creation/restoration.

It is hoped that a similar class or classes will be sponsored next year, perhaps in other parts of the state. Joe promises that anyone turned away this year will get priority next year.

(MESSAGE FROM THE CHAIR)

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course, you might then realize the initial number was zero. In which case, my students that told me they joined had better not have been joking! (Note to self: confirm student memberships prior to releasing grades.)

And how did we convince these and other people to join, you ask? By offering a wetland plant identification short course free to members. Board member Joe McMullen and his staff at Terrestrial Environmental Specialists donated their time and led an afternoon walk at the DEC Hamlin Wildlife Management Area (AKA Cicero Swamp). An excellent, albeit soggy for unprepared yours truly, educational tour of the wetland flora was offered.

Of course we now want to follow Joe's lead with other Forum-sponsored workshops. Already in the works is a birding outing to be lead by Kurt Weiskotten, a wetland recognition in right-of-ways workshop that Ed Frantz is putting together, hydric soils identification, to be lead by Fran Reese of LU Engineering, and stream dynamics by Melissa Toni of Malcolm Pirnie. The hope is to expand in this fashion on the services provided by the Forum.

Unfortunately, increasing output necessitates increasing input. I have to admit, I've been pushing the Forum Board of Directors fairly hard. But as expected, they have responded well. As one visible example, check out our new web site at www.wetlandsforum.org. Not bad, huh? Fran Reese and Andy Lowell (USF&WS) deserve the credit. Yet we realize we can't do everything. Not without more help anyway. Which is my build up to asking for your support: In particular, the duties of Forum Treasurer are, shall I say, taxing. Joe McMullen, our Treasurer of many years, has been hinting to pass this duty on for some time. But without a replacement, Joe has been willing to hang in there. That said, if there are any particularly thrifty members willing to consider the duties of Treasurer, please speak up. We will hold our annual elections at the April conference as usual. No, you needn't be a CPA, just highly responsible, intelligent, and fun. Especially fun.

As Ann Vileisis, in her 1999 book, *Discovering the Unknown Landscape: A History of America's Wetlands*, writes, "wetlands have long been a landscape on the periphery". Our mission at the NYS Wetlands Forum is to bring wetland issues to the forefront. Well, not exactly. But, among other things, our mission does include calling

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Photo courtesy of Nan Nelson, NYSDEC



Photo courtesy of Nan Nelson, NYSDEC

DRAFT ATLANTIC & GULF COASTAL PLAIN REGIONAL SUPPLEMENT TO THE 1987 WETLAND DELINEATION MANUAL

As you may know, the US Army Corps of Engineers is developing region-specific versions of their 1987 wetland delineation manual. The latest draft supplement was released for public comment this summer. It is for the Atlantic and Gulf Coastal Plain, which includes New Jersey and several other more southern states. The text of this Draft Interim Supplement is available at: <http://www.nab.usace.army.mil/Regulatory/PublicNotice/SPN/spn07-49.pdf>

The Northcentral and Northeast region, which includes New York, should have a draft available next year.

Recognizing the Forum's role in wetland information dissemination and comment facilitation, James Schmid, Ph. D., has kindly offered to share his comments to the Corps on the Draft Supplement with members of the NYS Wetlands Forum. We are pleased to reproduce his comments below, but in so doing must note these comments have not been technically reviewed nor sanctioned by the NYS Wetlands Forum. Assumedly, the Corps will review Dr. Schmid's comments and provide a responsiveness summary at some time prior to adopting the Final Supplement. Others who care to share their thoughts with the Wetlands Forum are similarly encouraged to do so. Our thanks to Dr. Schmid for thinking of us.

From: Jim Schmid

Schmid & Company, Inc., Consulting Ecologist

Date: 11 October 2007

To: Katherine Trott CECW-LRD
US Army Corps of Engineers
441 G Street NW

Washington, DC 20314-1000

Re: Draft Atlantic & Gulf Coastal Plain Regional Supplement to the 1987 Wetland Delineation Manual

The following comments are offered in response to Public Notice CENAP-OP-R issued by the Philadelphia District in July 2007. I hope they prove helpful as work continues on this draft regional supplement. My comments are offered as peer review in public service, not on behalf of any client.

As a user, I welcome the Corps effort to update the 1987 Manual with technical knowledge resulting from two decades of regulatory and scientific experience. The supplement appears to provide techniques useful for wetland identification and delineation for any purpose. Overall, the three-parameter methodology remains unchanged. The stated intent of the supplement (p. 1) is to update but "not to

change wetland boundaries identified under the 1987 Manual.

Use of the supplement's provisions concerning field indicators in place of the 1987 Manual (Table 1, p. 2), however, inevitably will change boundaries dramatically at the margins of some regulated wetlands where boundary conditions are subtle and small distances have major land use implications. Anticipated changes will yield both increased and decreased wetland polygons in specific locations. I recommend that the Corps and its Districts consider carefully and advise the regulated public of those specific circumstances under which the directives of the supplement are to be used for regulatory purposes.

I offer below comments on several of the supplement's field indicators that have caught my attention during preliminary review, based on long experience with the 1987 Manual primarily in the Mid-Atlantic States. (I have not had the opportunity to apply the draft supplement in the field.) The items I note below are matters that I suspect are likely to shift the location of boundary flags and will pose difficulty to me (and possibly to others) when the supplement is applied. In some places the draft supplement is ambiguous.

Vegetation

The supplement plans to drop use of + and - from the vegetation indicators (p. 15). That change in effect means that additional plant species will be considered indicative of wetlands; namely, the FAC- species which formerly were counted in the denominator, not the numerator, of the Indicator 1 dominance test. The result will be an expansion of regulated wetlands.

I am puzzled that the supplement fails to make reference to the 1997 revisions of the NWI plant list, citing instead only Reed 1988. I have heard that a new plant list is in preparation for Region 1, but it is not mentioned in the supplement. Meanwhile, Reed's 1997 list is far more comprehensive in its Region 1 listings and more nearly current in its nomenclature than Reed 1988, and its use has long been required by anyone taking seriously the mandate of the 1987 Manual to use "good judgment".

Soils

Hitherto, Corps guidance has authorized use of the NTCHS field indicators, provided those indicators did not bring into jurisdiction land otherwise not identified as wetland under the 1987 Manual. Replacing the 1987 Manual

With the supplement presumably is intended to extend wetland jurisdiction to all lands (with hydrophytic vegetation and hydrology) having soils described by one or more of the NTCHS field indicators.

The supplement adopts the most recent NTCHS/NRCS Field Indicators of Hydric Soils of the US and directs that the latest version (currently, 6.0) should be used for the appropriate resource areas. That strikes me as the correct guidance. Replacing the twenty year old Manual guidance with NTCHS hydric soil field indicators is an excellent step to incorporate the results of much scientific investigation. For field users, this represents a major recalibration of the field indicators for hydric soil.

I illustrate my concern with one example. Gray and mottled soil colors constitute one of the most commonly used field indicators for hydric mineral soils in the Mid Atlantic region (1987 Manual Paragraph 44.f(2)). Under the 1987 Manual this indicator was summarized as a presence "below the A-horizon or 10 inches (whichever is shallower) of: (a) matrix chroma 2 or less in mottled soils; or (b) matrix chroma 1 or less in unmottled soil" using the traditional Munsell color notation conventions (hue/value/chroma). The value of the soil colors within the diagnostic range of chromas was not specified, and there was no restriction on the color of the layers overlying the diagnostic layer.

This 1987 field indicator has been replaced with five NTCHS field indicators. In them, 6 inches or more of brown (chroma >2) soil above the diagnostic layer excludes a soil from qualifying as hydric, and gray soil (chroma 2 or less) is expected typically to start at the surface. The NTCHS F3 Depleted Matrix field indicator (p. 51) recognizes thin layers of gray soil near the surface as sufficient for hydric soil identification (2" or thicker, starting no lower than 4" from the surface; or 6" or thicker, starting no lower than 10" from the surface) when displaying 60% or more of the designated low (2 or less) chroma and high value colors. Thus shallow layers of gray soil will qualify as hydric under the supplement, likely encompassing a larger area than under the 1987 Manual indicator.

NTCHS F3 Depleted Matrix now requires redoximorphic features (mottles, etc.) in those gray layers with matrix having the value/chroma 4/1, 4/2, and 5/2, but not in layers having higher values with 1 or 2

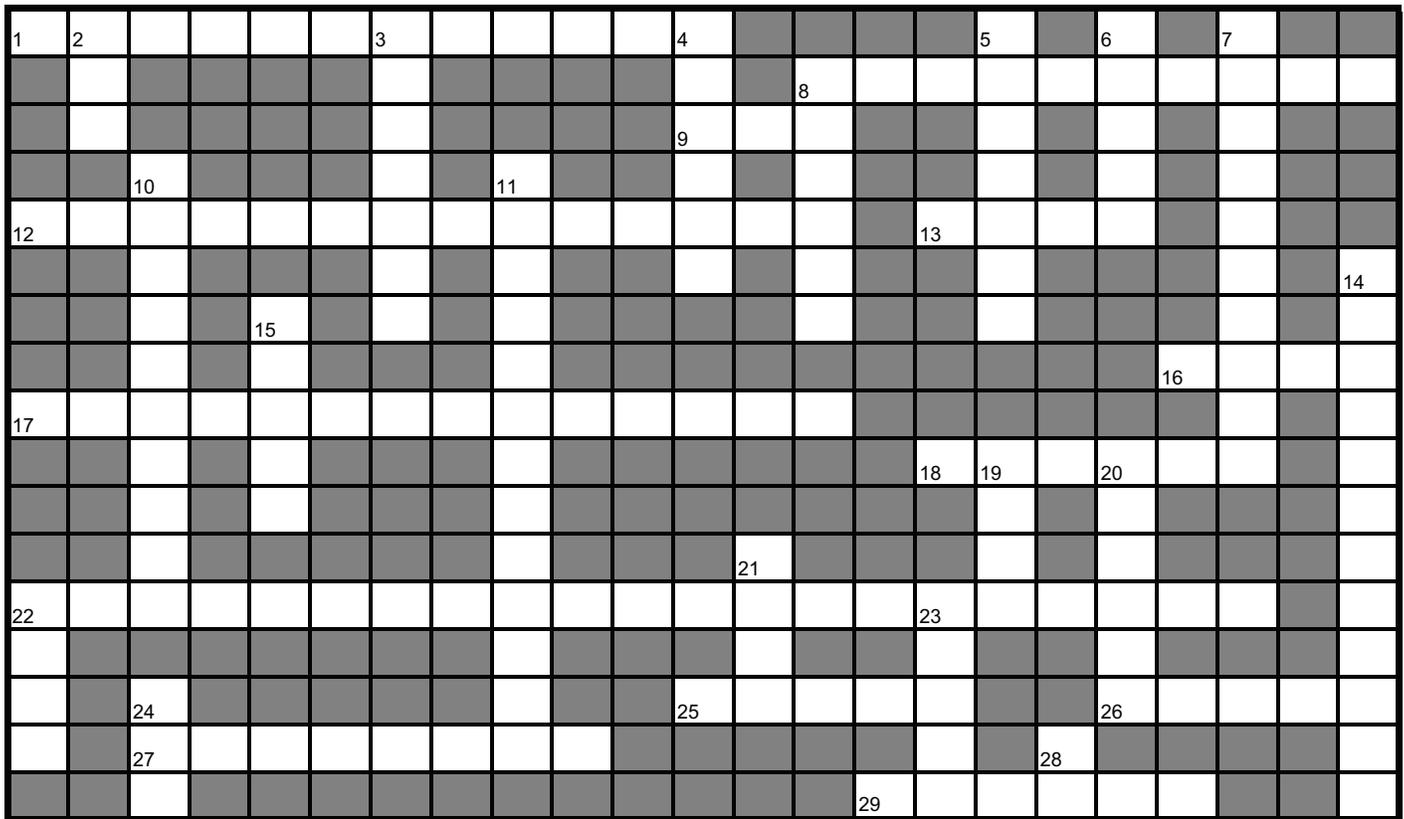
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Crossword Puzzle: Wetlands and New York

Test your knowledge!

By Melissa Toni

Answers are on the website: www.wetlandsforum.org



Across

- 1 Delineator's shovel
- 8 Cowardin class, mostly dogwood
- 9 Cowardin class, inland lake, abbr.
- 12 Latin for spicebush
- 13 SEQR assessment, abbr.
- 16 Gingrich
- 17 "Leader in Wetlands Conservation"
- 18 *Alnus incana* synonymy species
- 22 Wetland ash in NY, latin
- 25 King of the ferns
- 26 Makes oxygen as a byproduct
- 27 Only species of *Aix* in North America
- 29 New York's state animal

Down

- 2 Functional assess. w/reference wetlands
- 3 2.47 acres
- 4 Bird of prey
- 5 Soil color order system inventor
- 6 "Conserving the Nature of America" abbr.
- 7 Order of caddisflies
- 8 Isolated wetland lawsuit, abbr.
- 10 Only continent with no wetlands
- 11 Depletions and concentrations of soil color
- 14 Stream that flows for part of the year
- 15 This organization, abbr.
- 19 In charge of NRCS, abbr.
- 20 Largest lake entirely in NY
- 21 Genus for short-eared owl
- 22 Wetland indicator status for 22 across, abbr.
- 23 Soil color lightness and darkness
- 24 6 Down's wetland mapping system, abbr.
- 28 Rays of the sun, abbr.

(EPA AND ARMY CORPS ISSUES JOINT GUIDANCE REGARDING THE AGENCIES' JURISDICTION)

[Cont'd. from page 1]

to non-navigable tributaries that are not relatively permanent, or wetlands adjacent to but that do not directly abut a relatively permanent non-navigable tributary.

The significant nexus standard will be applied by assessing the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if they significantly affect the chemical, physical and biological integrity of downstream navigable waters. Additionally, the significant nexus analysis includes consideration of hydrologic and ecologic factors.

The agencies generally will not assert jurisdiction over swales or erosional features (e.g., gullies, small washes characterized by low volume, infrequent, or short duration flow) or ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

During the first six months implementing the guidance, the agencies will accept public comments on case studies and experiences applying the guidance. Comments can be submitted to docket EPA-HQ-OW-2007-0282 through www.regulations.gov until December 5, 2007.

Conclusion

Although the Guidance will assist the agencies in the application of the Rapanos decision, there likely will continue to be significant debate and litigation over the interpretation of the significant nexus test and its application to each particular situation. Landowners and developers seeking to fill or clear wetland areas proceed at their risk, unless they first obtain a favorable jurisdictional determination or 404 permit from the Corps.

(MESSAGE FROM THE CHAIR)

[Cont'd. from page 4]

attention to and objectively discussing local, statewide, regional, national, and global wetland issues as they relate to New York State. With Tom Jasikoff getting us started, and a wealth of other knowledgeable individuals pitching in, I'm hopeful the Forum conference this April 9 & 10 will change your wetland landscape for the better.

See you in April!

(NEW YORK'S EXPLOITABLY VULNERABLE PLANT SPECIES LIST)

[Cont'd. from page 3]

(which are dublicately listed in one of the other rarity lists), essentially none of these species are "*likely to become threatened in the near future throughout all or a significant portion of their ranges within the state.*" In fact, many of the species listed are among the most common species in the state.

In the public sector, where I work, the exploitably vulnerable list creates great confusion. Well-intentioned individuals often exclaim that such species will be affected by a project, and that this effect is an unacceptable significant impact. They point to the definition of these exploitably vulnerable species and emphasize the importance of these species based on that definition. They force meaningless conditions on projects by promoting measures to protect these common species. Last year, butterfly weed (*Asclepias tuberosa*) was singled out for protection on a project. Butterfly weed is a pretty plant, with a showy orange-colored flower, but the species is common. It often is found along roadways and other open, disturbed habitat; it is not a species that deserves specific avoidance measures.

So how do we convince these individuals that these are common species that should not really be defined as those "likely to become threatened in the near future?" Simple, we change the definition of exploitably vulnerable species to appropriately reflect the status of the species listed under this definition. We correct an error carried through from the original Act. We change the law.

Over the past several years, I have presented this problem to the New York State Department of Environmental Conservation,

Department of Lands and Forests, who maintain the state's protected plants law and regulations. They agree with my concerns. But, they indicate that the original definitions listed in the Act are part of the law, not part of the regulations like the species listed under each category. Their position is that the change is appropriate, but the law is difficult to change.

In the past couple years, I have raised this issue during the annual rare plant review meeting sponsored by the Natural Heritage Program. We have discussed many solutions, including completely changing the numerous species listed as exploitably vulnerable to just a handful of species that are truly exploitably vulnerable as defined.

My conclusion after all this discussion is that there is nothing wrong with the species listed as exploitably vulnerable. These species are vulnerable to exploitation from private property, and the Act protects landowners from the taking of these species without their permission. This protection is a very appropriate function of the Act. The problem is that individuals confuse species listed as exploitably vulnerable with rare species. It gets back to the erroneous definition.

So, to solve this disparity between the definition of exploitably vulnerable plants and the species listed under this category, I propose a new definition. My proposed definition for exploitably vulnerable is: those species that are subject to collection, removal, or harm on a landowner's property without their permission.

I considered expanding the definition to make a reference to rarity (e.g., "*which includes some rarities, although most species are common*"), but I think it is best to stay completely away from any inference to rarity. These are simply species subject to exploitation without landowner's permission. The definition should be left at that.

HYDRIC SOIL IDENTIFICATION WORKSHOP PLANNED FOR SPRING CONFERENCE

A workshop is planned for fall of 2008 to review hydric soil indicators found in Finger Lakes and Lake Plain soils of western and central New York. The workshop will follow up a basic training session that will be offered at the Spring NYSWF Conference. The workshop will be led by Frances Reese, with assistance from NRCS and local soil scientists. For more information, check with Fran at fa-reese@luengineers.com.

(DRAFT ATLANTIC & GULF COASTAL PLAIN REGIONAL SUPPLEMENT)

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chroma. Thus a gray layer of 4/1 with no mottles is no longer considered a hydric soil (unless it fits under an indicator other than F3), whereas gray layers of 10YR 8/2, 7/2, and 6/2 are hydric even in the absence of mottles. The former change will result in smaller areas of hydric soil, and the latter changes will result in larger areas of hydric soil. Soils having low-value, low-chroma matrix colors (3/1, 2/1, 3/2, and 2/2) are not hydric per F3, whether with or without redoximorphic features. The graphic on p. 130 of the supplement conveniently illustrates this guidance for the 10YR hue.

NTCHS indicator F8 Redox Depression (p. 54) dispenses with any specification of matrix color, so long as there is a 2 inch or thicker mineral soil layer with more than 5% distinct or prominent pore linings or soft masses starting within 4 inches of the surface. This indicator is likely to extend wetland boundaries beyond what would have been identified under the 1987 Manual. Consistent application of this indicator will be difficult unless a clear definition is provided for distinguishing the “microtopographic depressions on convex landscapes” to which F8 does not apply from the other depressional landforms where it does apply.

Certain indicators clearly identified as “testing” indicators by NTCHS apparently now are to be used. If so, the revision of the supplement should make clear to users that a soil meeting one of the “testing” indicators is to be counted as hydric. The discussion of TF2 Red Parent Material soils on p. 64 provides a technical definition and user notes. Yet the discussion on p. 107 ends without giving the user any guidance as to which red soils are or are not to be deemed hydric. Is the user to consider depressed landscape positions and the associated colors to represent hydric soils, while the adjacent flats and convex positions with their associated colors are non-hydric? Or are both to be deemed hydric? (If neither were to be deemed hydric, presumably there would be no discussion in the supplement.) For purposes of consistent field application, it would be most helpful to issue clear interim guidance that says “do this for now” and then to revise such guidance in the future, if and when better guidance becomes available for defining “this”.

The supplement (p. 22) notes that NTCHS indicators from certain regions may apply in adjacent regions where transition

zones overlap the adopted boundaries. It would be helpful if the final supplement provides further guidance as to when users ought to reach out for alternative field indicators, recognizing that NTCHS has authorized all of its indicators for testing (but not for use) in all regions. The intent could be either to maximize or to minimize the extent of soil recognized as hydric. Which should the user attempt to do? Also, if users (on p. 27) are going to be directed to the products of the Mid Atlantic Hydric Soils Committee, then the weight to be assigned to those regional indicators as compared to the national (NTCHS) indicators should be specified for applicable subregions, in the event that differences arise as they have in the past.

It is difficult to determine from the draft supplement how anomalous bright sandy soils (p. 111-112) are to be treated. The example photograph shows a soil that I normally would not recognize in the field as hydric soil, absent thorough documentation of prolonged wetness at that location. For consistent field application, the supplement needs some descriptive limit for anomalous bright sandy soils comparable to that provided for F20 Anomalous Bright Loamy Soils and a similar limitation based on topographic relationship to tidal waters (p. 63). Acceptance of such indicators will increase the area of hydric soil identified in the field.

The discussion of glauconitic soils (p. 109) presumably should conclude by telling the user not to rely upon such soils at all, inasmuch as they offer both false negative and false positive results if used as hydric soil indicators. At present the discussion does not reach a conclusion.

Hydrology

Use of the supplement will make changes in the duration of wetland hydrology needed to recognize wetlands. Replacement of 1987 Manual Table 5 with the 2005 Corps groundwater monitoring standard will extend the duration of wetness required to qualify as near-surface hydrology and thus decrease the extent of land meeting the standard for wetland hydrology, at least in disturbed areas. At the same time, recognizing the start of onsite growing season based on observable above-ground growth of two species of non-evergreen plants likely will extend the growing season and thus the extent of land considered to exhibit wetland hydrology.

The opportunity presented by the supplement should be taken to further distinguish those hydrologic indicators that show only the extent of possible wetness as opposed to those which show or reflect the actual duration of wetness beyond the

minimum threshold of anaerobiosis. Not only surface water and groundwater, but also water marks, sediment deposits, drift deposits, surface soil cracks, moss trim lines, drainage patterns, and the inundation and saturation visible on photographs in and of themselves may do nothing to demonstrate wetland hydrology of the duration necessary to produce anaerobic conditions. Some of these already are recognized as secondary indicators. It would be most helpful to discuss what conclusions can be drawn from each group of indicators. In this region duration of wetness is more significant as a driving force for wetland soil oxygen loss than frequency of wetness. The supplement appears to offer fewer cautions than the 1987 Manual reminding users that all non-wetlands are wet during periods of precipitation, but only wetlands remain wet for long periods during the growing season.

The discussion and photo for indicator B8 Sparsely Vegetated Concave Surfaces (p. 85) raises a matter of usage that could be clarified. If the area is unvegetated or sparsely (<2%) vegetated, then is it a wetland? mudflats and shallows are waters, but not wetlands unless vegetated. The supplement also affords an opportunity to clarify in general how much rooted vegetation is necessary to distinguish a wetland from shallow open water and deepwater aquatic habitats (if any update of 1987 Manual Paragraph 27 is appropriate).

Hydrology indicator C2 Dry-Season Water Table (p. 93) is not on the Table 4-1 list (p. 70). This indicator requires a considerable leap of faith. I would not infer the presence of growing-season hydrology just because I observe a water table 24 inches below the surface during a dry period. What field monitoring data support this inference? I would not be willing to adopt this indicator unless a massive quantity of data establishing strong correlation with wetland growing-season hydrology exists for sites on all types of soils from New Jersey through Texas. If it is going to be used, then careful attention must be given to defining precisely under what circumstances (season, percent of normal precipitation, etc.) this indicator is to be applied. It would be helpful to articulate a converse indicator to indicate when directly observed water is not an indicator of wetland hydrology (winter wetness, short-term flood periods, etc.) and perhaps other updates to 1987 Manual Paragraph 28.

Similarly, indicator D2 Geomorphic Position (p. 96) needs careful definition if it is going to be applied consistently. Features included in this category must be distinguished from the microtopographic

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The National Wetlands Awards Program honors individuals who have demonstrated extraordinary commitment to the conservation and restoration of our nation's wetlands. Take time to recognize exceptional individual achievement in wetlands conservation by submitting a nomination for a 2008 National Wetlands Award today. The deadline for submitting nominations is January 15, 2008.

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NYS DEC ISSUES NEW DRAFT PERMITS FOR STORMWATER DISCHARGE

— Andrew D. Bobrek, Bond, Schoeneck & King, PLLC

Introduction

The New York State Department of Environmental Conservation (NYSDEC) recently issued new Draft SPDES General Permits for Stormwater Discharge from both Municipal Separate Storm Sewer Systems (MS4s) and Construction Activity. These proposals, currently available for public review, will go into effect on January 8, 2008, and contain numerous changes from their current versions. This article will highlight and summarize the more noteworthy changes proposed by NYSDEC.

I. Draft SPDES for Stormwater Discharge from MS4s (GP-0-08-002)

On September 24, 2007, NYSDEC proposed numerous changes to the existing SPDES General Permit for Stormwater Discharge from MS4s (GP-02-02). These changes, along with the actual Draft General Permit for Stormwater Discharge from MS4s (GP-0-08-002) (the “Draft General Permit for MS4s”), can be viewed at: http://www.dec.ny.gov/docs/water_pdf/fdms4pfact07.pdf.

The Draft General Permit for MS4s, like its predecessor, will be a five (5) year permit that covers new and existing discharges of stormwater from MS4s to waters of the United States, as defined in 40 C.F.R. 122.26(b)(16). As mentioned, however, the proposed draft general permit will differ from its predecessor in several respects.

A. New Information

The Draft General Permit for MS4s will include new information intended to be helpful in the MS4 permitting process.

For example, the permit format has changed to include minimum control measures (MCMs) for both traditional land use control MS4s (cities, towns, villages) and traditional non-land use control / non-traditional MS4s (county, state, and federal MS4s-such as prisons, hospitals, and office buildings). Additional MCMs have also been identified for MS4s within Total Maximum Daily Load (TMDL) Watersheds.

Each of the MCMs include selected items that are required for annual reporting. The Draft General Permit for MS4s contains reporting elements for both permittees developing and permittees implementing stormwater management programs (SWMPs). Information contained in these reports should include the MCMs that all permittees are required to meet and the additional MCMs that permittees subject to the TMDL MCMs must meet. The Draft also sets forth several additional requirements and clarifications

relating to specific MCMs that must be complied with or otherwise observed.

B. Additional Designations

The Draft General Permit for MS4s also sets forth additional areas requiring general permits. According to NYSDEC, these additional designations result from application of Criterion 1 of the agency’s FINAL Designation Criteria for Identifying Regulated Municipal Separate Storm Sewer Systems (MS4s). Under Criterion 1, permitting is required for MS4s discharging to waters for which an EPA-approved TMDL has required reduction of a pollutant associated with stormwater beyond what can be achieved with existing programs (and the area is not already covered under automatic designation. Accordingly, NYSDEC has proposed the following areas as ones which now require MS4 permits under Criterion 1 and the Draft: Town of Southold; Town of East Hampton; Village of East Hampton; Town of Shelter Island; Village of Greenport; and Village of Dering Harbor.

C. Permit Coverage

Under the Draft General Permit for MS4s, coverage for permittees already authorized under the previous general permit (GP-02-02) will be automatically continued when the proposed Draft goes into effect. If MS4s are required to gain coverage under the Draft, and are not already authorized under GP-02-02, they must file a Notice of Intent (NOI) to NYSDEC. Additionally, any MS4 receiving authorization under the Draft General Permit for MS4s must develop and implement their storm water management plan within three (3) years from the effective date of the permit.

D. Tiered Watershed Requirements

There are additional requirements for permitting in watersheds where the reasonable potential to violate water quality standards has been judged to require additional controls. These watersheds are: the East of Hudson Watershed, the Onondaga Lake Watershed, the Greenwood Lake Watershed, the Oyster Bay Watershed, the Peconic Pathogen Watershed and the Peconic Nitrogen Watershed. The Draft General Permit sets forth the specific requirements pertaining to these watersheds.

II. Draft SPDES for Stormwater Discharge from Construction Activity (GP-0-08-01)

To complement its revisions affecting MS4 permits, NYSDEC has proposed a new permit to replace the existing SPDES General

Permit for Stormwater Discharge from Construction Activity (GP-02-01). The new permit, titled Draft General Permit for Stormwater Discharge from Construction Activity (GP-0-08-002), was made available on October 10, 2007, and can be viewed at: http://www.dec.ny.gov/docs/water_pdf/gpcondraft08.pdf.

As with future permitting for MS4s, construction activities will also be subject to numerous changes under Draft General Permit 08-002. These changes, as detailed below, include both major and minor revisions to the existing permit and permitting process.

A. “Major” Changes

According to NYSDEC, there are three major changes in the Draft General Permit for Construction.

The first major change involves construction activities located in the East of the Hudson Watershed. Owners and operators of construction activities within this Watershed, who disturb between five-thousand (5000) square feet and one (1) acre of land, will now be required to gain coverage under a general permit. Moreover, coverage must be obtained prior to commencing construction activity (although these parties will typically have to develop a Stormwater Pollution Prevention Plan (SWPPP) that only includes erosion and sediment controls).

The second major change involves construction projects located in either the East of the Hudson, Onondaga Lake, or Greenwood Lake Watersheds. Projects in these Watersheds must develop a SWPPP that includes post-construction stormwater management practices that must be designed in conformance with the Enhanced Phosphorus Removal Design Criteria included in the New York State Stormwater Management Design Manual (Design Manual) dated August 2003, or the most current version or its successor.

Finally, the third major change involves construction activities: (1) that are tributary to waters of the state classified as AA and AA-s; and (2) that will disturb land areas where the Soil Slope Phase is identified as E or F (generally those exceeding 25% slope) on the USDA Soil Survey for the County where the project is located. Under the Draft General Permit for Construction, construction activities meeting both of these criteria are ineligible for coverage under a general permit, and will need to obtain an individual SPDES permit.

B. “Minor” Changes

The Draft General Permit for Construction also proposes several

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additional, more modest, changes to the current general permit.

First, the Draft General Permit requires that an owner or operator of a construction activity, which is subject to the requirements of a regulated, traditional land use control MS4, have their SWPPP reviewed and accepted by the MS4 prior to submitting the NOI to NYSDEC. The specific requirements for obtaining this acceptance are set forth in the Draft General Permit.

A second minor change affects owners and operators of construction activities who have prepared a SWPPP that is not in conformance with the NYSDEC technical standards. Under the Draft General Permit, such activities will be authorized to discharge in 5 business days from the date NYSDEC receives a completed NOI, so long as the SWPPP has been reviewed and accepted by a regulated, traditional land use control MS4.

Third, an owner or operator of a construction activity, with coverage under the original general permit (GP-02-01) as of the effective date of the Draft General Permit, is automatically permitted to discharge in accordance with the permit.

Fourth, certain construction activities will require the preparation of a SWPPP that includes only erosion and sediment control practices, while other activities will require the preparation of a SWPPP including post-construction stormwater management practices. The Draft General Permit expressly provides which activities require only the more basic preparations, and which require more extensive preparations.

Fifth, the Draft General Permit provides inspection requirements that are less stringent than under the current permit. For example,

the Draft General Permit requires a qualified inspector to conduct at least one site inspection every fourteen calendar days (14) days and within 24 hours of the end of a storm event of 0.5 inches or greater (the required frequency of inspections under the existing permit is once every seven (7) calendar days). Additionally, where active construction has been suspended, the Draft provides that inspection frequency can be reduced to once every thirty (30) days provided temporary stabilization measures have been applied to all disturbed areas.

Finally, and also relating to inspections, the Draft General Permit for Construction requires the owner or operator to have a qualified inspector perform a final site inspection prior to submitting the Notice of Termination (NOT) to NYSDEC. Subsequent to this inspection, the qualified inspector must certify that: (1) all disturbed areas have achieved final stabilization; (2) all temporary, structural erosion and sediment control measures have been removed; and (3) all post-construction stormwater management practices have been constructed in conformance with the SWPPP-all of which can be accomplished by completion of the "Certification of Final Stabilization and Post-Construction Stormwater Management Practice" section of the NOT.

Conclusion

NYSDEC has proposed revisions to its SPDES General Permits for Stormwater Discharge from both MS4s and Construction Activity. These permits will go into effect on January 8, 2008, and contain several noteworthy changes to their current counterparts. While this article provides a general summary of these changes, practitioners, professionals, and other interested parties are strongly encouraged to review the Draft Permits, in their entirety, prior to this effective date.

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features excluded from indicators of hydric soil.

Indicator D3 Shallow Aquitard (p. 97) would benefit from additional discussion. Is it the intent to identify compacted areas such as wheel ruts and field roads as having wetland hydrology?

Data Form

In general the supplement's data form is much improved over that of 1987 and generally tracks the supplement text well. Its use should improve the documentation of conditions along wetland boundaries.

The soil data form usefully could include space for the requisite (abbreviated) adjectives to describe the abundance, size, and contrast of redoximorphic features to prompt the recording of such information on a routine basis, given the critical importance of those adjectives in applying NTCHS field indicators correctly.

I look forward to using the final version of the supplement.

Yours truly,

James A. Schmid, Ph. D., President
cc: M. Hayduk, Philadelphia District

WETLAND BIRD IDENTIFICATION FIELD CLASS

Montezuma National Wildlife Refuge, Friday, May 2, 2008 at 9:00 a.m.

Sponsored by the New York State Wetlands Forum, Inc.

Kurt Weiskotten will lead a bird identification field class at the Montezuma Wildlife Refuge in the Town of Tyre, Seneca County on Friday, May 2nd, starting at 9:00 a.m. The class will meet at the Visitors Information Center at the start of the auto loop road off of Route 20.

The class will concentrate on the identification and behavior of birds typically found in and around wetland and water habitats. Bird field identification, song recognition, seasonal and social behavior, and related wetland habitat information will be the focus. Certainly non-wetland dependent species will be observed and will be identified and discussed. All levels of birding experience are invited to attend. The group will travel around the auto loop stopping to observe wildlife at Benning Marsh and continue on to Tschache Pool and May's Point Pool for looks at waterfowl, shorebirds, passerines and more. If time allows, adjacent upland habitats at Esker Brook and Armitage Road will be visited.

Participants should dress for the field and weather. Waterproof boots are not required. The class will occur rain or shine. Please bring binoculars and field guides.

This class is open to anyone interested. New York State Wetlands Forum members can attend the class for free; for all others there is a \$20 fee payable to the Forum. Please email Kurt at kurt.weiskotten@thruway.state.ny.us if you plan to attend or with questions. Membership is available through the internet at <http://www.wetlandsforum.org>.



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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;
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- improve its member's knowledge and understanding of wetlands;
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