

# The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

## MESSAGE FROM THE CHAIR

— Sally Daly

Program Chair Barbara Beall has prepared such an outstanding agenda for the annual meeting and done such a good job appropriating the front page of this newsletter to tell you about it that there is not much more I need to say, except express my appreciation and thank Commissioner Cahill for kindly and generously agreeing to be our luncheon speaker.

One goal of the Forum is to address all of the issues, and we addressed another one with the November 5 meeting in Kingston. If you looked over the agenda, you may have wondered why the regulators were not talking about their own programs over two decades of wetland recognition and permitting in the Catskills. Even the regulators wanted to know. The program was presented by consultants, the people who work in the middle between the public and the regulators. In this role in the middle, consultants are continually called on to be educators (*see* The Role of Consultants as Wetland Educators, *The Forum*, Vol. 3, Issue 2). Consultants have a unique perspective on wetland recognition and permitting to share with local governments, and a lot of experience sharing information. They were interesting, informative, enthusiastic speakers. A secondary reason we put consultants rather than regulators on the floor this time can be explained by talking about phone calls. Before every meeting the Forum gets several calls asking if one regulator or another will be there; the callers usually don't want to hear the regulator speak, they want to corner the regulator about something making them unhappy. The purpose of this meeting was not to corner a regulator (although if the regulators are willing the Forum can hold such a meeting). Regulators were specially invited to this meeting, and I anticipate there will be regulators at future meetings. As a courtesy, phone numbers provided by the regulatory offices serving the Catskill area were included in registrants' packets.

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## EXCITING 1998 ANNUAL MEETING PLANNED

### KEYNOTE SPEAKER TO BE NYSDEC COMMISSIONER JOHN CAHILL

Excitement around the Spring 1998 Annual Meeting is building. One of the biggest coups is that Mr. John Cahill, Commissioner of the NYSDEC is slated as the Keynote Speaker at the luncheon on Thursday, April 9, 1998. This is sure to be one of many highlights of an event-filled two day meeting.

The meeting, with a focus on Applications of Wetland Science in New York State, will be held at the Empire State Plaza, on April 9th and 10th. The meeting features something for everyone, from the planning board member wanting to protect wetlands in their town to the university researcher. In addition, the format of the meeting has been modified to provide for more member participation in Forum business, and to allow for more informal socializing in the evening.

On Thursday morning, will be a session on using Artificial Wetlands for Stormwater and Wastewater Management, featuring speakers from the Center for Watershed Protection, a presentation on using a wetland to treat wastewater, and wetlands in agricultural settings for waste management and mitigation. A concurrent session features basic wetland and regulatory information.

In a departure from the normal NYSWF annual meeting format, the luncheon will be the stage for the presentation of Mr. John Cahill, Commissioner of the NYSDEC. While we do not know if there will be any juicy tidbits of regulatory or legislative wetland news dished up during lunch, it is sure to be an insightful presentation on the role of the Commissioner in the NYSDEC wetland regulatory program.

Thursday afternoon, concurrent sessions will focus on wetland monitoring mitigation and re-establishment in disturbed environments and case studies of land conservancies protecting wetlands at the local level. A second set of concurrent sessions looks at large scale regional wetland studies in New York State and perhaps Use of GIS in wetland research or another topic.

— Barbara B. Beall, LA Group, P.C.

There will be a cocktail reception in the late afternoon, and for anyone who wishes, an informal get together at a local restaurant for dinner.

Friday morning the quick pace continues. First, the ever popular Regulatory and Legislative Updates. Then, since there will be a captive audience, there will be a NYSWF Annual Meeting. To wrap up the meeting, a panel discussion with audience participation on where wetland research is headed in New York State, and what information is needed is proposed. And finally, if anyone wishes to organize a field trip or two for the afternoon there is that potential as well.

Early registration is a good idea due to lower costs and the time of year the Annual Meeting is being held in Albany.

Also, those interested in poster sessions or exhibitors, contact David Hoyt at (315) 772-4729.

For more information or to volunteer to help contact Barbara Beall, Annual Meeting Program Chair, The LA Group, 40 Long Alley, Saratoga Springs, NY 12866 518-587-8100 or E-mail at BeallBB@AOL.COM

All speakers must send in their abstracts. Please do this voluntarily.

There is still room for a single speaker in the Large Scale Regional Wetland Studies in New York State. Does anyone have something big and interesting they are working on?

There is also a concurrent session open for four speakers (GIS, wetland mitigation, habitat assessments, invasive species?) on Thursday PM.

We are looking for University researchers who would like to participate in the panel discussion Friday AM.

We are looking for moderators.

We are looking for field trips for Friday afternoon.

The NYSWF web page will be updated with the meeting agenda for the latest speakers and times. We hope to see you there!

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## A MATTER OF CONSCIENCE: SILENCE WITHIN THE WETLAND FIELD

— Patrick C. Garner

### Where Are We

As wetland scientists we are the keepers of the secret of incremental wetland loss. Daily we walk fields and forests and pristine wetland meadows, knowing that mediocre, poorly planned development almost always follows in our footsteps. Yet we watch in silence. We watch in full knowledge as wetlands, buffer, and critical upland areas are lost forever. We, more than any other professionals, are trained to understand the value of these areas. We, more than anyone, have a responsibility to be aggressive and vigilant in wetland protection. We are the keepers at the gate, and we are failing in our most basic responsibilities.

The new moral paradigm of our profession has emerged: We enter the wetland field because of our love of Nature, in our enthusiasm we seek academic training to further our knowledge, all the while considering ourselves environmentalists. We gain professional employment and then, invariably, become silent participants in the great wheel of a consumer society, turning our heads as the imperative of constant growth grows its weight against the gentle force that originally attracted us.

Although none of us dispute that wetland losses occur in every state, public perception is that wetland regulations have stopped these losses or that regulations have gone too far. Yet we know that virtually every project in an undeveloped area alters, modifies, and reduces the biomass of that area in a manner that is negative and irrecoverable. Do we publicly denounce these losses? Rarely. Why? The truth is that we do not do so because we don't want to lose our jobs.

Yet how many of us have reached the conclusion that the patterns of society's growth are coarse and careless, politically motivated, driven by deep concerns for profit, and rarely directed by conscious stewardship? How many of us walk from site to site with a niggling feeling of uneasiness about our own role in advancing developments?

Most of us entered the natural sciences because of our passion for Nature, our spontaneous awe at Nature's infinite facets, our understanding that we are personally enriched in Nature's presence. Now, as private consultants, educators and state or federal regulators, we fall into the pattern of being good workers. We go to our jobs, write reports, issue learned analyses and return home.

### Where We Aren't

The majority of us do not volunteer personal time to public education. We do not join advocacy groups, nor do we stand up publicly to offer alternatives to inappropriate development.

Yet as experts, we know that viable alternatives exist. Cluster housing, greenspace in critical habitat areas, wildlife corridors and sensitive use of buffer zones can ameliorate much of the impact of blanket development (McManus 1994). Implementation of these ideas does not have to come at the expense of citizens' rights. Wetland values far outweigh the value of short term agricultural or development uses (Reinhold 1994). But public knowledge of these facts and public enthusiasm for these values will only come about when we speak up.

We are the experts. If we don't share our knowledge, no one will care about the natural values we defend. We, better than anyone, know that society, with its checkerboard of houses, offices and complex infrastructure, is, in reality, just repeating the old Colonial cycle of cut-and-burn. We know the destruction that will follow the first re-intrusion by machine. Knowledge is not power, but rather a deep obligation on our part to speak out to those who do not possess this information, who cannot easily make the connection that the quality of their lives and the quality of Nature are inextricably intertwined.

Certainly our profession is not united in this vision that all is not well (Garner 1996). But I do venture that the vast majority of us still consider ourselves environmentalists. Further, we feel that we love our impartiality when we join any group with an agenda. No scientist wants to be seen as a propagandist. Whether we feel personal uneasiness with our society's visions or not, we often believe silence is our only viable alternative.

### Where We Should Be

Yet, accepting that argument creates an inevitable collision with our instincts and our conscience. For *in our silence* we become the keepers of the secret of *continuing wetland loss*. In our acquiescence to timid professionalism, to a strict Aristotelian neutrality, we have become party to the consequences. I say that silence in the garb of good science gives impartiality a meaning never intended by scientists ancient or

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## (MESSAGE FROM THE CHAIR)

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### 1998 and Beyond

As Board and Committee members make preliminary plans for the Fall 1998 and Spring 1999 meetings, they are also working on the Forum's infrastructure, revising Forum by-laws before reviewing the Corporate Charter and applying for a final 501(c)(3) ruling; the interim 501(c)(3) ruling period under which the Forum is operating ends December 31, 1998. By-laws revisions will be submitted to members who may revise them at or before the annual membership meeting to be held during the upcoming annual conference April 9-10 (see enclosed Agenda). Meeting notices will be mailed with receipts for 1998 membership dues. By-laws' revisions will be sent to members in good standing (dues paid) immediately after Board approval. The Board plans to put the by-laws on the Forum Web page (<http://www.capital.net/com/nywf/index.html>, or type *Wetlands Forum* for a Web search like I do) along with the revisions. They will also be available at the registration desk at the annual meeting, and at the membership meeting. This will be a particularly important meeting for members to attend.

By-laws revision is accelerating long-range planning for the Forum. The nature of the Forum and its mission statement, as a non-advocacy organization to improve communication among all wetlands interests about wetlands science, use, management and policy in New York State, means that the Board, as a whole, must be connected to the entire wetlands community. Board members have many other commitments, to their jobs and to their families. As a result, there has been considerable turnover of Board members. Except for the Web page account manager who will also be improving newsletter coverage on the Web page, all of the Forum's administrative, clerical and filing work is performed by those Board

members who are, although very busy, willing to do it.

With by-laws revision, the Board of Governors is facing a major decision. Will the Forum continue to recruit board members with the time, energy and ability to handle these administrative tasks, or will the Forum recruit board members able to locate donated office space and the funding to hire an administrator? There is enough money to go either way. There has been no direction from the membership through Board nominations; the call for nominations appeared in the fall newsletter and is included in this issue as well. If you might like to make a nomination or nominate yourself, please call me (518-456-5170) or write to the post office box on this newsletter. If you would share your ideas about the direction the Forum might take or would like to work with the by-laws/long-range planning committee, please contact David Hoyt at 315-772-4729.

I do not know what my role in the Forum will be next year. As one of three people who called together the steering committee that founded the Forum in 1993, member of the Founding Board, holder of every Board office, keeper of the files, and member or chair of every committee, my tenure has been exciting and fun. Facilitating the formation and development of the Forum was an honor, and one of the high points of my life. Being part of the program and administrative committees and helping with the newsletter and coordinating all of this with the wonderful people who were and are board and committee members was sort of like being a parent, particularly since I am the only Forum founder remaining on the Board, although several still help from time to time. It is gratifying to have watched the Forum grow and to see the enthusiasm new board members bring to the Forum every year. I wish them and the New York State Wetlands Forum every success in the future.

## MONITORING WETLANDS: A FLEXIBLE APPROACH

— *Chrys Bertolotto*

Developing a volunteer wetland monitoring program can be a complex task. To begin with, wetlands themselves are extremely variable. Just walking through a single wetland from end to end screamingly tells all your senses that you are moving from one distinct community into another. And if a single wetland is complex and variable, comparing one wetland to another is something akin to comparing the moon and the sun. Say "wetlands" and most people imagine a marsh filled with ponds and reeds and pond lilies. And that is indeed one type of wetland – but a bare mud flat can also be a wetland, and so can a forest. Even the marshes that people typically equate with the term "wetland" can be classified into several different categories, depending on the type of vegetation.

Further complicating the design of a wetlands monitoring project is the broad range of questions that monitors may want to answer – questions like:

- Is the wetland changing? If so, could changes be due to increased flows of stormwater runoff? widening of a road? encroachment of noxious weeds?
- Are created or enhanced wetlands performing the way they were expected to? (for example, are they being used by amphibians?)
- Are management actions (such as revegetation, preservation, or stopping grazing) having the desired results?
- What kind of wetland is that, anyway?

The selection of monitoring activities will depend on the reasons a wetland is being monitored. For example, if you only want to characterize a wetland, taking a year's worth of monthly readings on maximum water levels probably won't be necessary. On the other hand, if you suspect that increased stormwater discharge is changing the wetland's vegetation composition, such detailed documenting of maximum water levels would be extremely relevant.

*Monitoring Wetlands* provides a wealth of information on all aspects of wetland monitoring, from the initial steps of selecting a wetland and finding volunteers to the final steps of analyzing and using the data. Everything in the manual has been reviewed by an advisory board of scientists and volunteers and field-tested in two separate volunteer monitoring programs.

## CATALOG AVAILABLE

"Catalog of Federal Funding Sources for Watershed Protection" - EPA's Office of Water has recently published a new document entitled "Catalog of Federal Funding Sources for Watershed Protection" to provide information to State/local water resource professionals and watershed groups on Federal monies that might be available to fund a variety of watershed protection projects. This version of the Catalog updates EPA's "Watershed Protection: Catalog of Federal Programs" printed in 1993. The new Catalog contains one-page fact sheets for each of the funding sources (grants and loans) that indicate to the reader the type of projects funded and eligibility. Contacts and Internet sites are provided for each of the programs so the reader can obtain further information. Copies of the Catalog are available from NCEPI in Cincinnati at: phone (513) 489-8190 or (800) 490-9198 and fax (513) 489-8695. You must include the document number (EPA841-B-97-008) in requests to NCEPI. This document is also on the Internet at the Watershed Academy's homepage at: <http://www.epa.gov/OWOW/watershed/wacademy/fund.html>. This document is part of EPA's Watershed Academy Information Transfer Series and is number 11 in the series.

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## WETLAND WORDS AND WHAT THEY MEAN – VEGETATION

— Barbara B. Beall, LA Group, P.C.

In the last two issues of the Forum Newsletter, we have focused on hydrology and hydric soils and the technical terms associated with these parameters in the federal wetland delineation methods. In this article we will tackle the last parameter used in the Federal Delineation Manual...vegetation.

To review, in order for an area to be identified as a wetland, water must be present in the soil frequently enough and for long enough duration to cause the soil to become anaerobic in the upper part. All of the easily drained pore spaces are filled with water and there are no pockets of oxygen for the plant's roots to tap into for growth. As a result, many species of plants die under these anaerobic conditions. Imagine trying to grow African violets in a pot of soil that is saturated continuously for two weeks during the year. Some plants however, have developed special adaptations to live in these harsh growing conditions. These plants are called hydrophytes, which in English means "water plants."

Adaptations that the plants make to live in these adverse conditions can take many forms, but are generally grouped into morphological, physiological and reproductive adaptations. Morphological adaptations are changes in the structure or form of the plant which aid them in growing in their particular environment. In wetlands, hydrophytes, especially trees, may have buttressed bases which help provide additional stability in soft wetland soils. They may have adventitious roots, which are multiple root stems growing down from the main trunk. Mangrove trees are an example of a plant with this adaptation. Other plants have aerenchymous tissue, which is spongy hollow tissue often found in the stems which increases the plant's buoyancy, and the number of air spaces in the plant. This type of tissue may help the leaves of the plant to float, and may store air for the plant when it is under water. Wetland plants with floating leaves also often have a waxy surface to protect the leaf from constant contact with the water. Many of the emergent and floating aquatic plants, such as water lilies, have this feature. Shallow root systems are a morphological adaptation to provide additional stability to the plant growing in wetland soils. Finally, some plants have developed specialized cells to enhance the movement of oxygen to the roots from the stems of the plants.

Physiological adaptations are methods which plants use to change the metabolic

pathways in which they process energy. Remember the Krebs cycle in high school biology class? Accessing the deep recesses of your brain? Do you remember that there were alternative pathways through the Krebs cycle for anaerobic activity? To refresh your memory, these anaerobic pathways are not as energy efficient as aerobic pathways, and often cause the accumulation of chemicals which may be toxic to biological processes. For those athletes out there, it is kind of like when lactic acid builds-up in muscle tissue during anaerobic exercise. Many wetland plants are thought to possess alternative methods to handle the energy stresses and the build-up of these chemicals from anaerobic respiration. For example, some plants can store the accumulated chemicals in a non-toxic form in their roots until a dry spell when the chemicals can be released. Another adaptation is the ability to lower the rate in which metabolic activity takes place under stressful conditions. The larch (*Larix laricina*) is thought to possess this ability. Many plants can transfer oxygen from the roots into the pore spaces of the soil surrounding the roots, to minimize root degradation and to maintain nutrient uptake under anaerobic soil conditions. Cattails (*Typha spp.*) can maintain root growth under very low oxygen levels in the soil, a condition which would end root growth in many other plants.

Reproductive adaptations include prolonged seed viability in wet conditions, and the ability of the seed to be triggered to grow in dry conditions. Many wetland plants have seeds which can germinate under low oxygen soil conditions, and have seedlings which can survive low oxygen conditions during their early development.

Similar to the process used to develop the National Hydric Soils List, a group of wetland botanists and ecologists representing the four federal agencies involved in wetland regulations were assembled to assess the probability of the common plants in the United States to grow in wetland conditions. The scientists rated each plant's likelihood of occurring in wetlands, and listed these plants in the "National List of Plants that Occur in Wetlands." The list was further refined through the development of wetland plant lists specific to various regions of the country. New York State is in Region 1.

Indicator categories include Obligate Wetland (OBL) (occurs almost always in wetlands (>99% of the time)); Facultative Wetland (FACW) (usually occurs in wetlands (67% - 99% of the time) but may occur in

uplands), Facultative (FAC) (equally likely to occur in wetlands or non-wetlands (34% to 66% in wetlands)); Facultative (FACU) (usually occurs in non-wetlands (67% to 99%) but may occur in wetlands (1% to 33%)); and Obligate Uplands (UPL) (occurs almost always in non-wetlands (99% of time) in region listed). A + or - sign may also be included on the indicator to further refine the probability of occurrence, with a + sign indicating a higher probability of being found in wetlands.

A common misperception about this rating system is that the wetland indicator status of a plant serves to establish a "wetland plant gradient" or describes how wet an area a plant will grow in. This is not true and not the intention of this list. For example, a silver maple (*Acer saccharinum*, FACW) will grow in an upland yard very well.

In order for the "vegetation parameter" to be met for the purposes of delineating wetlands, the wetland plant community present in that location must be dominated by hydrophytes. To make this assessment, a wetland scientist will examine the whole plant community, and assess which plants are dominant in each layer. This includes the tree layer, the shrub layer, the herbaceous layer and any vines layer. Trees are defined as woody plants greater than 3 inches in diameter at breast height. In a typical wetland delineation, a visual estimate is made to determine which plants dominate the community in each layer. The dominant plants are recorded, and rated according to their probability of occurrence in wetlands. When the delineation needs to have more rigorous documentation, a comprehensive delineation is conducted, which includes physical measurements of the plant coverage for each layer, and a more complex rating system.

Regardless of the method used, the area must be dominated by hydrophytes (plants rated as FAC, FACW or OBL) in order for that location to meet the vegetation parameter under the federal delineation method. For the visual assessment, this means that more than 50% of the plant species recorded must be FAC, FACW or OBL. The comprehensive system often uses an "importance value" system which multiplies the percent dominance of each plant by a numeric rating for each indicator status, and then divides by the number of plant species to obtain an average indicator status rating for the plant community.

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## (A MATTER OF CONSCIENCE)

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modern. Noss and Cooperrider (1994) in *Saving Nature's Legacy* write, "The only science worth doing is one firmly grounded in an ethic and emotional commitment. Without values and commitments, science is perilous or at least irrelevant."

Bill McKibben, author of *The End of Nature* (McKibben 1989), has written about his "deep hope that someday we might all become native Americans, at home in our grand place." For me reading that phrase was an epiphany, a moment of coalescence when my own uneasiness as a working professional was explained. Whether we choose to romanticize our predecessors or not, indigenous populations had a minuscule impact on Nature. They were simply another species, essentially integrated with their world. McKibben does not argue that we should seek to return to the short-lived and hardscrabble world that preceded agriculture. Rather, he snaps his fingers in our face and says that pre-European people were *part* of Nature, not *apart* from Nature. He grieves for the losses and seeks alternatives. The cultural paradigm of growth and constant expansion must be modified to allow us to once again be of Nature rather than its adversary.

Yet expressing sentiments as strong as McKibben's can be dangerous. All of us want respect from our peers. All of us fear being singled out. No professional wants to be seen as an extremist. Keeping our opinions to ourselves allows us to pat ourselves on the back, while not exposing our views to public scrutiny.

Further, our own academic training, strong in science and silent on moral issues, encourages this reticence. How many of us have taken extensive courses in professional ethics? Personal beliefs are avoided as matters of science. Having forceful convictions that are driven by moral principles is considered problematic. For all these reasons, we invariably find that saying nothing is safer.

Yet, after years of my own long reflection, I reject that logic.

Silence is a mistake and a professional error. Nothing changes when we neglect our deepest misgivings. Foolish, ill-conceived laws are not re-written. Public consciousness is not transformed. Unchallenged misinformation takes on the aura of truth. Political and economic agendas, rather than scientific facts, drive important dialogues. When experts increasingly focus on the minutiae of their fields, they lose their voice and

influence. A review of articles in recent volumes of *Wetlands*, the journal of the Society of Wetland Scientists, finds an exclusive focus on matters of arcane science, and a total of absence of material addressing matters of public dialogue or issues of development impacts to biologic systems. The words, *ethics, morals, character, values, responsibility, principles*, are missing from our journals. To twist an old cliché, we have buried our heads in the wetlands.

In a purely anthropocentric sense, we have an obligation to become involved in political dialogue. Equally in a moral sense, we have an obligation to be forthright in our awareness. We cannot afford to be peripheral players if we ever care to be more than educated technicians. We review ourselves as professionals, yet professionals are driven by character and spirit to be deeply engaged in debate on issues of local, national and global importance. Are we involved in matters that influence environmental decision-making, or are we scientific bean counters, only wringing our hands over the effects of sediment transportation on the distribution of *Spiraea latifolia*? As Garrett Hollands, a senior wetland scientist with ENSR, stated bluntly in a recent seminar (Hollands 1997), "Like it or not, politics are in your life every stinking day, and you better get involved."

We should not assume that expressing ourselves in a political forum categorizes us as extremists. Our hands-on knowledge of incremental loss and of antique zoning regulations which result in insensitive construction techniques can be transformed into work that *will* eliminate ongoing wetland losses. Rather than being passive observers, we should be aware of our importance as seasoned experts; we should influence dialogue and offer viable alternatives to insensitive and unnecessary development proposals.

Our public dialogue need not, should not be one of stridency or even of emotion. *Involved* scientists can maintain a dispassionate stance in a political forum. Our duty, though, is unequivocal; we should be at the heart of the continuing maelstrom that surrounds the protection of wetlands and their associated resources. We have a moral imperative to speak out. Our voices should be clear, persistent and persuasive. We should speak as experts, never railing to reiterate the values of the natural systems we so thoroughly understand. For if we fail in this duty, our silence serves only to increase the unending loss of the wetlands we purport to study and preserve.

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## About the Author

Patrick C. Garner is a wetland professional who has been practicing in the field since 1977. A private consultant and author, he is current President of the Association of Massachusetts Wetland Scientists and a Director of the Massachusetts Association of Conservation Commissions.

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## RECENT DEC ADMINISTRATIVE DECISIONS

In the Matter of the Application of Joseph Barouk, Decision of the Commissioner, October 28, 1997.

In this Decision, Commissioner Cahill adopted the hearing report of ALJ Helene Goldberger and denied the applicant's application for a wetlands permit pursuant to ECL Article 24 for the placement of approximately 3 acres of fill in a wetland located in Genesee County for the purpose of expanding his existing salvage and used car parts business. A complete copy of the decision and hearing report can be found at the DEC web site <http://www.dec.state.ny.us/ohms/decis/barsukd.htm>.

# THE “TULLOCH RULE” — SCOPE OF REGULATED ACTIVITIES UNDER CWA § 404

— Kevin M. Bernstein  
Bond, Schoeneck & King, LLP

## Background

Prior to 1993, the Corps had taken the position that it lacked the authority to regulate activities other than filling even if there was an impact on wetlands. Therefore, activities such as draining, diversion of water, or even dredging might not be regulated. The definition of “discharge of dredged material” excluded de minimis incidental soil movement occurring during normal dredging operations.

As a result of a settlement agreement in the litigation known as North Carolina Wildlife Federation v. Tulloch, the Corps promulgated new regulations which were published in the Federal Register in August, 1993 (58 Fed. Reg. 45,008) and which became known as the Tulloch Rule. Under the new regulations, when draining involves some discharge — even if de minimis — and the result is a significant change to the waterbody, the Corps will regulate the de minimis discharge.

Specifically, the regulations provide that no Clean Water Act (CWA) § 404 permit is required as long as the discharge is associated with any activity that does not or would not have the effect of destroying or degrading an area of the waters of the United States. 33 CFR § 323.2(d)(3). Under the regulations, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States. 33 CFR § 323.2(d)(4). Thus, the discharge of dredged material includes small volume incidental fallback. This term has been defined as the incidental soil movement from excavation, such as the soil that is disturbed when dirt is shoveled or the back spill that comes off a bucket and falls back into the same place from which it was removed.

## Litigation

The new regulations were challenged by the American Mining Congress. See American Mining Congress v. U.S. Army Corps of Engineers, No. 93-1754 (D.D.C.)

Plaintiffs contended that Congress never intended for incidental fallback to be within the reach of CWA § 404, which was designed to regulate the *disposal* of dredged spoil. The Tulloch Rule, they argued, impermissibly extends federal regulation to removing material from waters. This allows the Corps to regulate excavation and landclearing activities which would not have

otherwise come within the scope of the 404 permit program.

The Corps contended that it has jurisdiction over incidental fallback and always has had such jurisdiction but that there has been a narrow exception for de minimis discharges.

On January 23, 1997, Judge Stanley Harris issued an opinion invalidating the new regulations because they exceeded the Corps statutory authority. 951 F. Supp. 267 (D.D.C. 1997). According to the court, the effect of the rule was to bring within the ambit of the Corps CWA § 404 regulatory jurisdiction all dredging, mechanized landclearing, ditching and channelization activities because small volume incidental fallback unavoidably results from these operations. An exception would be when such dredging operations are conducted for navigation purposes. However, most dredging for navigation purposes is done by the Corps itself.

The new regulations shifted the burden on the regulated party to show to the Corps that the Corps did not have jurisdiction over a proposed project. See 33 CFR § 323.2(d)(3)(i).

The court’s decision focused on whether incidental fallback that accompanies landclearing and excavation activities is a “discharge of dredged material,” as that term is defined under the CWA, at specified disposal sites. Section 404(a) of the CWA provides that the Corps “may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” In addition, the CWA defines “discharge” as “any addition of any pollutant to navigable waters from any point source.” Therefore, the court concluded that incidental fallback is not the addition of a pollutant into navigable waters and therefore did not constitute a discharge which can be regulated by the Corps.

The court rejected the Corps argument that the term “addition of pollutants” is ambiguous and therefore the court should defer to the expertise of the agency. Instead, the court said that since Congress did not consider incidental fallback as the addition of a pollutant, deference to the expertise of the agency would not be appropriate. The court offered the following reasons to support its conclusion:

1. CWA § 404 refers to “discharges” but does not regulate excavation or dredging activities, unlike, for example, Section 10 of

the Rivers and Harbors Act, which specifically refers to excavation or fill.

2. The legislative history surrounding the passage of the CWA and amendments in 1977 suggest that Congress thought the word “discharge” and “discharge of dredged material” meant open water disposal of material removed during the dipping or deepening of navigable waterways. According to the court, this understanding of the term “discharge” excludes small volume incidental discharge that accompanies excavation and landclearing activities.

3. Although the CWA has been modified several times since it was enacted, it has not modified the Corps longstanding interpretation (at least prior to the Tulloch Rule) that incidental fallback associated with dredging activities are not subject to regulation. The court found support in its position that incidental fallback, as well as landclearing and excavation activities are not regulated by the Corps, in several court decisions.

4. Congress has not acted to regulate incidental fallback despite having several proposals in front of it in recent years.

Finally, the court held that even if the term “addition of a pollutant” were broad enough to cover incidental fallback, the Tulloch Rule still would be invalid because it departs from Congress’ intent that the material must be discharged at a “specified disposal site.” In other words, Congress’ intent in regulating the discharge of dredged or fill material anticipated that there would be a relocation of material from one site to another. According to the court, the Tulloch Rule makes the term “specified disposal site” meaningless since all excavation sites would be considered specified disposal sites.

## Corps/EPA Guidance Regarding Decision

On April 11, 1997, the Corps and EPA issued a “Joint Guidance” on how to proceed in light of the Court’s decision. The Joint Guidance stated that discharges associated with certain activities might, in certain specific circumstances, consist entirely of incidental fallback. Alternatively, the Joint Guidance continued, these activities could also be associated with more substantial discharges that would trigger Section 404 jurisdiction even under the Court’s decision. Under the Joint Guidance, Corps districts were advised to carefully evaluate each situation to determine whether, and to what extent, the activity is potentially affected by the Court’s decision. Under the Joint Guidance, the following activities were among those that required case-by-case examination to determine whether they are affected by the Court’s decision:

[Cont’d. page 10]

## U. S. HOUSE BILL INTRODUCED TO PROTECT WETLANDS

On October 29, 1997, Congressman Wayne T. Gilchrest (R-Maryland-1st) introduced H.R. 2762, entitled the "Wetlands and Watershed Management Act of 1997" to strengthen and clarify the federal wetlands protection program. "In the United States, we've lost more than half of our original wetlands," Gilchrest said. "As Congress begins to review our national wetlands policy, I hope this legislation will serve as a starting point for a balanced approach to protecting this critical resource, and one that is based on sound science." Gilchrest's impetus for introducing this legislation stems in part from the loss of 73 percent of Maryland's wetlands since the state was first settled.

The Wetlands and Watershed Management Act would:

- amend the Clean Water Act to add wetlands to the definition of navigable waters;
- expand dredge and fill activities covered under Section 404 to include other alterations like clearing, excavating and draining, defining "discharge of dredged material" as any addition of dredged material into navigable waters, including any addition incidental to any activity that would have the effect of degrading any area of such waters, including wetlands;
- stipulate that unless a new manual is adopted, the 1987 Army Corps Delineation manual shall be used;
- require that modifications of the manual take into consideration the 1995 National Academy of Sciences study;
- provide financial incentives for watershed management and planning, including technical and financial assistance to private landowners and expedited permit review for watersheds under comprehensive management;
- authorize funds to assist states, counties and regions in developing watershed plans;
- declare that areas certified by the Secretary of Agriculture as prior converted cropland are not navigable waters unless cropping has ceased and the area meets the definition of wetland;
- define "wetlands" as areas that are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation

typically adapted to life in saturated soil conditions;

- direct the Secretary to develop materials and conduct training courses for consultants, State and local governments, and landowners explaining the use of the 1987 Manual in the delineation of wetland areas;
- require applicants for Federal permits (for potential discharges into, or alterations of, navigable waters) to provide a certification from the State where the discharge or alteration originates that the discharge or alteration will comply with applicable provisions of the Act and allow for protection, achievement, and maintenance of designated uses included in applicable water quality standards;
- direct the Secretary and the Administrator to establish and implement a permit monitoring and tracking program on a watershed basis to monitor the cumulative impact of individual and general permits issued for discharges of dredged or fill material. Included within the purpose of such program would be the determination of whether such activities are consistent with the national goal of achieving no net loss of the functions and acres of wetlands;
- require the revocation of any general permit for the discharge of dredged or fill material if the activities authorized by the permit have adverse environmental impacts or are more appropriately authorized by individual permits or if a State or regional entity has failed to monitor the adverse effects of activities authorized by State programmatic general permits;
- authorize the Secretary to issue programmatic general permits on a Statewide basis to avoid unnecessary duplication of regulations by Federal, State, and regional programs. Such permits would be required to include safeguards to ensure that the State program will have no more than minimal environmental impacts and will provide at least the same degree of protection for the environment for Federal interests as provided by the Act;
- exempt certain agricultural activities performed on wetlands from regulation under specified permit provisions;

- require dredged or fill material permit applications to provide for mitigation measures, including compensatory mitigation, with respect to effects on wetlands;
- provide for the establishment of mitigation banks (sites where wetlands or other aquatic resources have been restored, created, or preserved for purposes of providing compensatory mitigation credits to offset authorized impacts to similar resources);
- provide for expedited permit processing, at the request of an approved State management entity, for a dredged or fill material permit if the permit application is in compliance with an approved wetlands and watershed management plan;
- direct the Administrator and the Secretary to provide guidebooks or other materials and technical assistance to private landowners for identifying, evaluating, and restoring wetlands and developing integrated wetland management plans consistent with this Act;
- authorize citizen suits with respect to violations of conditions included in a general permit, mitigation banking instrument, or other mitigation requirement.

Gilchrest has been recognized as a leader in the House on wetlands issues, and in 1991 called for a National Academy of Sciences study to establish a scientific definition of wetlands. "Our current wetlands policy has been riddled with court battles and controversy over what Congress intended 25 years ago," Gilchrest said. "Most of our wetlands regulations have been based on interpretation by federal agencies and courts of a very small section of law. This bill will provide a clear, complete statutory basis for wetlands protection."

[Editor's Note: On October 29, H.R. 2762 was referred to the House Committee on Transportation and Infrastructure. On November 10, H.R. 2762 was referred to the Subcommittee on Water Resources and Environment. The Subcommittee held hearings on December 9.]

Although the information in this document has been funded wholly or in part by the United States Environmental Protection Agency under assistance agreement X992664-01-0 to the New York State Wetlands Forum, Inc., it may not necessarily reflect the views of the Agency and no official endorsement should be inferred.

## **NYSWF MEMBER HIGHLIGHT: JENNIFER BRADY-CONNOR**

Since September 1996, NYSWF member Jennifer Brady-Connor has been immersed in wetlands education activities around Saratoga County as the Wetlands Outreach Coordinator for the Saratoga Land Conservancy. Based in Ballston Spa, New York, the Saratoga Land Conservancy is a private, nonprofit organization founded in 1988 to promote the preservation of natural, scenic, agricultural, and recreational land within the Saratoga region. The EPA is funding Jennifer's position with the intent of minimizing wetlands violations in rapidly-growing Saratoga County.

In her current position, Jennifer is active in developing wetland education programs and materials for landowners, developers, local governments, corporations, local schools, and the general public. As an educator, Jennifer tries to maintain a non-advocacy approach: she lays out the facts for people to ruminate upon and consider, but secretly hopes, of course, that they will behave positively toward wetlands. The most rewarding experience is, as Jennifer puts it, "getting the message out that wetlands can not only be creepy, crawly, bug-infested, stinky, water holes, but that they can also add beauty and value to our lives". She finds it particularly satisfying to conduct an event geared toward children and realize that, by the end of the program, the parents are intrigued and involved in learning about wetlands as well!

One of the more unique events that her organization sponsored (together with the Saratoga Film Forum) was a 3-D screening of "The Creature from the Black Lagoon". Before the movie began, Jennifer spoke about the historical aspects of wetland perceptions, how our perceptions are continually changing, and how these perceptions are often reflected in the writings and art at the time. She looks forward to American Wetlands Month 1998, for which her organizations is planning a variety of activities including canoe trips, wildflower walks, and basic wetland identification workshops. (For more information on the wetlands outreach activities at the Saratoga Land Conservancy, see Jennifer's article in the Winter 1997 issue of *The Forum* [Volume 4, Number 1].)

Prior to her current position, Jennifer was a Land Steward Assistant/Educator with the Saratoga Land Conservancy. She graduated from SUNY-Albany with a B.S. in Biology, and has continued her education at SUNY-Environmental Science and Forestry with a summer semester at the Cranberry Lake Biological Station. The Cranberry

Lake courses, especially Wetland Ecology, spurred her interest in wetland ecosystems and related policy. She has been active in the community as a volunteer coordinator with Save the Pine Bush in Albany, NY; as a fund-raiser and educator for Earthbound at the SUNY-Albany campus; and as an infirmity assistant with the Partnership for Service-Learning in Guayaquil, Ecuador.

Jennifer values her membership in the NYSWF as an avenue to remain abreast of current wetland issues; as she states, "the newsletter and people of the NYSWF continually reinforce that this is an ever-evolving field of wetland science and policy". (*Editor's note: Jennifer was recently nominated to the NYSWF Board of Governors for the 1998 - 2000 term; elections will be held at the upcoming annual membership meeting and conference.*)

## **THANK YOU**

Many thanks to Whiteman Osterman and Hanna for their generous donations to the New York State Wetland Forum. Terresa Bakner and Matt DiFilabo, a summer intern prepared a successful grant application to the USEPA to assist the NYSWF with increasing the distribution of its newsletter. In addition, at the last Board of Director's meeting of the Forum, Terresa Bakner presented a check from Whiteman Osterman and Hanna. Money ear-marked by Whiteman Osterman and Hanna for their bi-annual wetland educational meetings and which is no longer needed for that effort due to the work of the Forum, was instead distributed to a variety of environmental organizations including the Forum. What a wonderful way to dispose of extra funds. Anyone else out there feeling flush?

## **AN AMERICAN WETLANDS MONTH CELEBRATION**

TEAM WETLANDS:  
101 WAYS TO WIN FOR WETLANDS

April 15-17, 1998  
HYATT CRYSTAL CITY  
ARLINGTON, VIRGINIA

For information contact:  
TEAM WETLANDS  
c/o Terrence Institute  
4 Herbert Street  
Alexandria, VA 22305  
Ph: 703/548-5473  
Fx: 703/548-6299  
e-mail: terrinst@aol.com

## **(THE "TULLOCH RULE")**

[Cont'd. from page 8]

- mining activities, including sand and gravel mining, aggregate mining, precious metals and gem mining, recreational mining, and small-instream hydraulic dredges;
- ditching and draining activities, including ditching to lower the water table, ditching to drain wetlands, and removal of beaver dams;
- maintenance dredging activities and excavation for currently used flood control projects or for previously abandoned flood control, and irrigation or drainage projects;
- channelization and the reconfiguring or straightening of streams;
- other excavation activities.

In sum, the Joint Guidance concluded that if the activity in question involved only incidental fallback, as defined by the District Court, it would be covered by the Court's ruling. However, if the activity was associated with other discharges of dredged or fill material in waters of the United States, it would not be affected by the Court's ruling and should continue to be regulated.

### **Stay of Decision Granted**

On June 25, 1997, the U.S. Circuit Court for the District of Columbia granted a stay of the District Court's decision. In response, Corps districts have been advised that the "Excavation Rule" at 33 CFR § 323.2(d) is in effect and should be fully implemented. Furthermore, the Joint Guidance concerning compliance with the District Court's decision is no longer in effect. However, the Corps will not initiate enforcement actions for any activities that only involved "incidental fallback" (as addressed in the Joint Guidance) that occurred between January 23, 1997 and June 25, 1997.

The Circuit Court also granted the motion for expedited decision on the appeal. A schedule has been established that requires final briefs to be completed by November 19, 1997. A decision on the appeal should be made in early 1998.

## **(WETLAND WORDS)**

[Cont'd. from page 4]

### **References**

- Environmental Laboratory. 1987. *Corps of Engineers Wetlands Delineation Manual*, Technical Report Y-87-1, US Army Engineer Waterways Experiment Station, Vicksburg, Miss.
- Reed, P.B., Jr. 1988. National list of plant species that occur in wetlands: Northeast (Region 1). U.S. Fish Wildl. Serv. Biol. Rep. 88 (26.1). 111 pp.



## (MONITORING WETLANDS)

[Cont'd. from page 3]

The manual details quantitative and qualitative methods for monitoring a variety of characteristics in both naturally occurring wetlands and created or enhanced wetlands. It begins with the method most groups will use first – a reconnaissance walk, in which volunteers walk the wetland to identify major vegetation communities, locate photo points, identify surrounding land uses, and establish locations of transects. Data gathered on the reconnaissance walk serves as baseline for future monitoring. From that point, the monitoring group may choose to study certain wetland characteristics in more detail. The manual provides protocols for monitoring hydrology (for example, measuring the quantity of water that flows through an area, or the time water remains on site); wetland buffer condition; soil types; vegetation; topography (determining elevations); and wildlife. Monitoring wildlife can include such activities as bird diversity surveys or counting and identifying amphibian egg masses.

### A choice of methods

For most of the characteristics listed above, *Monitoring Wetlands* provides two or more alternative methods. This allows each monitoring program to choose an approach that best suits its monitoring goals, its volunteers' level of expertise, the amount of training that can be provided, and the available time and funding.

[Cont'd. page 12]

## NRCS NEWS AND UPDATE

— Michael Townsend

### Wetland Reserve Program

The Natural Resource Conservation Service (NRCS) in New York State is being used as an example of "how to" run the Wetland Reserve Program. New York State is a leader among the other states for progress and growth in this program.

In **FY97** there were 173 applications with a total of 15,918 acres enrolled; 42 counties participated and the cost was \$9 million. These contracts include 142 permanent easements on 11,594 acres; 116 30-year easements on 4058 acres; and 15 restoration contracts with 266 acres enrolled. There were 128 funded contracts covering 7083 acres and 37 counties participated; the cost was \$3.6 million.

So far in **FY98**, approval has been granted to fund 30 more 30-year easements on 1500 acres and 76 permanent easements on 6200 acres, a total of 106 applications on 7700 acres, at a cost of \$5.5 million.

### Wildlife Habitat Incentives Program

The NRCS is announcing the new Wildlife Habitat Incentives Program. This program will benefit grasslands and riparian habitats in New York State. Under this program, eligible landowners may apply for funding to establish wildlife habitat development practices. More information will be available in the next issue of this newsletter, *The Forum*. You may also call your local county NRCS office.

## HOTEL INFORMATION FOR NYSWF 1998 ANNUAL MEETING

Since the 1998 Annual Meeting will be in Albany during the legislative session and budget time, you may wish to make reservations for accommodations early.

**Quality Inn**, 3 Watervliet Avenue, Albany NY 12206 (518-438-8431)

The NYSWF has reserved a block of 35 rooms for Wednesday (4/8/98) and Thursday (4/9/98) for \$61.00 a single and \$66.00 a double. Mention Group Number 7002 - New York State Wetlands Forum. Rooms are on a first come-first served basis until 3/9/98.

Other hotels under \$80 a night in Albany Metro Area are:

**Albany Ramada Inn**, 1228 Western Avenue, Albany NY 12203 (518-489-2981)

**Howard Johnson Hotel**, 1375 Washington Avenue, Albany, NY 12206 (518-459-3100)

**Holiday Inn Express-Turf**, on Western Avenue. 1422 Western Avenue, Albany, NY (518-438-0001)

**Motel 6**, 100 Watervliet Avenue, Albany NY, 12206 (518-438-7447)

**Ramada Inn Downtown**, 300 Broadway, Albany NY 12207 (518-434-4111)

**Red Carpet Inn**, 500 Northern Blvd., Albany NY 12204 (1-800-251-1962)

There are also many hotels in the Albany Airport area on Wolf Road and Central Avenue.

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# GRANDFATHERED PROJECTS UNDER THE GUN

— *Terresa Bakner, Whiteman, Osterman & Hanna*

When the nationwide permit program was reissued by the United States Army Corps of Engineers on December 13, 1996, the Corps made significant changes to the most popular and widely used nationwide permit — Nationwide Permit 26, which authorizes the placement of fill, pursuant to the terms and conditions of the permit, in waters of the United States, including wetlands, for construction projects generally. The Corps, however, continued its practice of allowing projects that had commenced or were under contract to commence in reliance on Nationwide Permit 26 an additional year to complete the project fill pursuant to the “old” Nationwide Permit 26. The deadline for so-called “grandfathered” Nationwide Permit 26 projects will expire on January 21, 1998.

Also of great interest was the Corps’ decision to completely jettison Nationwide Permit 26 as of December 13, 1998. The Corps’ stated intention in the preamble to the Federal Register Notice dated December 13, 1996, is to replace the rather generic Nationwide Permit 26 with activity-specific nationwide permits. To date, the Corps has not published a proposed rulemaking with respect to the activity-specific replacements for Nationwide Permit 26.

## **National Association of Homebuilders Wins Challenge to Nationwide Permit Program**

The National Association of Homebuilders (NAHB) sued the Corps in federal court after the Corps issued the new nationwide permit program. The NAHB alleged that the Corps had failed to seek public input for changes to three wetland regulations that are part of the new nationwide permit program. According to the District Court decision/order, the NAHB claimed that the Corps’ decision to phase out Nationwide Permit 26 in two years, prohibit the use of Nationwide Permit 26 with other nationwide permits, i.e., stacking of nationwide permits, on projects exceeding three acres, and prohibit the use of Nationwide Permit 26 for projects affecting more than five hundred linear feet along a streambed, violated the Clean Water Act and the Administrative Procedure Act.

The District Court agreed with the NAHB that the Corps’ notice of these regulatory changes was insufficient. The court ordered the Corps to publish a new, or potentially the same, draft proposal in the Federal Register by the end of November, 1997 and a final revision, i.e., final rules on the above aspects of the nationwide permit program by April, 1998. Although the Court

required the Corps to reopen the notice on the provisions of the new nationwide permit, the Court did not invalidate the provisions that it found had been subject to insufficient public notice and review. If you would like a copy of the Order issued by the Court, please do not hesitate to contact Tom O’Donnell or Terresa Baker at Whiteman Osterman & Hanna, (518) 487-7615.

[**Editor’s Note.** The Federal Register Notice required by the NAHB Court Order was published on November 26, 1997. Comments on the three changes described in the article must be received by February 24, 1998.]

## **(MONITORING WETLANDS)**

*[Cont’d. from page 11]*

### **Resources**

*Monitoring Wetlands: A Manual for Training Volunteers*, by Tina Miller, Chrys Bertolotto, Janice Martin, and Linda Storm (1996). 106 pages, plus appendices. Includes protocols for all the methods listed in this article, plus equipment lists and data forms. To order, send \$15 (includes shipping) to Adopt a Beach, P.O. Box 21486, Seattle, WA 98111-3486; ph. 206/624-6013; fax 206/682-0722. A disk with an Access database to manage and analyze the monitoring data can also be requested.

*Chrys Bertolotto is Executive Director of Adopt a Beach, P.O. Box 21486, Seattle, WA 98111-3486.*