

# The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

## MESSAGE FROM THE CHAIR

— Barbara B. Beall

I am honored and humbled to be following in the footsteps of Norbert Quenzer Jr. and Sally Daly as Chair of the Forum. Norbert courageously suggested that an organization was needed to foster communication among organizations and individuals interested in New York wetlands. He then made this idea a reality. Sally Daly became the torch-bearer of the Forum. She carried the non-advocacy message to a wide audience and worked tirelessly to establish a organizational framework for the Forum. Along with the efforts of past board members, including John Caffrey, John Connell, Ray Cummings, Jim Donovan, Peter Feinberg, Heidi Firstencel, Larry Goehring, Stephen George, Gary Goff, Paula Marshman, Judy Ross, Rebecca Schneider, Dan Spada, and Susan Stiner, these people built a strong foundation for the Forum.

The 1998 Annual Meeting was a terrific success. Over 190 people were in attendance and one individual even commented it was "the best yet." As usual, the Regulatory and Legislative Update session received the highest marks. Many thanks to all the speakers and moderators, especially NYSDEC Commissioner Cahill, as well as Board Members Michael Corey, David Hoyt, and Sally Daly who were key to its organization.

One of the goals of the Forum's Board of Directors is to make the internal workings of the Forum even smoother. To that end, Beth Seme and her association offices have been hired to provide administrative services. If you were at the annual meeting, you noticed how nicely the registration process worked. This central location will also handle day to day mail and telephone calls; so we have a new address and telephone number. The Forum continues to build its web page, and messages or information can be forwarded to any of our board members via our e-mail site. We are developing an e-mailing list. If you want to be on this list, please post your e-mail address on the Forum's e-mail site.

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## CORPS PROPOSES NWP26 REPLACEMENTS

— William S. Kibler, Esq., Bond, Schoeneck & King, LLP

### Introduction

In June 1996, the U.S. Army Corps of Engineers (the Corps) proposed to reissue Nationwide Permit (NWP) 26. Following a review of comments received, and a study of the use and impact of NWP 26, the Corps determined that NWP 26 should be replaced with activity-specific NWPs. In the interim, a substantially modified NWP 26 was reissued in December 1996 for a two-year period. In its review of NWP 26, the Corps discovered that from May to December 1997, 83% of the total activities authorized by NWP 26 fell into 10 categories. Residential development accounted for 24% of the activities authorized by NWP 26, transportation activities accounted for 19%. Six to eight percent of NWP 26 authorizations were for each of the following activities: agricultural activities, retail developments, industrial developments, and stormwater facilities and impoundments. Institutional facilities, mining activities, and channel modifications each compromised two to five percent of NWP 26 authorizations during that time period.

On July 1, 1998, the Corps issued public notice of its proposed phase out of NWP 26. The Corps proposes issuing six new Nationwide permits and modifying NWPs 3, 7, 12, 14, 27, and 40, to become effective when NWP 26 expires. The Corps also proposes adding one new NWP condition and modifying six existing NWP conditions which will apply to all new and existing NWPs. Additionally, the Corps proposes modifying NWP 29, the "single family home" NWP, to decrease the impacted acreage limit from one-half acre to one-quarter acre.

Although NWP 26 was originally scheduled to expire on December 13, 1998, the Corps proposes changing the expiration date to March 28, 1999, to allow the Corps time to involve other government agencies and the public in reviewing the proposed NWPs and formulating a new regional conditioning process, discussed below.

Permittees who have received an NWP authorization before NWP 26 expires will have 12 months to complete the authorized activity, provided they have commenced construction or are under contract to commence construction prior to the date NWP 26 expires. See 33 C.F.R. § 330.6(b). The existing NWPs, with the exception of NWP 26, will remain in effect until they expire on February 11, 2002.

The replacement of NWP 26 with activity-specific NWPs is intended to help implement the President's Wetlands Plan issued by the White House Office of Environmental Policy on August 24, 1993. A goal of the President's Wetlands Plan is that federal wetlands protection programs be fair, flexible, and effective. To that end, the Corps' modification of the Nationwide Permit Program is intended to provide effective protection of wetlands and other aquatic resources while avoiding unnecessary impacts to private property, the regulated public, and the environment. The Corps intends the proposed new and modified NWPs to reflect its "unequivocal commitment to its environmental mission and to wetlands protection."

The Corps' proposal replaces NWP 26 with six activity-specific NWPs, focussing on impacts to the aquatic environment as a whole, not on impacts to any particular geographic type of waters. The proposed new and modified NWPs will not be limited to projects at or above the headwaters of a body of water, as was the case with NWP 26.

As with the previous NWPs, most of the proposed new and modified NWPs have pre-construction notification (PCN) requirements. PCN requirements allow the Corps to review proposed activities on a case by case basis to:

- 1) place special conditions on specific projects to ensure that the authorized impacts will have minimal individual and cumulative adverse effects on the aquatic system; or
- 2) assert discretionary authority to require a

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## LETTERS TO THE FORUM

I have enclosed my evaluation form for the annual conference of the NYS Wetlands Forum, Inc. I thought it was an excellent conference for it represents the greatest service which the Forum provides; that is hosting an annual meeting which is devoted exclusively to wetlands issues. . . . I have some suggestions for program ideas for future meetings.

The Forum has done an excellent job in presenting wetlands topics at past meetings. However, there are some issues which I think have been neglected or avoided. As you know, I have recommended in the past that the Forum extend an invitation to property owners, developers, and the regulated community in general to participate at our meetings. We have consistently heard from three major wetlands constituencies at Forum events. These are government regulators, private consultants, and academia. If you are truly a *non-advocacy forum*, then you have a responsibility to provide a platform for those who have had first hand experience with the implementation of both scientific research and government regulatory programs. For years we have heard from those whose jobs depend on wetlands. We also need to hear from those who have had a very different experience with wetlands, ranging from those who either had to modify or drop projects, experienced litigation, or even served prison time for wetlands violations.

There are significant public policy issues regarding wetlands which are not understood by those most affected by the policies. I am constantly trying to open up the debates we have on public policy. Therefore, I think that the Forum should address the following topics:

- 1) **No-Net Loss Policy:** As far as I know, there is neither federal nor state statutory authority for this concept. Instead, it has been implemented by executive order or state regulations/guidelines. This policy has huge impacts on society, both positive and negative. Did the public, the taxpayer, the voter in this country have the opportunity to understand what can no longer be done because of the no-net loss policy and decide whether they accepted those costs?
- 2) **The Propaganda War:** Junk science has no place in the debate over what is a wetland, what is it worth, and how shall we protect it. However, can we say that all of our regulatory programs are based upon good information? I have been bothered for years over the widely quoted "fact" that the nation has lost one-half of its wetlands over 200 years. I would like to see the data and the assumptions which support this "fact". Are wetlands and their protection being used to achieve larger, but hidden agendas such as halting development, restricting population growth, or de-populating vast areas?
- 3) **Regulatory and Judicial Abuses:** I have not yet read about a wetland violation case which I thought deserved imprisonment.
- 4) **The Exalted Status of Wetlands:** Alone among natural/biological systems, wetlands have achieved a special protected status. We are basically saying that wetlands are an ecosystem which should not be changed by human beings. This is a serious precedent we have set. What will the next special ecosystem be, old growth forests, prairie, desert, tundra, prime farmland, second or third growth forests? How did we get to this point? Does the public understand and support where the scientific and government regulatory community has taken them?

Thank you for the opportunity to share these ideas. I would like to know if the Board of Directors would endorse these suggestions.

Roland R. Vosburgh, *Director*  
Columbia County, New York Planning Department

**Editor:** As noted by Mr. Vosburgh, the New York State Wetlands Forum is a non-advocacy group. The *Forum* encourages the views of all those who have an interest in wetlands. We would like to make this "Letters to The Forum" section a regular feature of our newsletter. If you have a view on wetlands science or policy, or wish to respond to letters previously published, please e-mail Kevin Bernstein at [bernstk@bsk.com](mailto:bernstk@bsk.com).

### ATTENTION MEMBERS

Members who wish to be included on an e-mail list for occasional notices, etc. from *The Forum* should send their e-mail address to The New York State Wetlands Forum at [nywf@capital.net](mailto:nywf@capital.net).

## INVOLVING COMMUNITY GROUPS AND LOCAL GOVERNMENTS IN LONG ISLAND SOUND HABITAT RESTORATION

— Vic Pyle, III; *Habitat Restoration Project Manager*

Save the Sound, Inc. of Stamford, CT and Glen Cove, NY was recently awarded a multi-year challenge grant from The Pew Charitable Trusts<sup>1</sup> to conduct the Long Island Sound Habitat Preservation and Restoration Project. This grant has been matched by generous contributions from a number of foundations, corporations, and individual donors including the New York City Environmental Fund and NF&M International. The grant will allow Save the Sound, Inc. to increase awareness and appreciation of significant habitats in need of protection and restoration; to mobilize and empower stakeholders to restore degraded and lost habitats; to minimize habitat losses; and to prioritize habitat restoration needs throughout Long Island Sound. Optimistically, these goals will be achieved by initiating a grassroots effort in the many communities along the shores of the Sound and providing citizens with planning tools, technical assistance, and motivation to undertake specific actions to preserve and restore significant habitats.

Save the Sound, Inc., a nonprofit environmental organization dedicated to the restoration, protection, and appreciation of Long Island Sound and its watershed through education, research and advocacy, was founded 25 years ago as the Long Island Sound Taskforce. In 1995, our name was changed to Save the Sound, Inc. to better express the organization's mission and to serve as a call to action. We currently employ nine full-time staff members and over forty-two additional part-time volunteers and seasonal staff.

We are well-organized and strong advocates for the health and vitality of Long Island Sound. In 1997 alone, over 20,000 children and adults participated in our hands-on educational activities on the Sound. Using a corps of over 200 volunteers, we coordinate an ongoing water quality monitoring and research program at sixty-one sites across the Sound that operates under an EPA-approved Quality Assurance/Quality Control (QA/QC) Plan. The collected data are analyzed and published each year in the Long Island Sound Water Quality Report. The research staff is also currently conducting research on the relationship between algal blooms and hypoxia by analyzing water samples for algal species abundance and diversity and photosynthetic chlorophyll pigments, and relating that data to dissolved oxygen levels. In addition, Save the Sound

acts as the administrative and managerial organization of the Long Island Sound Watershed Alliance (LISWA), a regional network of over 300 individuals and grassroots organizations that take action on issues potentially affecting Long Island Sound.

As project manager for the habitat grant, I am responsible for researching, writing, and editing the Conservation Blueprint (a comprehensive "how-to" manual for habitat restoration); forming partnerships for restoration; and conducting technical assistance workshops for local governments and community groups. To assist with completion of the requirements and deliverables of the grant, a legal consultant and an environmental consultant were hired in June 1997. In addition to these consultants, a Technical Advisory Committee comprised of experts in the field of habitat restoration, ecology, marine policy, and environmental law, was formed in the summer and fall of 1997. The committee will serve as the expert/peer review panel for the Conservation Blueprint and will provide their in-depth expertise and knowledge to all aspects of the project, including providing guidance to the Project Manager and Consultants as well as the review of documents and other products produced by the Initiative. The Conservation Blueprint is on schedule to be published in September, 1998 and will cost approximately \$15 to cover printing and postage costs.

The success of our project is dependent upon cooperation with several key groups. Save the Sound's grant effort would not be possible without the considerable work and effort put forth by the Long Island Sound Habitat Restoration Initiative (Initiative)<sup>2</sup>, a team of Federal, state, and local government agencies and other entities around the Sound interested in the future of Long Island Sound habitats. Save the Sound, the only non-governmental member of the Initiative team, coordinates the public outreach and education efforts for the Initiative. Assisted by the other members of the Initiative, Save the Sound coordinated nine successful public meetings in May 1997 in various locations around the Sound. The purpose of the meetings was to solicit input and comment from the public on proposed restoration sites and refine the prioritization criteria and site rankings.

## JOB ANNOUNCEMENT: WETLAND ECOLOGIST, LANDSCAPE ECOLOGIST OR GEOGRAPHER

### **Wanted: Wetland Ecologist, Landscape Ecologist or Geographer**

Full time position with the TPMC Office at the NOAA Coastal Services Center, Charleston, SC

The Technology Planning and Management Corporation (TPMC) has an immediate opening for a full-time wetland/landscape ecologist or geographer experienced with examining wetland value/function, forecasting change at landscape scales, or using spatial models.

TPMC is a private corporation that provides technical support to the National Oceanic and Atmospheric Administration (NOAA). The current position is in TPMC's Charleston, SC office and supports the NOAA Coastal Services Center.

Current projects are located in the ACE Basin, SC, Kachemak Bay, AK, and NY/NJ Harbor. The person hired will work on a team consisting of ecologists, planners, geographers, and coastal managers from federal, state, and local governments, the private sector, and not-for-profit organizations. The team will examine how interrelationships between ecology, land use, and socioeconomics affect management of coastal resources.

The minimum qualifications for this position are an MS in landscape ecology, wetland ecology, geography or closely related field with three years of experience, and demonstrated technical writing and communication skills. Experiences linking wetland ecology to socioeconomic pressures, using GIS or remote sensing to examine wetlands, working with local governments or community groups, and/or working at landscape scales would also be beneficial.

To apply, send resume, cover letter and salary requirements to:

Nick Christopher  
TPMC at DOC/NOAA  
Coastal Service Center  
2234 South Hobson Avenue  
Charleston, SC 29405-2413  
e-mail: nchristopher@csc.noaa.gov  
Fax: (843) 740-1312

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## DEC COMMISSIONER JOHN P. CAHILL GIVES KEYNOTE SPEECH AT FORUM ANNUAL MEETING

The New York State Wetlands Forum once again held a successful annual meeting, this year in Albany on April 9 and 10. We hope you had an opportunity to attend and participate. For those of you who did not attend, and even for those who did, provided below are excerpts from some of the presentations during the 1½ day meeting. As space allows, other excerpts will appear in later issues of *The Forum*.

### EXCERPTS FROM REMARKS OF COMMISSIONER JOHN P. CAHILL

New York State is blessed with remarkably rich and varied wetland resources. We have over 25,000 acres of tidal wetlands and roughly two and a half million acres of freshwater wetlands. These range from the beautiful bogs of the Adirondacks to the critically important tidal marshes of Long Island. New York is the only state in the nation to border on both the Atlantic Ocean and the Great Lakes; in between them lie acres of floodplain wetlands, beaver ponds, and expansive marshes and swamps.

In addition to providing biological richness and diversity, wetlands provide other important benefits to the environment and the citizens of New York, such as protecting water quality and protecting us from flooding after storms and spring melts.

Probably the best known benefit of wetlands is as fish and wildlife habitat. Indeed, it was the drastic decline in our nation's waterfowl populations that originally signaled the crisis of wetlands losses decades ago. Wetlands provide important breeding, feeding and resting areas for countless species of fish, wildlife, and plants, including more than half of the state's protected plants. And more than two-thirds of the fish and shellfish harvested in New York depend on tidal wetlands for some portion of their life cycles, one indication of the tremendous economic importance of wetlands to the state.

Wetlands are also important to the quality of life that New Yorkers enjoy, providing valuable open spaces and recreational areas. More than 12 million New Yorkers annually participate in outdoor activities such as hiking, birdwatching, fishing and hunting, and many of these visits are centered around activities that are tied, in one form or another, to the health of our wetlands. These activities provide personal, social and conservation benefits, as well as economic benefits. The economic return in the state from these activities is more than \$4 billion each year. Natural resources and fish and wildlife oriented tourism offers great

potential for economic growth and wetlands are an important component of supporting this economic base.

Unfortunately, we have not always recognized the unique values of this resource. Since colonization, and especially after World War II, roughly half of New York's wetlands were lost to agriculture, development, landfilling and natural changes. Other wetlands have been degraded by pollution and the invasion of exotic plant species. Until relatively recently, wetlands faced many threats, and enjoyed few protections.

Fortunately, in a remarkably short time, we have succeeded in reversing that trend, so that today, New York State's wetlands are well-protected, and in many parts of the state we are now gaining new wetlands. For instance, DEC staff on Long Island recently conducted a comprehensive study of Suffolk County's south shore tidal wetlands and concluded that, since the passage of Article 25 in 1973, New York State has virtually eliminated losses of tidal wetlands from human causes. Although some natural losses continue, due to storms and erosion, we have also gained a total of 500 new acres of tidal wetlands due to changing sea levels. That is a remarkable success story, and one which most New Yorkers probably aren't aware of.

Losses of freshwater wetlands also have declined dramatically since the passage of the Freshwater Wetlands Act in 1975, and, once again, we are now actually gaining wetlands acreages in a few part of the state as agriculturally drained lands are abandoned and they revert to their original wetlands condition. Very healthy beaver populations in most of the state are also doing their natural best to add to New York's wetlands, a trend that is expected to continue.

Much of the credit for the reduction in wetlands losses can be given to the increased public awareness of the importance of this resource, and I applaud the efforts of the Wetlands Forum for holding meetings such as this, which are an important opportunity to share information, generate new ideas, and maintain important professional contacts. Credit also is due to the State's Tidal and Freshwater Wetlands Acts. I'm sure I don't need to explain these programs to you, but I would like to recognize those aspects of the regulatory programs that contribute to their success.

Legitimate concerns have been expressed about the redundancy of state, federal and in some cases, local wetlands regulatory

programs. So despite the strengths of our respective programs, we also recognize that improvements can be made. Governor Pataki has made sensible, effective regulatory reform a high priority for this administration, and we have made significant improvements in the administration of wetlands programs by developing general permits for routing or emergency work, and coordinating better with other agencies.

\* \* \*

We are also receptive to new, innovative approaches for improving the existing state wetlands program. For example, wetlands mitigation banking has been promoted as another tool for meeting the mitigation needs of projects that have minimized impacts to wetlands, but for which some residual impacts will occur. Instead of small, isolated, and often-neglected mitigation wetlands that are built to offset individual projects, wetlands mitigation banks can be sited so they are more ecologically valuable and viable. These larger banks are easier to maintain and monitor in the long term. Two proposals for mitigation banks in the western part of the state have already been advanced, and a handful of others are at various stages of conceptual development. We are currently exploring the viability of mitigation banks in the context of the state regulatory program, and if you have questions about banking, I encourage you to speak with Patricia Riexinger, our wetlands program manager, who is also here today and tomorrow.

\* \* \*

In all these initiatives you will see one common thread, one to which this Forum meeting has been dedicated, the importance of science to wetlands conservation. Science, and its technological applications, are the foundation for effective conservation efforts. Evaluating, documenting, and quantifying what we do is how we learn what works and how to improve. GIS technology has provided us with an amazingly useful new tool, and we are developing a GIS-based computerized Wetlands Tracking System to assist us in tracking changes to the wetlands resource. This system will initially focus on regulatory impacts, such as permit decisions, boundary delineations, mitigation, and compliance efforts, which will enable us to account for impacts to wetlands, identify hot-spots of activity, assess cumulative impacts, and consequently modify our program focus or implement new efforts to accommodate stresses on the resource. This will allow us to determine how many acres of wetlands have been added to the resource base without shuffling through reams of paper in the

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## **(CORPS NWP26 REPLACEMENTS)**

*[Cont'd. from page 1]*

standard individual permit. The PCN requirements differ for each NWP. District Engineers will continue to require that applicants avoid and minimize impacts on site.

The Corps has made a preliminary determination, similar to that made previously for the overall NWP Program, that the proposed new and modified NWPs do not constitute a major Federal action significantly affecting the quality of the environment because the NWPs authorize only those activities that have minimal adverse effects on the aquatic environment both individually and cumulatively. The Corps has prepared a preliminary environmental assessment and a preliminary Finding Of No Significant Impact (FONSI). Those documents are available from the Corps through each of the district offices and on the Corps' home page. <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/> The Corps has provisionally determined that the proposed new and modified NWPs comply with the requirements for issuance under general permit authority.

### **Mitigation**

To determine whether a project might qualify for an NWP, the threshold measurement of the gross impact to existing waters is the acreage of loss of waters of the United States. The acreage of loss includes the filled area, plus any waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project.

The Corps will normally require compensatory mitigation for those projects which require pre-construction notification (i.e., impacts to more than one-third acre of the waters of the United States for most of the proposed NWPs).

There are several methods of compensatory mitigation accepted by the Corps. The permittee can restore, create, enhance, or preserve wetlands or other aquatic habitats to replace the functions and values of the wetlands and other waters of the United States that are lost as a result of the project.

Another method of compensatory mitigation is mitigation banks. A mitigation bank is a site where wetlands or aquatic resources are restored, created, enhanced, or preserved to provide compensatory mitigation in advance of the authorized impacts.

A third method of compensatory mitigation is in lieu fee programs which may be used to off-set losses of waters of the United States. Permittees may use in lieu fee programs that protect, enhance, or restore

wetlands, riparian corridors, and open water areas, including upland buffers which protect water quality. The permittee pays a fee to the operator of the in lieu fee program in exchange for the protection, enhancement, and restoration of these areas.

Although the Corps of Engineers authorizes the use of mitigation banks and in lieu fee programs, neither the Department of Environmental Conservation nor the Adirondack Park Agency presently authorize the use of in lieu fee payments. Additionally, there are no mitigation banks presently in place in New York.

### **Regional Conditioning of Nationwide Permits**

There are two types of regional conditions: conditions added as part of the Section 401 Water Quality Certification/Coastal Zone Management Act (401/CZM) process, and conditions added by the Divisions of the Corps of Engineers after consultation with Corps Districts, other agencies, and the public. The 401/CZM Regional conditions must be announced by the final Corps Public Notice concerning the final NWPs. Corps Regional conditions are added to NWPs by Division Engineers after a public notice and comment period.

When each District issues its initial public notice for the proposed NWPs, which should be approximately concurrent with the 1 July 1998 Federal Register Notice for the modified NWPs, the public notice will include: 1) Corps regional conditions for NWP 26, if any, that are applicable to any of the proposed NWPs; 2) the existing Corps regional conditions, if any, for the NWPs that are proposed to be modified; and 3) any additional Corps regional conditions the districts are proposing at that time. Each district may propose additional Corps regional conditions in future public notices. Corps regional conditions will be tailored to the issues related to the aquatic environment within each district. Corps regional conditions can cover a large geographic area, (e.g., a state or county), a particular waterbody or watershed, or a specific type of water of the United States (e.g., trout streams).

### **Proposed Nationwide Permits**

Proposed Nationwide Permits are presently identified by a letter. If issued, they would be placed at a reserved NWP number or given a new number. The six new proposed Nationwide Permits are: A) Residential, Commercial and Institutional Activities; B) Master Planned Development Activities; C) Stormwater Management Facilities; D) Passive Recreational Facilities; E) Mining Activities; and F) Reshaping Existing Drainage Ditches.

### NWP-A: Residential, Commercial and Institutional Activities

This NWP authorizes discharges into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, associated with residential, commercial, and institutional development activities. Authorized activities include: residential developments (multiple and single unit development for other than the personal residence of the permittee), commercial developments (such as retail stores, industrial parks, restaurants, business parks, shopping centers, and commercial recreational activities), and institutional developments (such as schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship). The construction activities may include grading; rechannelization; expansion of an existing development; building pads; soil erosion and sediment control measures; infrastructure such as utilities, roads, driveways, and sidewalks; and recreational activities associated with the development, provided that the construction activities meet the criteria listed in the NWP.

The activity cannot cause the loss of greater than three acres of non-tidal waters of the United States. NWP-A uses an impact index which authorizes varying maximum acreage loss dependent on the size of the parcel being developed. There are five categories of parcel size ranging from less than five acres to greater than 100 acres for which various maximum acreage losses are authorized varying from one-quarter acre to three acres.

### NWP-B: Master Planned Development Activities

This NWP authorizes discharges into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters associated with a comprehensively planned development which may include a combination of, but is not limited to, the following: residential housing, office parks, retail stores, restaurants, playgrounds, ball fields, golf courses, ponds, impoundments, community green space, parks, trails, soil erosion and sediment control measures, sewage and water treatment facilities, stormwater management facilities, and infrastructure such as utilities, roads, driveways, and sidewalks, provided that the activity meets the criteria listed in the NWP. The discharge related to the activity may not cause the loss of greater than ten acres of non-tidal waters of the United States. Like NWP-A, NWP-B uses an index of impacted acreage presented in the NWP as a chart.

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## (LONG ISLAND SOUND HABITAT)

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The intention of the Save the Sound project is to not duplicate the efforts of the Initiative. Rather, the Save the Sound project will complement and improve the Initiative effort by working at the grassroots level to assist those local governments and community groups that might not otherwise have the financial or personnel resources to undertake a habitat restoration project in their municipality. The end result will be increased grassroots support for habitat restoration and increased overall acreage and higher quality Sound habitats.

Save the Sound will also enhance the Initiative's efforts through its participation in Restore America's Estuaries (RAE)<sup>3</sup>. RAE is an alliance of eleven regional nonprofit conservation organizations that is working nationally to end estuary habitat loss and restore a sizable portion of estuary habitat nationwide by advocating for new legislation and increased funding for estuary protection. Each of the other ten RAE organizations is conducting a similar habitat restoration effort tailored to its particular estuary, and we are working closely with our partners in RAE to bring estuarine habitat preservation and restoration into the national forefront. A key component of this strategy was the introduction of the Estuary Habitat Restoration Partnership Act, a bill developed with the expertise of RAE member groups and sponsored by Senator John Chafee (R-RI) (see attached story).

The end result of this project and all other habitat restoration efforts will be a healthier Sound and a better informed citizenry. By involving a community in a habitat restoration project located in their own town, we will be able to establish a stronger connection between people and the impact that they can have on their environment. For more information, please contact Vic Pyle of Save the Sound, Inc. at the above referenced address.

Web links of interest:

Save the Sound, Inc. <<http://www.savethesound.org>>

Restore America's Estuaries (RAE) <<http://www.estuaries.org>>

Long Island Sound Habitat Restoration Initiative <<http://www.epa.gov/region01/eco/lis/restore.html>>

Pew Charitable Trusts <<http://www.pewtrusts.com>>

### Footnotes:

1 The Pew Charitable Trusts, a national and international philanthropy with a special commitment to Philadelphia, support nonprofit activities in the areas of culture, education, the environment, health and human services, public policy, and religion. Through their grantmaking, the Trusts seek to encourage individual development and personal achievement, cross-disciplinary problem solving, and innovative, practical approaches to meeting the changing needs of a global community. The opinions expressed in this article are those of the author and do not necessarily reflect the views of The Pew Charitable Trusts.

2 Habitat Restoration Team members: U.S. EPA Long Island Sound Office; Connecticut Department of Environmental Protection; New York State Department of Environmental Conservation; New York State Department of State; U.S. Fish and Wildlife Service; National Marine Fisheries Service; New York City Parks and Recreation Department; New York City Department of Environmental Protection; New York Sea Grant Extension Program; Save the Sound, Inc.; and Long Island Sound Study Citizen's Advisory Committee.

3 RAE Member Groups and the estuary they represent: American Littoral Society (Hudson/Raritan Estuary, NJ/NY); Chesapeake Bay Foundation (Chesapeake Bay, DC/MD/PA/VA); Coalition to Restore Coastal Louisiana (Louisiana Embayments, LA); Conservation Law Foundation and the Island Institute (Gulf of Maine, MA/ME/NH); North Carolina Coastal Federation (North Carolina Sounds, NC); People for Puget Sound (Puget Sound, WA); Save San Francisco Bay Association (San Francisco Bay, CA); Save the Bay (Narragansett Bay, RI); Tampa BAYWATCH (Tampa Bay, FL); Save the Sound (Long Island Sound, CT/NY); and the Galveston Bay Foundation (Galveston Bay, TX).

## LEAGUE OF WOMEN VOTERS RECEIVES GRANT FOR WETLANDS EDUCATION PROJECT

The Natural Resources Committee of the League of Women Voters of the Rochester Metropolitan Area has received a \$1000 grant from the LWV Education Fund (in partnership with the U.S. Environmental Protection Agency) to develop a wetland education project for grade school age children. The project includes an interactive model of a wetland that will demonstrate the functions and values of wetlands and the impact of human activities on the wetlands. The model will contain wetlands, houses, lawns, trees, roads, buildings, and a shopping mall. Sponges create the wetlands and water, powders and colored liquids are used to simulate rainfall and additives such as salt, fertilizers and pesticides. Children will be able to add or subtract buildings, and observe the impact on run-off. These impacts will demonstrate wetlands functions such as water holding capacity, absorption capacity, flood reduction, erosion control, sediment trapping and filtering, and wild life habitat. In addition brochures, which double as a discussion outline, were designed by League members. The display also contains a slide show of local wetlands; use of the slide show is optional since it will appeal more to older children and adults.

The Natural Resources Committee plans to take the model to environmental and conservation day programs, selected school activities focusing on environmental issues, Girl Scout and Boy Scout troops, and the Native American Resource Center. The display is available to other groups and organizations for educational purposes.

The League of Women Voters' interest in water resources dates back to 1956 when they undertook their first study of the topic; more recently the League studied and adopted a statement of position in 1997 regarding watershed protection of drinking water. For the past two years the National League of Women Voters Education Fund in partnership with the USEPA has funded projects designed to educate citizens (all ages), developers, and elected officials about wetlands.

For additional information or to make arrangements for a presentation of the wetland education program, please call the League of Women Voters at 717-262-3730 or Jane Schmitt at 716-334-0588.

### New Publication:

From the Chesapeake Bay Program: [Protecting Wetlands: Tools for Local Governments in the Chesapeake Bay Region.](#) [Protecting Wetlands II: Technical and Financial Assistance Programs for Local Governments in the Chesapeake Bay Region.](#) [Beyond Sprawl: Land Management Techniques to Protect the Chesapeake Bay.](#) For more information contact Lori Bouman at [bouman.lori@epamail.epa.gov](mailto:bouman.lori@epamail.epa.gov) or Jennifer Koss at [koss.jennifer@epamail.epa.gov](mailto:koss.jennifer@epamail.epa.gov). Chesapeake Bay Program Office; 1-800-YOURBAY; [www.chesapeakebay.net/bayprogram](http://www.chesapeakebay.net/bayprogram).

## CORPS OF ENGINEERS ISSUES GUIDANCE AFTER U.S. V. WILSON

The U.S. Army Corps of Engineers has decided not to ask the U.S. Supreme Court to review a December 1997 ruling by the U.S. Court of Appeals for the Fourth Circuit holding that the Corps exceeded its authority in trying to regulate isolated wetlands. A three-judge panel of the circuit court found in U.S. v. Wilson, 133 F.3d 251, (4th Cir. 1997), that the Corps does not have jurisdiction to regulate isolated wetlands unless it can demonstrate that the degradation or destruction of those wetlands could affect interstate commerce. The court held that a Corps' regulation that defined "waters of the United States" to include waters whose degradation "could affect" interstate commerce expanded the statutory definition of covered waters to include intrastate waters having nothing to do with navigable or interstate waters. Thus, the Fourth Circuit ordered a new trial for developer James Wilson and two partnerships convicted of Clean Water Act violations.

In a Guidance issued on May 29, 1998, the Corps and EPA addressed how it will approach the regulation of isolated wetlands in light of the Wilson ruling. Within the five states comprising the Fourth Circuit (Maryland, Virginia, West Virginia, and the Carolinas), the Corps and EPA will adhere to the holdings in the Wilson decision. At the same time, within the Fourth Circuit states, both the Corps and EPA will continue to assert Clean Water Act (CWA) jurisdiction over any and all isolated water bodies, including isolated wetlands, based on the CWA statute itself, where (1) either agency can establish an actual link between that water body and interstate or foreign commerce and (2) individually and/or in the aggregate, the use, degradation or destruction of isolated waters with such a link would have a substantial effect on interstate or foreign commerce. According to the Guidance, this approach addresses the concerns of the Fourth Circuit regarding jurisdiction.

According to the Guidance, the Wilson court produced legally binding holdings of law regarding only three matters: (1) the "criminal intent" that a judge and/or jury must find to convict any person of a criminal violation of the CWA, (2) whether the provision of the Corps regulation defining CWA jurisdiction over "isolated" water bodies (i.e., 33 CFR 328.3(a)(3)) is authorized by the CWA, and (3) the admissibility of expert testimony on legal interpretations. The United States believes that the Fourth Circuit's holdings of law on the first two issues were incorrect. In addition, the

Fourth Circuit's decision in the Wilson case is not binding outside the Fourth Circuit, and therefore will not be implemented outside the Fourth Circuit (i.e., outside the states of Maryland, Virginia, West Virginia, North Carolina, and South Carolina).

The focus of the Guidance, however, was limited to the issue of CWA jurisdiction. Further, the Guidance states its position that the discussions of two additional matters by two judges are nonbinding. These matters are: (1) whether the CWA authorizes the United States to assert jurisdiction over "adjacent" wetlands even if those wetlands do not have a direct or indirect surface connection to other waters of the United States, and (2) whether the CWA authorizes the United States to assert CWA jurisdiction over the "sidecasting" of dredged material into waters of the United States during ditching or dredging activities in waters of the U.S. Because no binding decision was reached on these matters, the Corps and EPA will continue to assert jurisdiction over adjacent wetlands and sidecasting activities consistent with our existing regulations and guidance (See Tulloch Rule Article, page 10).

The focus of the Guidance is the Fourth Circuit's holding in Wilson that ". . . we conclude that 33 CFR 328.3(a)(3)(1993) (defining waters of the United States to include those waters whose degradation 'could affect' interstate commerce) is unauthorized by the Clean Water Act as limited by the Commerce clause and therefore is invalid . . . ."

Although the Corps and EPA strongly disagree with this holding, the Guidance acknowledges that it must be implemented throughout the Fourth Circuit. Consequently, in the Fourth Circuit, neither the Corps nor the EPA will cite or rely upon 33 CFR 328.3(a) as the basis for asserting CWA jurisdiction over any area, until further notice. However, according to the Guidance, this change does not necessarily mean that either the Corps or the EPA will decline to assert jurisdiction over any aquatic area in the Fourth Circuit states, for the reasons explained below.

Pursuant to the Guidance, for any water body, including any wetland, that is part of, or flows into, or is a wetland adjacent to, a tributary system of traditional navigable waters or interstate waters, Corps and EPA should not cite 33 CFR 328.3(a)(3), but instead cite the relevant subsections of 33 CFR 328.3(a), such as subsection (a)(1) (covering traditional navigable waters); (a)(2)

(covering interstate waters); (a)(5) (covering tributaries to navigable or interstate waters); and/or (a)(7) (covering adjacent wetlands). Of course, outside the Fourth Circuit, if the Corps and/or EPA determines that a water body is in fact isolated and intrastate, then 33 CFR 328.3(a)(3) may be cited as the basis for CWA jurisdiction.

In addition to the above, the Guidance stated two "practical reasons" why EPA and the Corps prefer to assert and document CWA jurisdiction over an aquatic area as part of a tributary system to traditional navigable waters, or as wetlands adjacent to such a tributary system, rather than as an "isolated," intrastate water body under 33 CFR 328.3(a)(3). First, there is a more conclusive body of case law supporting CWA jurisdiction over an aquatic area based on that area's status as part of, or wetlands adjacent to, a tributary system to traditional navigable waters, rather than as isolated waters.

The second reason is a matter of ease of proof. When a water body is shown to be part of a tributary system to interstate or traditional navigable waters, that usually easily-established fact is sufficient to show that the water body can be regulated by the federal government under the commerce clause.

Under the Guidance, previously issued Section 404 permits authorizing discharges into isolated waters in the Fourth Circuit remain in effect as issued. The Corps and the EPA do not believe that the Fourth Circuit's decision in the Wilson case requires the Corps to modify such previously issued permits or to delete permit conditions requiring compensatory mitigation for activities in isolated water bodies, or to delete other permit conditions relating to such waterbodies. Moreover, to the extent that jurisdiction over isolated waters is established as identified above, no modifications to existing practice for normal compensatory mitigation or other permit conditions are necessary for permits issued in the future for activities in isolated water bodies.

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*Invitation and Call for Papers*

**New York and the Northeast Workshop**

# **Wetlands and Water Resources (Watershed) Management**

*Hosted by:*

**The Institute for Wetland Science and Public Policy  
The Association of State Wetland Managers  
New York State Wetlands Forum, Inc.  
Land Trust of the Saratoga Region  
Saratoga County Water Quality Committee  
Saratoga County Soil and Water Conservation District  
Saratoga County Environmental Management Council  
New York State Department of Environmental Conservation  
Adirondack Park Agency**

*Sponsored by:*

**U.S. Environmental Protection Agency, Region II**

*Other Cooperating Parties:*

(The following have indicated an interest but others will be added.  
Please contact us if you have an interest in being a cooperating party.)

**U.S. Environmental Protection Agency  
U.S. Army Corps of Engineers  
U.S. Fish & Wildlife Survey  
U.S. Geological Survey  
SUNY Syracuse College of Environmental Science and Forestry**

**November 3-4, 1998**

**Sheraton Saratoga Springs Hotel and Conference Center  
Saratoga Springs, New York**

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**Wetland Coordinator:** Dr. Jon Kusler, Institute for Wetland Science and Public Policy, Association of State Wetland Managers

**Workshop Goals:**

- Facilitate communication between local governments, federal and state agencies, nonprofit organizations, academic institutions, consultants, landowners, developers and others working with wetlands and watershed management in New York and the Northeast.
- Provide “how to” training and guidance to communities, agencies, and nonprofits, others with regard to wetland and watershed management including specific techniques and approaches.
- Help improve communication and reduce the gap between wetland/floodplain ecosystem management and water resources development/watershed management.
- Further integrate wetland and water resources management in the Saratoga Region.

**Registration Fee:** \$65.00. Scholarships will be available upon request to local governments, nonprofits, students, and others needing assistance.

**Call for Paper Topics:**

- Case studies of local government wetland and watershed management efforts
- Wetland assessment for water resources/watershed management and other purposes
- Wetland mapping and other information gathering in a watershed context
- Wetland restoration in a watershed context
- Wetlands and stormwater management
- Wetlands and floodplain management
- Wetlands and source water supply protection
- Wetlands and river corridor management
- Wetlands and lake protection
- Watershed management and wetland mitigation banking
- State wetland conservation planning and wetlands/watershed management
- Emerging technologies for wetlands/watershed management (GPS, GIS, Digital Imagery, etc.)
- Public education and outreach efforts
- Funding wetlands/watershed management efforts

**Submission of Abstracts:** Please submit an abstract of 50 to 100 words (see list of topics above) by September 1, 1998 if you are interested in presenting a paper at the workshop. We are looking for good “nuts and bolts” presentations.

**Exhibitors:** Exhibit space will be available at no charge. A limited amount of exhibit space is available, so please reserve early.

**Hotel:** The Sheraton Saratoga Springs Hotel and Conference Center is a luxury hotel in downtown Saratoga Springs with many amenities. Government room rates for the workshop will be \$53.00 for single occupancy and \$68.00 for double occupancy (plus tax). All speakers and attendees will be responsible for making their own reservations.

**Additional cooperating parties:** We are interested in having other groups, agencies and organizations join us. If you are interested, contact Jon Kusler, The Association of State Wetland Managers, P.O. Box 269, Berne, NY 12023-9746; (518) 872-1804; Fax: (518) 872-2171; e-mail: [aswmi@aol.com](mailto:aswmi@aol.com).

## (CAHILL – KEYNOTE SPEECH)

[Cont'd. from page 4]

offices of biologists in various agencies and organizations. I am optimistic about this new tool and invite you to share any ideas you have about it with Judy Stevens, our cartographer in the Bureau of Habitat. Judy is here with us today, so I encourage you to speak with her if you get the chance.

\* \* \*

Before I conclude, I'd like to take a moment to invite your feedback on one more important initiative. Two years ago, DEC received an EPA grant to develop water quality standards for wetlands. For the past year and a half, Tom Snow, in the DEC Bureau of Habitat, has been researching the efforts of other states in this area and evaluating our existing regulatory programs as the first step towards pursuing water quality standards for wetlands. We have formulated a concept that we will be bringing out to discuss with many of you later this summer. By late summer we expect to begin a series of informal meetings with interest groups and other stakeholders to test our ideas, get your feedback, and try to understand what this will mean for wetlands and stakeholders. This will be essential to providing information we'll need to refine our proposal. Tom will be speaking in more detail tomorrow in the regulatory update session, but I believe this initiative is important and wanted to address it with all of you at this time. I hope you'll help us in this new, important effort.

## WETLAND MEETINGS, ANNOUNCEMENTS, PUBLICATIONS

September 9, 1998. New York Planning Federation, Rochester New York. The New York State Wetlands Forum, Inc. will host a seminar about incorporating wetland resources information into community planning issues using case studies from municipalities and study areas in New York State.

Spring 1999. Building Conservation Partnerships with Indigenous Peoples in the Northeast. At SUNY College of Environmental Science and Forestry. Contact Jon Kusler for more information.

Second Week of June, 1999. Society of Wetland Scientists Annual Meeting, Norfolk Virginia. Downtown Marriott.

## INCIDENTAL FALLBACK OF DREDGE MATERIAL DOES NOT REQUIRE SECTION 404 PERMIT - "TULLOCH RULE" INVALID

— William S. Kibler, Esq., Bond, Schoeneck & King, LLP

### Background

Prior to 1993, the Corps of Engineers (the Corps) had taken the position that it lacked the authority to regulate activities in wetlands 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. 45008). The new regulations became known as the "Tulloch Rule." Under the Tulloch Rule, when draining involved some discharge, even if de minimis, and the result was a significant change to the water body, the Corps would regulate the de minimis discharge. "Incidental Fallback" is defined as the incidental soil movement from excavation, such as the redeposited material, including soil, that drops off a backhoe while removing soil from a wetland. Under the Tulloch Rule, the Corps regulated the incidental fallback of dredged material as a discharge.

In the Winter 1998 Issue of The Forum (Volume 5, No. 1), Kevin M. Bernstein explained the Tulloch Rule and reported on a case from the Federal District Court for the District of Columbia which invalidated the Tulloch Rule. See American Mining Congress v. U.S. Army Corps of Engineers, 951 F.Supp. 267 (D.D.C. 1997).

On June 19, 1998, the U.S. Court of Appeals for the District of Columbia Circuit upheld the District Court ruling, finding that the Corps of Engineers had exceeded its authority in regulating incidental fallback. See National Mining Association v. U.S. Army Corps of Engineers, \_\_\_ F.3d \_\_\_, 1998 WL 321064 (D.C. Cir. June 19, 1998).

The plaintiffs in the case before the Court of Appeals argued that the Tulloch Rule exceeded the Corps' statutory jurisdiction under Section 404 of the Clean Water Act. That section extends only to "discharge"; defined in the Clean Water Act as the "addition of any pollutant to navigable waters." 33 U.S.C. §§ 1344, 1362(12). Plaintiffs argued that fallback, which returns dredged material virtually to the same spot from which it came, cannot be said to

constitute the addition of material to the water. Therefore, the Tulloch Rule conflicted with the Clean Water Act's unambiguous terms and, as plaintiffs argued, should be invalidated.

The Corps of Engineers and the Environmental Protection Agency argued that fallback may be classified as a discharge under the terms of the Clean Water Act. The Clean Water Act defines a discharge as the addition of any pollutant to navigable waters and defines pollutant to include dredged spoil as well as rock, sand, and cellar dirt. 33 U.S.C. §§ 1362(6) and (12). The Corps of Engineers in turn defines dredged material as "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c). The Corps' definition of dredged material was not challenged as part of this action. Thus, according to the agencies, wetlands soil, sediment, debris, or other material in the waters of the United States undergoes a legal metamorphosis during the dredging process, becoming a pollutant for purposes of the Clean Water Act. If a portion of the material being dredged then falls back into the water, there has been an addition of a pollutant to the waters of the United States.

The Court of Appeals expressed skepticism regarding the agency's argument that wetlands soil, sediment, debris, and other material in the waters of the United States somehow undergoes a legal metamorphosis during the dredging process, rendering the dredged material a pollutant.

However, the Court of Appeals decision turned on the Court's interpretation of the statutory term "addition." The Court said:

We agree with the plaintiffs, and with the District Court, that the straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge.

National Mining Association, \_\_\_ F.3d \_\_\_, 1998 WL 321064, \*4. The Court held that the removal of dredged material from the waters of the United States, as opposed to discharges, is governed not by the Clean Water Act, but by the Rivers and Harbors

[Cont'd. page 11]

## HUD PROPOSES WETLAND RULE

On June 2, 1998, the Department of Housing and Urban Development (HUD) issued a proposed rule to codify policies and procedures to avoid the long and short term adverse impacts associated with the destruction or modification of wetlands and to avoid direct or indirect support of new construction in wetlands wherever there is a practicable alternative. 63 Fed. Reg. 300045.

The procedures would apply to HUD and certain State and local responsible entities before their respective decisions to approve a proposed action that involves HUD financial assistance and that would affect a wetland. The wetland procedures would be incorporated into HUD's existing floodplain management regulations.

The rule proposes several other changes to HUD's regulations that govern floodplain management and that would also govern the protection of wetlands. These include, among others, broadening the use of the abbreviated four-step decision making process used by HUD and responsible entities when considering the impact on floodplains in connection with the repair of existing structures. Specifically, the rule proposes to authorize the use of the abbreviated process for all of HUD's rehabilitation programs, not just for repairs financed under its mortgage insurance programs. This rule would also add a requirement that, for residential new construction in a 100-year floodplain, an applicant must secure a final Letter of Map Amendment or final Letter of Map Revision as a condition for approval of HUD financial assistance.

Comments regarding this proposed rule can be submitted, by August 3, 1998, to the Regulations Division, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500. For further information, contact Richard H. Broun, Director, Office of Community Viability, Office of Community Planning and Development, Department of Housing and Urban Development, Room 7240, 451 Seventh Street, SW, Washington, DC 10410-7000. For inquiry by phone or e-mail, contact Walter Prybyla, Deputy Director for Policy, Environmental Review Division at (202) 708-1201, Ext. 4466 or e-mail: [Walter\\_Prybyla@hud.gov](mailto:Walter_Prybyla@hud.gov).

## THE ESTUARY HABITAT RESTORATION PARTNERSHIP ACT (S. 1222)

— Vic Pyle, III; *Habitat Restoration Project Manager*

Senator John Chafee (R-RI) introduced Senate Bill 1222: The Estuary Habitat Restoration Partnership Act on September 25, 1997, calling it "an essential ingredient to our ability to succeed in preserving and restoring America's estuaries." The Act recognizes that restoration of habitats is a critical part of any coordinated effort to restore and protect our coastal heritage. Among other things, the bill helps coordinate existing planning efforts and build a strong commitment to community driven restoration efforts. It also offers a model for streamlined public and private sector cooperation and partnerships and provides increased funding resources for restoration.

The Bill would help build a strong commitment to restoration by making estuarine restoration a high national priority; dedicating new resources to increase habitat acreage; building effective public-private partnerships to leverage scarce resources; continuing to encourage cooperation and coordination among federal, state, and local agencies and citizen groups; and enhancing and learning from existing programs and restoration work.

Voluntary restoration efforts will be funded and driven from the community up with a 25% to 65% funding match requirement based on a community's needs and

available resources. This approach will leverage scarce federal funding and build the kinds of partnerships that will bring new vigor to restoration efforts nationwide, resulting in up to \$10 of on-the-ground restoration for every \$1 in federal funding.

The legislation currently has 26 co-sponsors, including half of the New Hampshire delegation and the entire Senate delegations of Virginia, Maryland, New Jersey, New York, Connecticut, and Rhode Island. The fact that the Bill is co-sponsored by a majority of the fifty Senators certainly bodes well for its potential to become law, but we need your grassroots support to make it happen. For those of you who live and work in Pennsylvania, West Virginia, Delaware, Maine, New Hampshire and Vermont, please contact your Senators and urge him or her to co-sponsor and support this important piece of legislation!

More in-depth information about the estuary habitat restoration legislation can be found on the RAE web site <<http://www.estuaries.org/legpg1.html>> or at the Library of Congress THOMAS web site <<http://thomas.loc.gov/>>. If you do not have access to the Internet, please contact Vic Pyle of Save the Sound, Inc. at 1-888-SAVE-LIS (1-888-728-3547).

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### (INCIDENTAL FALLBACK)

*[Cont'd. from page 10]*

Act of 1899. The Court of Appeals also rejected the Agency's argument that the Court's ruling would block the regulation of discharged dredged material. The Court said dredged material discharges continued to be properly regulated under the Clean Water Act. The Court reasoned that fallback of material to essentially the same place from which it was withdrawn is fundamentally different from discharging dredged material to some location other than the waters from which it was dredged.

The Court of Appeals also upheld the injunction granted by the District Court. The injunction prevents the Corps from applying the Tulloch Rule and requiring permits associated with the Tulloch Rule. The Court of Appeals ruled that the District Court acted within its discretion in issuing a nationwide injunction against the Tulloch Rule requirements.

The Corps of Engineers and EPA officials are reported to be studying the decision of the Court of Appeals to decide whether to appeal the ruling to the U.S. Supreme Court.

## **(CORPS NWP26 REPLACEMENTS)**

*[Cont'd. from page 5]*

Unlike NWP-A, NWP-B is limited to authorizing those activities that are mixed-use in nature. NWP-B is intended to be consistent with increasing nationwide efforts by counties and local municipalities to encourage mixed-use development and to motivate land use planning alternatives that incorporate consideration of the environment.

### NWP-C: Stormwater Management Facilities

NWP-C authorizes discharges of dredged or fill material into non-Section 10 waters of the United States, including wetlands, for the construction and maintenance of stormwater management facilities, including activities for the excavation of stormwater ponds/facilities, detention and retention basins, installation and maintenance of water control structures, outfall structures and emergency spillways, and the maintenance dredging of existing stormwater management ponds/facilities, and detention and retention basins provided that the activity meets the criteria listed in the NWP. The construction of new stormwater management facilities may not cause the loss of greater than two acres of non-tidal wetlands.

### NWP-D: Passive Recreational Facilities

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, for the construction or expansion of passive recreational facilities, provided that the activity meets the criteria listed in the NWP. The activity may not cause the loss of greater than one acre of non-tidal waters of the United States, including non-tidal wetlands. A passive recreational facility is defined as a low impact recreational facility that is integrated into the natural landscape and consists primarily of open space that does not substantially change pre-construction grades or deviate from natural landscape contours. The primary function of passive recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces. Examples of passive recreational facilities that may be authorized by this NWP include: hiking trails, bike paths, horse paths, nature centers, and campgrounds, excluding trailer parks. The construction or expansion of golf courses and ski areas may be authorized by this NWP, provided the golf course or ski area does not substantially deviate from natural landscape contours and is designed to minimize adverse effects to waters of the United States and riparian areas through the use of such practices as integrated pest management, adequate stormwater manage-

ment facilities, vegetative buffers, reduced fertilizer use, etc.

### NWP-E: Mining Activities

This NWP authorizes discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters for aggregate mining and hard rock metal/mineral mining activities, including exploration, excavation, dredging, processing, stream relocation and/or diversion, overburden disposal stockpiling, mechanized land clearing, mined land reclamation, and support activities, provided the discharge meets the criteria established in the NWP. NWP-E includes separate standards for activities conducted in lower perennial riverine systems, intermittent and ephemeral streams, intermittent and small perennial stream relocations, isolated wetlands and wetlands above the ordinary high water mark in non-Section 10 waters, intermittent and small perennial stream relocations, isolated wetlands and wetlands above the ordinary high water mark in non-Section 10 waters, dry washes and arroyos, and support activities.

### NWP-F: Reshaping Existing Drainage Ditches

NWP-F authorizes discharges of dredged or fill material into non-Section 10 waters of the United States to modify the cross-sectional configuration of existing serviceable drainage ditches constructed in non-Section 10 waters of the United States. No compensatory mitigation is required if the work is designed to improve water quality. The reshaping of the ditch cannot increase drainage beyond the original project boundaries or expand the area drained by the ditch as originally designed. This NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the United States or to the maintenance of existing drainage ditches to their original dimensions and configuration, which does not require a Section 404 permit. See CFR Section 323.4(a)(3).

### NWP-3: Maintenance

The Corps has proposed several modifications to NWP-3.

Paragraph (i) of the proposed modification authorizes the same activities as the presently existing NWP-3.

Paragraph (ii) of the proposed modification will authorize the removal of accumulated sediments from streambeds and other open water areas in the vicinity of existing structures, such as bridges and culverted road crossings. This modification also authorizes the placement of riprap to protect the structure from scour.

Paragraph (iii) of the proposed modification will authorize discharges of dredged or fill material for the purpose of restoring uplands adjacent to waters of the United States where those uplands have been damaged by discrete events, such as floods or storms. The purpose of this modification is to allow the reconstruction of shorelines, riverbanks, and other lands adjacent to open water areas to the extent and contours that existed prior to the damaging event.

### NWP-7: Outfall Structures and Maintenance

The Corps proposes to modify NWP-7 to authorize the removal of accumulated sediments from outfalls, intakes, and associated canals. All of the original terms and limitations of NWP-7 are retained in the proposed modification to NWP-7. This NWP will not authorize the construction of new canals or the removal of sediments from the headwaters of large dams, flood control facilities or large reservoirs. These types of work may be authorized by individual permits, regional general permits, or other NWPs, such as NWP-19 or 31.

### NWP-12: Utility Activities

The proposed modification of NWP-12 will include the following construction activities commonly associated with utility lines: electric and pumping substations, foundations for electric utility line towers, and permanent access roads. Currently, NWP-12 authorizes only utility line backfill and bedding activities. All the original terms and limitations of NWP-12 have been retained with some clarification in the proposed modification.

Paragraph (i) of the proposed modification authorizes the same activities as the presently existing NWP-12.

Paragraph (ii) authorizes discharges associated with the construction or expansion of electric or pumping substations provided the discharge does not cause the loss of more than one acre of non-Section 10 waters of the United States, including wetlands contiguous to Section 10 waters.

Paragraph (iii) authorizes discharges for foundations of utility line towers, poles, and anchors.

Paragraph (iv) would authorize discharges for construction and maintenance of permanent access roads which would be used to maintain the utility line, especially in emergency situations.

### NWP-14: Linear Transportation Crossings

The Corps proposes to modify NWP-14 to authorize discharges of dredged and fill material into non-tidal waters of the United States, excluding non-tidal wetlands contiguous to tidal waters, for the construction,

*[Cont'd. page 15]*

## (MESSAGE FROM THE CHAIR)

[Cont'd. from page 1]

Externally, the Forum Board of Directors wants to reach out to a more diverse group of individuals involved in wetlands, while still providing important and timely information to our core membership. We are a co-sponsor of the New York Planning Federation's 1998 Annual Meeting (September 14-16) in Rochester, and Diane Kozlowski has organized a group of sessions on wetland regulation and mitigation for Wednesday, the 16th. We will also have a booth at the meeting so that planners and local government officials can learn about the Forum. We are also co-sponsors of a Wetlands and Watershed (Water Resource) Management meeting this fall being coordinated by Jennifer Brady-Connor of the Saratoga Land Trust and the Association of State Wetland Managers. An invitation and call for papers is in this newsletter with the contact information.

You'll also notice a letter from Roland R. Vosburgh, Director of the Columbia County

Planning Department in this newsletter. We will continue to encourage the expression of diverse viewpoints about wetlands both in the Forum newsletter and at meetings, and encourage you to write or speak.

Finally, a lot of thought went into the theme for the 1999 Annual Meeting, "Balancing Wetland Interests." The meeting is designed to look at the various factors which are balanced in wetland management (science, economics, and policy) and will also provide a mix of information within these fields to participants. A majority of responses to the 1998 Annual Meeting questionnaire expressed interest in learning about economics as it relates to wetlands. From my perspective, economics has become an important factor not only in the wetland permitting arena but also in the allocation of financial resources for research and preservation/conservation planning. Environmental and economic issues go hand-in-hand, and in order for there to be intelligent and thought-

ful discussions on wetland management and regulation, a groundwork of knowledge about economics must be laid. Still, there were a number of respondents to the annual meeting survey who did not want to have an annual meeting devoted to economics. For those individuals there will be a number of sessions which focus on wetland science and wetland policy.

Please contact me or any of the other Board members if you would like to volunteer to help, if you know of someone else who you think should help (and you want to volunteer them (how sinister - I like it)), or if you have a good idea or some interesting information. I can be reached through the Association's Offices, through the Forum's e-mail or my own at BeallBB@aol.com or by telephone at 518-587-8100 (work). I look forward to hearing from you.

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## SUMMARY OF THE REGULATORY AND LEGISLATIVE UPDATE SESSION AT 1998 FORUM ANNUAL MEETING

**Joseph Seebode, Chief, Regulatory Branch, New York District Army Corps of Engineers**

### Regulations and Nationwide Permits

Discussed seven topics related to policy and legislative actions for 1998: Nationwide permits (NWP) State Programmatic General Permits (SPGPs), Regional General Permits (RGPs), Administrative Appeals, Wetland Delineator Certification Program (WDCP), Wetland Mitigation Banking, and Watershed Management.

Nationwide Permits: Friday, December 13, 1996, there were 39 new nationwide permits issued, with significant changes and reductions in NWP 26, 12, 14, as well as authorizing fills for single family homes, changing Preconstruction Notice (PCN) requirements, and other special condition changes. On December 12, 1998, Nationwide Permit 26 will expire. New nationwide permits are anticipated to be published this month or next in the Federal Register. If you wish to be on the mailing list for the Corps public notice, contact Mr. Seebode. There will be a public hearing on the nationwide permit program in Albany in May or June. In May of 1997, the Corps

undertook an information gathering process to look at the impact of nationwide permit use. It was determined that 85% of nationwide use could be identified in 9 categories. 26% was for residential, 20% was for transportation projects, 8% was for retail and industrial uses, 8% was for stormwater, and 5% was for agricultural activities. This data provided the basis for the new NWP regulatory program. NWP 26 was placed into a series of 16 categories, such as residential, commercial development, master plan development, linear projects, stormwater management, mining, agriculture, stream restoration. Each category has its own specific details and size allowances and notification requirements. The Public Notice will be out in the federal register within the next 3 to 4 weeks. The goal is to have the new NWP program in place before the sunset date of December 13, 1998.

### SPGP and Regional General Permits:

There are 5 ongoing initiatives. Marina districts, utilizing Article 15 review for docks, piers, and bulkheads to minimize impacts to navigational issues and the environment. It is anticipated this SPGP will be issued later this year or early next year. The APA SPGP is still under discussion, with a notice anticipated in late summer or fall for public comment. The Sacandaga Lake SPGP is looking to authorize small activities in the lake for dredging, beach and shoreline restoration. A NYC/NYS SPGP is being proposed for fish enhancement and

stream bank protection where timely authorizations are beneficial and there are limited impacts. A regional SPGP is out on public notice for allowing activities to protect properties or streams which were impacted from the damage from the ice storm and flooding. The Regional General Permit will be issued this month or next month.

Administrative Appeals Process: This would provide the opportunity for the development community to appeal wetland delineations not property responsive or adverse permit decision. There is funding for this program in the 1998 budget but the Corps cannot execute the program now since they are waiting for OMB approval. The Corps will publish a final rule in the federal register in the fall, with implementation in the winter. This process would establish an independent person in the division or district office to review appeals brought forward to the District.

WDCP: There is no funding in the FY 1998 budget for the program. It is scheduled to be included in the 1999 budget, and the program may be implemented as early as October 1, 1998. This also needs final rule making in the federal register.

Wetland Mitigation Banking: This is an up and coming feature in the wetland regulatory program. It allows for the development of large scale wetland enhancement and restoration projects to credit small development projects with difficult mitigation

[Cont'd. page 15]

# CALL FOR PAPERS

## “BALANCING WETLAND INTERESTS”

### NEW YORK STATE WETLANDS FORUM, INC - 1999 ANNUAL SPRING MEETING SYRACUSE OR UTICA, NEW YORK

Balancing policy, science and economics in the preservation, management and/or regulation of wetlands. Presenting a variety of wetland topics of interest to different shareholders. This will be the dual focus of the 1999 Annual Meeting of the New York State Wetlands Forum, Inc. Potential Session Topics include but are not limited to:

<b>Science</b>	<b>Policy</b>	<b>Economics</b>
Hydric Soil Development	Property Rights vs. Public Need	Economics 101
Assessing Mitigation Success	Wetland Takings Transportation/ Utility Infrastructure	Economics in Permit Decisions
Wetland Functions and Values	Development vs. Protection	Weighing Public Interest Benefits
New Delineation Issues	Status and Trends in NYS	Economics in Alternatives Analyses
Intermittent Streams vs. Wetlands		Funding Sources for Wetland Protection
Stormwater and Sediment Impacts		
Habitat Restoration		
Reference Wetlands Developments		

Authors wishing to make a 20-minute presentation at this meeting should submit an abstract, and a submission form for consideration to the Program Chair BY NOVEMBER 1, 1998. Submittals can be typed, on computer disk (MS Word) or by e-mail to nywf@capital.net.

#### ABSTRACT CONTENT AND STYLE

Typed abstracts submitted for consideration must include the title, author(s), address(es) and abstract description of the topic in 250 words or less in the following format:

**TITLE.** Author and Author’s address, phone number, fax number, e-mail address.

List the author’s full first and last names. In cases of multiple authors, superscripts should be used to identify the authors with their affiliations and addresses. The name of the presenter must include the phone and fax number and any e-mail address along with the mailing address. Skip one line and then type the abstract. Abstracts, in 250 words or less, must describe the study or topic in detail yet be concise. Scientific names, in italics, should be used the first time an organism is mentioned, followed by the common name in parentheses.

#### Abstract Submission Form 1999 Annual NYSWF Spring Meeting

Contact Person \_\_\_\_\_ Affiliation \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ Fax \_\_\_\_\_ E-Mail \_\_\_\_\_

Session Topic \_\_\_\_\_

Is your organization interested in being an exhibitor?      \_\_\_\_\_ Yes      \_\_\_\_\_ No

*Mail to: New York State Wetlands Forum, Inc., P.O. Box 1351, Latham, New York 12110-1351*

## (SUMMARY)

[Cont'd. from page 13]

issues. Many entrepreneurs have approached the Corps and the state, and as a result the Corps has reopened discussions with the NYSDEC and others at the state level to pursue this issue. There are many concerns with mitigation banking that need to be resolved, these include: goals, site selection criteria, operation, credit policies, establishment and use process, preferred development options, (tidal/freshwater forested or open marsh), along with long term management

and strategies and construction management practices.

**Watershed Management:** Regarding the Clean Water Action Plan, regulations, money, and policy perspectives can all be used to increase wetland resources. The Corps is looking at methods to reduce impacts, increase protections, and thereby increase the amount of wetlands. For example, Special Area Management Plans (SAMPs) can be used in areas under significant development pressures to establish comprehensive land use plans, and identify appropriate protection plans. In New York

District, this process was used to help develop the Hackensack Meadowlands SAMP. Other states such as Maryland, Florida, Texas, Oregon, Michigan and Minnesota have state plans coming together to use land use tools to protect wetlands through preservation, protection, mitigation banking, transfer of development rights, and also streamline review process for minor projects through RGPs in other areas. The New York Corps District intends to use this process more often, such as the RGP for Sacandaga Lake.

## (CORPS NWP26 REPLACEMENTS)

[Cont'd. from page 12]

expansion, and improvement of public linear transportation crossings for public projects such as roads, railroads, and runways. For private linear transportation crossings and for public linear transportation crossings in tidal waters or non-tidal wetlands contiguous to tidal waters, such as a controlled-access road to an industrial site, or the construction of a private road leading to a residence, the original terms and limitations of NWP-14 will be retained.

### NWP-27: Stream and Wetland Restoration Activities

The Corps is proposing to modify NWP-27 to add the restoration and enhancement of streams to the wetland and riparian enhancement authorized by the existing NWP-27. The modified permit would authorize projects that would enhance, restore or create structural habitat features, hydraulics, and vegetation in altered and/or degraded non-Section 10 streams and non-tidal wetlands. The intent of this permit is to facilitate the restoration of degraded or altered streams and wetlands. This NWP cannot be used to authorize activities for the conversion of natural wetlands or streams to another aquatic use such as the impoundment of a stream for waterfowl habitat. No activities or discharges not directly related to the restoration of ecological values or aquatic functions may be authorized by this permit.

### NWP-40: Agricultural Activities

The Corps proposes to modify NWP-40 to authorize the discharge of dredged or fill material into non-tidal waters of the United States, including non-tidal wetlands, for the purpose of improving production on existing agricultural lands. In addition to the construction of foundations and building pads for farm buildings currently authorized by NWP-40, the proposed modification to NWP-40 may be used to authorize the

installation or placement of drainage tiles, construction of drainage ditches or levees, mechanized land clearing, land leveling, and similar activities. The discharge may not cause the loss of greater than 3 acres of non-tidal wetlands. To determine the maximum allowable loss under NWP-40, the Corps proposes using an index of impacted acreage organized according to the size of the farm at which the discharge will occur.

### **Discussion of Nationwide Permit Conditions**

The Corps proposes modifying former Section 404 Only Condition 6 by changing its title from "Obstruction of High Flows" to "Management of Water Flows" and modifying it to require that neither upstream nor downstream areas are more than minimally flooded or dewatered after the project is completed. In addition to the standard NWP condition for endangered species, the Corps has required regional conditions and activity-specific conditions to address specific endangered species. The Corps proposes modifying other conditions and consolidating the General and Section 404 Only NWP Conditions into the single list.

The Corps proposes to modify seven existing NWP General Conditions (9, 13, 16, 19, 20, 21, and 22).

General Condition 9 - The Corps proposes to change the name of this condition from "Water Quality Certification" to "Water Quality." The Corps further proposes to modify this condition to require, for Nationwide permits 12, 14, 17, 18, 21, 32, 40, A, B, C, D, and E, a water quality management plan if one is not already required as part of Clean Water Act Section 401 Certification.

General Condition 13 - Notification. The Corps is proposing to require notification to the District Engineer for all the proposed NWPs based on varying thresholds of impact, generally one-third of an acre of impacted wetland.

General Condition 16 - Subdivisions. The Corps is including a condition in the proposed Nationwide Permits similar to the subdivision clause of presently existing Nationwide Permit 26, which prohibits the use of NWP-26 for real estate subdivisions created after October 5, 1984 where new discharges of dredged or fill material into waters of the United States in the subdivision would cause the upper acreage limit of NWP 26 to be exceeded. The Corps proposes including a similar clause for NWPs A and B. The purpose of this condition is to prevent the subdivision of property as a means of getting around the acreage limits of NWPs A and B.

General Condition 19 - Suitable Material. The Corps proposes modifying this general condition by inserting the words "used for construction or" between "material" and "discharged." This change is made to ensure that materials used for structures or work in navigable waters of the United States are suitable.

General Condition 20 - Mitigation. The Corps is proposing to modify this general condition to require restoration, creation, enhancement, or preservation of aquatic resources to offset losses of functions and values due to authorized impacts. This condition will no longer allow a District Engineer to approve a compensation plan in lieu of on-site minimization or avoidance measures.

General Condition 21 - Spawning Areas. The Corps proposes adding a sentence to this condition to prohibit activities that fill or excavate important spawning areas.

General Condition 22 - Management of Water Flows. The Corps proposes changing the title of this condition from "Obstruction of High Flows" to "Management of Water Flows" and modifying it to require that permittees design their projects to maintain pre-construction downstream flow conditions.

## (CORPS NWP26 REPLACEMENTS)

[Cont'd. from page 15]

The Corps is also proposing to include definitions for some terms used in the NWP's.

### **PUBLIC COMMENT AND HEARING**

Comments on proposed new and modified NWP's and the proposed modification of NWP 29 must be received by the Corps by August 31, 1998. Comments on the proposal to extend the expiration of NWP 26 to March 28, 1999 must be received by the Corps not later than July 31, 1998. Comments may be sent to Headquarters, United States Army Corps of Engineers, Attn: CECW-OR, Washington, D.C. 20314-1000.

In addition to seeking comments on the proposed new and modified NWP's, the

Corps is soliciting comments on the following general issues related to the proposed NWP's: the scope of the new NWP's, acreage limitations and PCN thresholds on the proposed NWP's, assessing cumulative impacts on a watershed basis; and regional conditioning of the NWP's. The Corps is also seeking comments on other issues related to the NWP's such as maintenance of landfill surfaces, maintenance and filling of ditches adjacent to roads and railways, maintenance of water treatment facilities, the use of mitigation banks in the NWP program, and the expansion of NWP 31.

Regional public hearings on the proposed new and modified NWP's will be held in

New York City on August 10, 1998, from 12:30-4:30 p.m., at 26 Federal Plaza, Room 3604; in Albany on August 11, 1998, from 1:30-5:30 p.m., at 80 Wolf Road (not a typo), Room 404; in Buffalo on August 19, 1998, at 7:00 p.m., at Erie Community College, North Campus; and in Weedsport on August 20, 1998, at 7:00 p.m., at Weedsport High School. A national public hearing will be held in Washington, D.C. on August 19, 1998, from 10:00 a.m. to 4:00 p.m. at the National Guard Association Building, 1 Massachusetts Avenue, N.W.

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