

# The Forum

NEW YORK STATE WETLANDS FORUM NEWSLETTER

## MESSAGE FROM THE CHAIR

— *Barbara B. Beall, The LA Group*

This has been a very busy summer for everyone. I, for one, have been swamped. That was a cheap pun, but who can resist senseless wetland humor?

The Board has also been busy. Thanks to the efforts of Diane Kozlowski, we hosted a very interesting session at the New York Planning Federation's annual meeting in Rochester, New York this September. Sandra Doran of the Buffalo District US Army Corps of Engineers spoke on the federal wetlands regulatory program. Jim Smith, Supervisor of the Town of Perinton discussed many of the innovative land use planning efforts the town is using to preserve open space, including wetlands. Jim Howe of the Central and Western New York Office of the Nature Conservancy presented a case study of an in-lieu fee payment for wetland losses which was used to preserve unique and rare wetland ecosystems on eastern shore of Lake Ontario. And Joe McMullen of Terrestrial Environmental Services presented on wetland restoration and creation.

In November, the Forum helped co-host the Workshop on Watersheds and Wetlands. Jennifer Brady-Connor (who now works for ASWM) and Jon Kusler are to be congratulated for an excellent meeting with thought-provoking sessions. The Forum also now has an "official" display and a membership brochure, big steps for an organization run by volunteers.

We are in the process of organizing our Annual Meeting to be held March 24<sup>th</sup> and 25<sup>th</sup> 1999, at the Hotel at Exit 37 of the New York State Thruway in Liverpool, New York. The theme of the meeting is "Balancing Wetland Interests, Economics, Policy, and Science," chosen because all three of these focuses are important to wetland management, and because the survey results from the 1998 meeting indicated the membership wanted a diverse array of wetland issues. Scientists, policymakers and developers should all be pleased. Consider

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## CORPS MODIFIES PROPOSED NWP26 REPLACEMENTS; NEW YORK AND BUFFALO PROPOSE REGIONAL CONDITIONS

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

### Introduction

On July 1, 1998, the Corps of Engineers (the Corps) issued public notice of proposed modifications to the Nationwide Permit (NWP Program). The Corps proposed issuing six new NWPs and modifying six others. The Corps also proposed adding one new NWP condition and modifying six existing NWP conditions which will apply to all new and existing Nationwide Permits.

Please refer to the Summer 1998 issue of *The Forum* (Volume 5, No. 1) for a detailed report on the Corps' proposed replacements to NWP 26.

### Modifications to Proposed NWP-26 Replacements

On October 14, 1998, the Corps modified its proposed changes to the NWP Program as published on July 1, 1998.

In its October 14 Notice, the Corps withdrew proposed NWP B, which would have permitted certain discharges associated with master planned developments. The Corps proposed limiting the use of certain NWPs within the 100 year floodplain of Waters of the United States. Insurance maps published by the Federal Emergency Management Agency will be used to identify the extent of 100 year floodplains. The Corps also proposed limiting the use of NWPs in designated critical resource waters and impaired waters.

The changes are proposed to take place when the presently existing NWP-26 expires on September 15, 1999. The existing NWPs, with the exception of NWP-26, will remain in effect until they expire on February 11, 2002.

### Buffalo District Regional Conditions

Corps of Engineers districts are authorized to issue regional conditions tailored to the issues related to the aquatic environment within each district. Corps regional conditions may cover a large geographic area (e.g., a state or county), a particular water body or watershed, or a specific type of

Water of the United States (e.g., trout streams). The Buffalo District of the Corps of Engineers has regulatory authority for Corps programs covering the 31 counties in central and western New York which coincide with New York State Department of Environmental Conservation (NYSDEC) Regions 6 through 9. The New York District has regulatory authority over the remaining counties of New York State corresponding with NYSDEC Regions 1 through 5.

The Buffalo District has proposed regional conditions affecting 11 NWPs. The proposed regional conditions include increased notification requirements, requirements for vegetated buffer zones and compensatory mitigation, and a bar against any loss of bogs, fens, or vernal pools.

Under the proposed Buffalo District Regional conditions, NWP A (Residential, Commercial, and Institutional Activities) would not apply to the New York Coastal Zone, to Cross Lake, or to adjacent areas of the Seneca River. Any loss of one to three acres of freshwater wetlands would require a wetlands functional assessment.

NWP C (Stormwater Management Facilities) may be partially revoked in the Buffalo District: (a) to exclude new stormwater facilities; and (b) to limit impacts of maintenance of existing facilities to one acre or less.

NWP D (Passive Recreational Facilities) may be partially revoked to exclude golf courses or ski resorts. Additionally, under NWP D parking facilities must have permeable surfaces. Compensatory mitigation will be required and impacts will have to be avoided or minimized to the maximum extent possible.

Under NWPs A and D notice must be given to the District Engineer for work affecting any of several waters listed by the Buffalo District. Additionally, no discharges below the ordinary high water mark will be

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## New York State Wetlands Forum

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### Mission:

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

## LETTERS TO THE EDITOR

The Forum, and many others, received this e-mail from Great Lakes United New York Habitat Watch, August, 1998 in response to the Forum's Letter to the Editor from Roland Vosburgh, Director, Columbia County Planning Department.

“OPPORTUNITY TO RESPOND TO WETLANDS PUT DOWN: Roland Vosburgh, a land planner from Columbia County's New York Planning Department has voiced his opinion concerning public policy issues regarding wetlands in the Spring 1998 issue of “The Forum” – a newsletter of the New York State Wetlands Forum. The following is excerpted verbatim from Vosburgh's letter (with permission from the NYSWF).....The content of the letter indicates how far we still have to go in educating municipal leaders and land planners about the social and environmental importance of wetland and riparian systems. Kevin Bernstein, editor of “The Forum” would like to make the “Letters to The Forum” a regular and vital feature of the newsletter. Bernstein highly encourages the contribution of commentary on wetlands science or policy, and reactions to previous articles or letters. Contact Kevin at [bernstk@bsk.com](mailto:bernstk@bsk.com).

**Mr. Vosburgh's Response:** Regarding Great Lakes United's last comment about the need to educate municipal leaders and land planners about wetlands, I have a Bachelors of Science in forestry from SUNY College of Environmental Science and Forestry, and a Masters of Science from the University of Massachusetts also in forestry. While at the University of Massachusetts, I was contracted as an aerial photo-interpreter to map wetlands for the NWI mapping project. This work involved wetland field verification. My Master thesis studied the correlation between the hydrology of Lake Champlain and the growth of red and silver maples.

Since leaving school, I have worked for Columbia County, first as a staff person for the Environmental Management Council, and then as the Director of the Columbia County Planning Department. I keep informed of wetland issues through attendance at a variety of wetland workshops and meetings. I am a member of the Forum because it is important to bringing local planning perspective to these meetings. I also believe that I have an adequate level of knowledge about wetland science and policy on which to base the comments in my previous letter.

Having worked in the Columbia County Planning Department, and given my background in science and wetlands, my letter was attempting to express the perspective of local governments. I understand first-hand applicants' frustration about the complexity of the federal and state regulatory processes. As a planner, I must seek answers to the questions: “Are all wetlands equally valuable? Should all wetlands be preserved for all time? Wetlands are dynamic ecosystems...why are nature's changes acceptable, yet human-induced changes unacceptable?”

Based on my training and hands-on experience in wetland mapping, it is my opinion that an adequate argument has not yet been made that every wetland needs to be preserved and protected. I also believe that wetland public policy should be initiated by legislation not by regulation, something that seems to occur regularly in the federal and state programs. I am not an advocate of filling wetlands wholesale, but I am looking for a rational dialog about wetland protection and management that will encourage both sides to come to the table.

### 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).

# WETLAND PRESERVATION THROUGH OPEN SPACE PLANNING

— Excerpts of a presentation by James E. Smith, Supervisor, Town of Perinton

In the Town of Perinton, we look at open space preservation and ask ourselves, “How important is open space and how dedicated will we be to its preservation? When our grandchildren inherit this Town, what will it be? Border-to-border development or a reasonable mix of preserved open spaces and appropriate development.” We have decided that open space preservation including wetland preservation is important.

Perinton lies approximately 8 miles southeast of Rochester in Monroe County, is 35 square miles in area, and was the fastest growing suburb in Monroe County during the 1960s and 1970s. Our population in 1960 was 16,000, and is currently 45,000, and we issue approximately 200 permits for new dwellings a year. It was that development pressure which led to the adoption of various open space preservation laws.

In developing our open space plan, the Town of Perinton’s Conservation Board conducted several inventories of the Town to map and understand the existing natural features of the available open space. The Town then adopted a land use plan that included various land use tools such as Conservation Easements, Acquisition, Environmental Preservation Overlay Districts (EPODs) and Incentive Zoning to encourage open space preservation.

**Conservation Easements:** The Town of Perinton’s Conservation Easement law is based on Section 247 of the New York General Municipal Law, which allows a locality to “acquire by grant the easement to land within such a municipality...for the preservation of open spaces and areas...which would maintain or enhance the conservation of natural or scenic resources.” When a landowner grants a conservation easement to the town they agree to retain the character of the land and not develop it for the duration of the Conservation Easement. The private landowner does not have to allow public access or give up any of his long-term development rights. In return, the Town assesses the land at a rate that takes into account the conservation easement, thus reducing the taxes. The purpose of acquiring easements is to legally place a restriction on the use of the land and to reduce taxes to a level where the landowner can afford to continue to own the land. This keeps landowners out of the waiting arms of developers, which slows growth. Currently, 20% of the Town or 4,235 acres are under conservation easement, with 66% of the

easements for longer than 10 years. Approximately 60% of these easements are used to protect active farms. The remaining 40% protect important natural resources including wetlands. The impact to the tax rate has been minimal, an increase of 0.4%. Obviously, there are significant penalties to the landowner for a premature exit from the conservation easement. The penalties decrease the longer the easement has been in force.

**Reserve Fund for Open Space Acquisition:** The Town Board has also established a reserve fund for open space acquisition, with conservation easement penalties contributing to this fund. With these funds, the Town can buy significant environmental areas that it might not otherwise afford. Over 800 acres of environmentally sensitive lands, including significant wetlands, have been added to the Town of Perinton’s open space. When combined with Perinton’s parklands, over 1,400 acres have been preserved.

**Environmental Protection Overlay District:** The Environmental Protection Overlay District identifies sensitive natural areas with features that clearly limit the ability to develop the land. Two specific areas of concerns are wetlands (those areas that exhibit a high to medium probability of flooding or ponding) and steep slopes (greater than 15%) that are prone to erosion. These areas are mapped and identified on a Limited Development District (LDD) map, that is a type of overlay district. The zoning allows for one house per five acres in this district. However, in reality, the land is usually not developed, but instead, the landowner/developer receives credits for the potential homes that could be built. These credits can be incorporated into a subdivision plan in another location. This led to Perinton’s final open space preservation tool.

**Incentive Zoning:** The Town of Perinton’s Open Space Preservation Law is the first law adopted in New York State using the State’s Incentive Zoning Legislation. It provides for the transfer of development rights from an area the Town would prefer not to have developed to an area that is better suited for development. By encouraging the transfer of development rights, the Town of Perinton accepts density rates in developable areas higher than the mapped zoning. Under this Incentive Zoning, everyone wins. The Town preserves sensitive environmental resources at no cost. The developer can build a subdivision at an equal or lower cost

(especially considering the costs of constructing on more difficult sites) and at greater densities with all the houses clustered in one location.

The expenditures for these programs have been relatively minimal. There have been minor changes in the tax burden as a result of conservation easements. The land acquisition fund is enhanced by the penalties paid by landowners breaking conservation easements. The EPOD and Incentive Zoning programs are free. In return, these open space preservation programs have provided tremendous benefits to the Town of Perinton. Short-term and medium term growth has been controlled. Farming continues to be a viable land use in this developing area, and perhaps more importantly, the community has been awakened to the benefits of open space preservation.

# ARE WETLAND SCIENTISTS INADVERTENTLY SPREADING PURPLE LOOSESTRIFE AND PHRAGMITES?

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

Most of us who are involved with wetlands study spend a certain amount of time in the field during these studies. Whether we are environmental consultants, state or federal agency representatives, academia, or students, we tramp through wetlands doing delineations, reviewing boundaries, assessing functions and values, and performing research work. Many of us also work in a wetland in one county or region of New York one day and another wetland in a different county or region (or even another state) the next day or next week.

After years of such work, I am beginning to wonder about the consequences of these field efforts on the spread of unwanted wetland vegetation, particularly purple loosestrife (*Lythrum salicaria*) and common reed grass or phragmites (*Phragmites australis*). Are field biologists inadvertently spreading these dandelions of the wetland world? Have conscientious wetland scientists, who are working to preserve and enhance wetland habitat, played a role in their degradation? I think the answer is likely yes to both of these questions, and all of us should start to take some steps to at least reduce the risk of spreading unwanted wetland vegetation.

If you ever worked during late summer or fall in a wetland containing purple loosestrife, you quickly realize why this species is so successful. It produces thousands of tiny seeds that rain down when you push through a patch of the plants. Any animal (including humans) that brushes against the plants becomes a seed carrier. These seeds collect in your pockets, folds of your boots, and anywhere else. The clothing and field gear of wetland scientists helps to increase their role as inadvertent carriers. Those fancy vests with all those pockets for carrying flagging, maps, your Munsell color charts, and everything else may be handy, but think about how many seeds could be lodged in them without you knowing it. Hip-boots are often needed for wetland study. When folded down, they collect an enormous amount of material. Soil sampling equipment and even the mud on your boots can be a source of viable vegetation material and easily spread when tracked into another area.

I am not saying that field wetland scientists are solely or even largely responsible for the spread of unwanted vegetation. “Natural” forces, such as wind, water movement, and wildlife, are largely respon-

sible for wetland/aquatic plant distribution and disbursement, with wind and water movement probably the primary means of distribution. Even a mild to moderate wind can produce a snowstorm of cattail seeds in late fall or early spring. Many seeds and other plant parts float in water and can be distributed through a drainage basis rather quickly by water movement.

Wildlife are particularly likely significant in vegetation spread to distant wetland habitats, because of the abundance of migratory bird species in some wetlands. During a recent trip to a secluded state park in the Allegheny Mountains of south-central Pennsylvania, I was asked why purple loosestrife was now there when it was never known from this area before. I really could not say why, but at about the same time a large flock of Canada geese dropped in across the lake. I wonder where these geese were in the last few weeks. Possibly they were floating among the purple loosestrife at Montezuma or working along the edge of a patch of phragmites somewhere else. The geese are also more common there than in past years. Other migratory waterfowl are obviously responsible for distributing wetland vegetation, but think about the changes in both the seasonal and geographic distribution of geese (Canada and Snow geese) in the recent years. The potential of wildlife to be a carrier of wetland vegetation from place to place was always there, but their role may be affecting certain areas differently now because of the seasonal and geographic distribution change of certain wildlife species, such as geese.

The inadvertent spread of unwanted vegetation whether by “natural” means or by humans will always be a problem. However, I would suggest that all wetland scientists take the following simple steps after reviewing a wetland in the field and before moving to another area.

- Consider the type of material of your outer clothing layer during certain times of the year. (If you ever tried to get beggar tick seeds out of a wool shirt you know what I mean.)
- Brush off your clothing.
- Take everything out of your pack, vest, or belt pouch and shake it out.
- Dump out your boots and scrape off any mud accumulated on the bottom.

- Clean off your soil sampling equipment.

These simple steps do not take much time and may not seem worthwhile, but after years of looking at wetlands throughout the eastern United States, I think they are warranted. All wetland scientists should adhere to these practices when in the field.

## LAWRENCE W. JACKSON REMEMBERED

As you may be aware, Larry Jackson passed away August 3, 1998 after a difficult fight with cancer. Larry was well known throughout the environmental and wetland professional community. Many of us were in contact with Larry through his work at the Public Service Commission. Others worked with Larry through the New York Wildlife Society. He was active in efforts to identify areas of biological diversity and assisted in land conservation activities across this region. He also had a wonderful love of the outdoors, and had hiked extensively. Larry was a member of the New York State Wetlands Forum and was present at many of our meetings. A fond memory we all have is of Larry on the Great Swamp Canoe Field Trip at the Bear Mountain Meeting.

Larry’s passing has been a great loss for all who worked with him and/or knew him through his other interests and pursuits. Larry worked tirelessly to make the world a better place, bit by bit. His significant knowledge of the natural ecosystems, his gentlemanly ways, his quiet yet thoughtful words, and his understated sense of humor will be missed by many.

Larry is survived by his wife of 26 years, Kitt (Rarog) Jackson, his daughter Rebecca and son Mark, his mother, two sisters, a brother, and numerous nieces and nephews. Memorial contributions can be made to the Lewis M. Fowler Camp and Retreat Center, Albany Synod, 1790 Grand Boulevard, Schenectady, New York 12309.

A wonderful tribute to Larry Jackson can be found at on the worldwide web (HYPERLINK <http://helderweb.com>) <http://www.helderweb.com> . The New York State Wildlife Society is also preparing a memorial for Larry to appear in their next newsletter and Wildlife Society Bulletin.

# DEC RELEASES DRAFT WATER QUALITY STANDARDS FOR WETLANDS

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

In October, the DEC released draft Water Quality Standards for wetlands. These standards, which will be contained as amendments to the DEC's existing water quality regulations (6 NYCRR Parts 700 to 703), are designed to give the same level of water quality protection to wetlands as afforded to surface and ground waters. The following are excerpts of a draft DEC memorandum prepared to explain the purpose of these standards and address certain issues that have been raised during DEC's internal review and rulemaking process.

## Need for Wetland Water Quality Standards

The goal of the federal Clean Water Act (CWA) is to maintain the chemical, physical, and biological integrity of the Nation's waters. The policy of Environmental Conservation Law (ECL) Article 17-0101 is to "maintain reasonable standards or purity of water of the state consistent with the public health and public enjoyment thereof, the propagation and protection fish and wildlife including birds, mammals and other terrestrial and aquatic life, and the industrial development of the state" . . . To accomplish these goals, New York State is required to classify waters according to their best use(s) (i.e., functions, values and benefits) and adopt standards necessary to protect these uses for all "waters of the United States," and "waters of the State." Although wetlands are included in the definitions of both "waters of the United States" and "waters of the State," they have not been recognized, nor classified as a distinct waterbody separate from streams, rivers, lakes and groundwater. As a result, not all of the best uses of wetlands are protected, nor are wetlands afforded the level of water quality protection commensurate with the best uses they provide.

From a water quality perspective, wetland best uses are protected using water quality standards specifically developed to protect best uses characteristic of streams, rivers, lakes, and groundwater, but not necessarily wetlands. They include drinking water, primary and secondary contact recreation, fishing, fish survival and fish propagation. However, the best uses of wetlands also include: flood and stormwater control; erosion control; fish, shellfish, wildlife, and hydrophytic plant propagation, survival and habitat; nutrient cycling and food chain support; surface and groundwater exchange; and public enjoyment (i.e.,

recreation, open space, aesthetic, and education and scientific research). Therefore, only those best uses that are mutually shared between wetlands and the other surface waters are protected with the current water quality standards. Those best uses of wetlands that transcend traditional surface water best uses are not afforded adequate protection by the existing standards.

In addition, the current water quality standards have traditionally focused on protecting water quality from a chemical perspective. Although the current standards protect the chemical integrity of wetlands, they do not address the physical and biological integrity of these waters. Existing surface water quality standards more directly apply to activities such as discharge of sewage, industrial wastes, and other types of wastes resulting from waste water treatment plants, industrial processes, stormwater runoff, etc., that have the potential to alter the chemical characteristics of the receiving water. By achieving the chemical standards, it is presumed that the water's best use(s) will not be impacted or impaired. However, a majority of the impacts to wetlands occur through physical (e.g., filling, dredging, or draining) or biological (e.g., vegetation removal) alterations, and not chemical alterations. Although impacts to the physical and biological integrity of a wetland can impair its best uses, existing water quality standards cannot adequately protect wetland best uses against these types of impacts.

Furthermore, wetlands possess physical, biological, and chemical characteristics that are highly variable and vastly different from those of streams, rivers, lakes and groundwater. Because of this variability, wetlands often contain naturally unique physical, biological and chemical features that must be preserved in order for the wetland ecosystem to remain viable and sustainable over time. Applying the same set of water quality parameters (e.g., pH, phosphorus and nitrogen, etc.) to wetlands does not reflect the natural variability within these systems. This result in either over or under protection of certain wetland water quality characteristics, and moreover illustrates the need for promulgating water quality standards specifically for wetlands.

## DEC's Draft Proposal:

To maintain and protect the chemical, physical, and biological integrity of New York's wetlands, DEC's Division of Fish, Wildlife, and Marine Resources proposes to

develop narrative water quality standards for wetlands by amending Titles 6 NYCRR Parts 700 to 703, to address each of the following issues:

1. Revise Part 700 by including a comprehensive "wetlands" definition that includes the federal and state wetland definitions and make other appropriate definition changes.
2. Revise Part 701.1 "General conditions applying to all water classifications" to include "fill."
3. Revise Part 701 by creating a water quality classification for wetlands (i.e., Class W).
4. Revise Part 701 by establishing and assigning wetland "best uses" to the wetland water quality classification.
5. Revise Part 702 to include a procedure for using mitigation to meet the water quality standards for wetlands.
6. Revise Part 703.2 "Narrative water quality standards" to include narrative water quality standards that protect the best uses of the wetland class, and Section 703.3 to include appropriate pH, dissolved oxygen, dissolved solids, and turbidity standards that apply specifically to wetlands.

## Explanation of Proposed Changes:

### Add "Wetland" Definition

The narrative wetland water quality standards will apply to all state wetland regulatory programs, as well as any federally regulated activity that requires a Section 401 Water Quality Certificate. Therefore, the "wetland" definition placed in 6 NYCRR Part 700 must include both the federal and various state wetland definitions.

### Revise "General Conditions Applying to all Water Classifications" to Include "fill"

In 6 NYCRR Part 701.1, the "general conditions applying to all water classifications" states "the discharge of sewage, industrial waste, and other wastes shall not cause the impairment of the best usages of the receiving water as specified by the water classifications at the location of the discharge and at other locations that may be affected by such a discharge." The terms "sewage," "industrial wastes," and "other wastes" are defined in regulations to include only specific types of materials or substances when discharged to a water of the state. Inclusion of "fill" into the general conditions statement corresponds to those activities regulated under Section 404 of the CWA.

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# UNDERSTANDING WETLANDS

— *Tanessa Hartwig, AmeriCorps Member,  
Orange County Soil and Water Conservation District*

For many people, the current “fuss” over wetlands is a little confusing. After all, less than 15 years ago the government was subsidizing people to drain them. Now, almost on the turn of a dime, the government and many non-profit agencies would like to save as many wetlands as possible, even to the point of creating new ones! To understand why so many people want to save wetlands, we first must recognize the many different types of wetlands and understand the basic processes involved within a wetland.

Wetlands are a transitional area between land and water — either spatially (as in a marsh at the edge of the Hudson River) or through time (as in an open pond that evolves into a shrub marsh and may someday be fairly dry land). In order to be classified as a wetland, an area must have three characteristics: inundation, hydric soils, and hydrophytic vegetation. **Inundation** refers to the dominance of water at a site. To be considered inundated, a wetland must be saturated with water for at least two weeks during the growing season. This creates the anaerobic conditions that lead to the growth of hydrophytic plants and the formation of hydric soils. **Hydric soils** are usually classified as poorly drained or very poorly drained on a state soil map and can be divided into two groups: organic and mineral. Organic soils contain mostly partially decayed materials and are therefore very dark. Peat, in which some decaying fibers are still identifiable, and muck, in which most of the materials are no longer identifiable, are both organic soils. Mineral hydric soils contain much less decaying organic material and more sand, silt, and clay. They tend to be lighter in color than organic wetland soils. Often, mineral hydric soils will display gleying or mottling. Gleying occurs when oxidized iron, which is normally orange, red, or yellow, is reduced due to anaerobic conditions. The reduction of iron gives soils a gray or bluish-gray color. Mottles are spots of orange, yellow, or reddish-brown against an otherwise grayish background. These occur in wetland soils that are alternately wet and dry. **Hydrophytic plants** have developed adaptations for dealing without oxygen for extended periods of time. Those plants that are almost always found in wetlands are considered obligate, while those that are sometimes found in uplands are considered facultative wet or facultative. Some wetland

plants will actually pump oxygen from their leaves to their inundated roots, resulting in oxidized rhizospheres, or rust-colored root channels. These rhizospheres are often used as indicators of wetland conditions.

Wetlands are sometimes divided into five major types: lacustrine, riparian, marine, estuarine, and palustrine. Lacustrine wetlands are found along lakes, while riparian wetlands are associated with rivers. Marine wetlands are along the coast, and estuarine wetlands are found where salt and fresh water mix, usually at the mouth of a river. Palustrine means marshy; these are the marshes, bogs, and swamps that are not associated with any larger body of water.

Another method of classification is to determine the major vegetation types and the amount and type of inundation occurring at the site. This method uses terms that are more familiar: marsh, swamp, bog, vernal pool, etcetera. **Swamps** are distinguished by the dominance of woody plants rather than herbaceous species. Forested wetlands are swamps dominated by trees, while shrub swamps are dominated by shrubby vegetation. Vegetation is considered shrub rather than forest when a majority is less than twenty feet tall. Shrub swamps are often found in flooded or poorly drained areas along streams, lakes, marshes, and forested wetlands. Often, they are transitional areas, and quickly (sometimes in less than fifty years) turn into forested wetlands. **Bogs** tend to be very interesting areas. Many were formed as the glaciers retreated and left pockets of water in poorly drained depressions with no outlet. Therefore, bog soils are a highly anaerobic environment and become highly acidic. Instead of forming an organic muck substrate, bogs form a layer of peat. Peat often forms a mass of floating vegetation over the water, upon which other vegetation will grow. Bogs have made their mark in archaeology due to the same principle that forms peat — slow rate of decomposition. Two thousand-year-old human bodies have been found almost perfectly preserved in bogs, adding to what we know about ancient history. **Marshes** are wetlands that are dominated by herbaceous species. Cattails are often the dominant species in a marsh ecosystem. Marshes often form at the edges of lakes or rivers. **Wet meadows** are a type of marsh dominated by grasses and sedges. Generally, water is not visible for most of the year. In fact, these areas resemble grasslands more than wetlands. **Vernal Pools** are small,

temporary ponds filled by spring rains and snowmelt. These pools are especially important to amphibians. Since they cannot support fish life, vernal pools are the perfect place for these animals to lay their eggs. Without any fish, there is little chance of anything eating the precious bundles.

The food web in wetlands is interesting because it encompasses two energy flow patterns. One involves consumption of live plants, while the other depends on the consumption of dead plant material. Often, these two webs intertwine. In many aquatic ecosystems, submerged aquatic plants and phytoplankton make up the base of the food chain. Energy is then passed through various food chains, eventually ending up in a primary or secondary predator, such as a bass or a fisherman. In many wetlands, however, detritus is the base of their major food web, with the first web taking on a secondary role. Because decomposition is slow in wetlands, organic matter tends to build up quickly, contributing to the base of a very large and complex food web. The decaying plant matter is eaten by bacteria, invertebrates, and small fish and energy is then transferred up the various food chains. As decomposers break down dead plants, they release nutrients and organic compounds into the surrounding water. Other creatures or plants can then use these nutrients. This process of nutrient cycling contributes to the biological productivity of wetlands, placing many wetlands among the most productive ecosystems in the world. Wetlands are also highly productive because they are generally “pulsed” ecosystems, subject to a periodic rise and fall of the water level. Nutrients are brought in by flooding or made more accessible when the water level falls.

Wetlands have a distinct place in the functioning of a watershed. They tend to perform many different functions in various locations, like an actor that plays more than one role in the same play. Many wetlands act as a flood control system. As floodwaters come rushing down a river, the marsh or other wetland vegetation can help tame the churning waters. This slowing of the water gives it more time to sink into the soil, percolating rather than continuing downstream. Even wetlands not located near a river’s edge can help prevent flooding. For instance, a one-acre swamp, when flooded to a depth of one foot, can hold 333,000 gallons of water. Fast flowing water can also pick up a lot of sediment during its course. This sediment may carry toxins or bacteria and can disturb fish and other aquatic animals by clogging their gills and creating a “fog” that

[Cont'd. page 14]

## **(DEC RELEASES DRAFT WATER QUALITY STANDARDS FOR WETLANDS)**

*[Cont'd. from page 5]*

The inclusion of "fill" in the general conditions statement is particularly important for maintaining and protecting the best usages of wetlands. For example, the discharge of soil or "fill" material is not specifically identified as sewage, industrial wastes, or other wastes. However, filling a wetland with soil or other types of organic or inorganic material can have serious detrimental impacts on its best uses. Based on the definition of "other wastes," the placement of soil or fill material in a wetland for a particular purpose (e.g., construct a house) is not considered "discarded matter," and therefore is not regulated as "other waste." The addition of the term "fill" into the general conditions statement will now address these types of activities.

### **Create a Wetland Water Quality Classification**

Wetlands are often distinctly different ecologically, hydrologically, chemically, and morphologically from other surface water systems (i.e., streams, rivers and lakes). As a result of these differences, wetlands provide many uses, benefits and/or functions that are not provided by any other type of water. Therefore, in order to maintain and protect these uses, benefits and/or functions, it is necessary to classify wetlands separately from other surface and groundwaters.

A single wetland water quality classification (e.g., Class W) is proposed for inclusion in Part 701. All wetlands, irrespective of size, cover type, location in the landscape, etc., will be grouped together in one class. Although wetland subclasses were initially proposed, it was subsequently determined that assigning wetlands to separate subclasses requires the DEC to then identify and map every wetland in New York State. Since not all wetlands are currently identified and mapped, the wetland subclassification approach would result in a major, statewide mapping effort, therefore requiring an enormous amount of staff time and funding resources to complete this initiative. However, based on consultation with Division of Legal Affairs staff, assigning wetlands to a single class does not require DEC to map all these wetlands. Since all wetland best uses will be applied universally to all wetland types, there is no need to map all these waters.

### **Assign Best Uses to Wetland Classification**

Standards will be developed to protect the best uses of the corresponding water classification. One of the first steps in

developing wetland water quality standards is to determine the uses of wetlands. Once the best uses have been assigned to the wetland classification, then standards will be developed to protect those uses from being impaired or degraded.

### **Establish a Procedure for Using Mitigation to Satisfy the Wetland Water Quality Standards**

The DEC understands and realizes that there may be instances or circumstances that warrant the issuance of a wetland permit even though the proposed activity will result in the impairment to or loss of a wetland's best use. Activities that are vital to maintaining and protecting the public health and welfare may take precedence and override the need to protect and preserve the functions, values and benefits derived from wetlands, thereby allowing a wetland to be degraded or destroyed. In this situation, the wetland water quality standards would require the permit applicant to compensate the residents of New York State by mitigating for any unavoidable or residual impact to a wetland's best use. This can be accomplished through compensatory mitigation which includes restoring, creating new wetlands or enhancing wetland best uses.

### **Develop Narrative Water Quality Standards**

Narrative water quality standards will be developed to ensure wetland best uses are not impaired and the chemical, physical, and biological integrity of the wetland is maintained and protected. Narrative standards are general statements about the integrity or condition of the waterbody which must be maintained and protected, and the level of water quality necessary to support those uses.

Accompanying the narrative wetland water quality standards is a comprehensive "guidance" document staff can use to implement the standards within a regulatory and non-regulatory context. Information contained in the guidance document should assist staff in determining if a proposed activity will violate the narrative wetland water quality standards.

\* \* \*

The DEC is cognizant of **several sensitive issues** that could arise as a result of its adoption of these standards. For example, it has been suggested that the Section 401 Water Quality Certificate is a means by which DEC is "expanding" its jurisdiction to those wetlands not protected by Article 24. However, authority to issue Section 401 Water Quality Certificates already exists, and in fact, is the means by which most states protect their wetland resources. The current

water quality standards (i.e., 6 NYCRR Parts 700-705) do not contain adequate standards by which the Section 401 Water Quality Certificates can be issued to maintain and protect wetlands.

In addition, the DEC is restricted in its ability to issue Section 401 Water Quality Certificates because of a New York State Court of Appeals decision. In the 1993 case of Niagara Mohawk Power Corporation v. New York State Dept. of Environmental Conservation, the Court of Appeals ruled that any conditions or standards used to place conditions on a Section 401 Water Quality Certificate can only be those standards identified in New York State's water quality regulations (i.e., 6 NYCRR Part 700-705), which, again, are for surface and groundwaters. Criteria or stipulations other than those chemical toxicity standards contained in 6 NYCRR 700-705 cannot be included as conditions within the permit.

Concerns have also been raised about how the narrative wetland water quality standards will be integrated into the State Pollution Discharge Elimination System (SPDES) program, and what water quality standards apply to wetlands. Determining what specific chemical toxicity standards apply to the wetland will depend on if the wetland drains into a classified or non-classified water body, or if the wetland is isolated. If a wetland drains into another classified surface water, staff would continue to apply the corresponding chemical toxicity standards of the adjacent surface water classification to the wetland. By creating a wetland classification, class "D" waters or non-classified waters that meet the definition of a wetland will be designated as a class "W" water, and the appropriate chemical water quality standards necessary to maintain and protect the wetland best uses will be assigned to these discharges.

\* \* \*

The two **primary alternatives** to this proposal that have been discussed are to take no action or develop and adopt quantitative wetland water quality standards. However, for the reasons set forth below, these alternatives are not workable. First, if standards are not developed and promulgated, the State of New York will continue to issue Section 401 Water Quality Certificate and other wetland permits without due consideration to protecting all wetland best uses and the biological and physical integrity of these waters. Using existing water quality standards will perpetuate inadequate protection of the wetland resource and result in the loss of wetland benefits to citizens of New York State.

*[Cont'd. page 11]*

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**NEW YORK STATE WETLANDS FORUM, INC.  
1999 ANNUAL MEETING - BALANCING WETLAND INTERESTS  
SCIENCE, POLICY AND ECONOMICS**

March 23 and 24, 1999 - Hotel at Exit 37 (Liverpool)  
Syracuse, New York

**PRELIMINARY AGENDA**

**TUESDAY, MARCH 23rd**

**7:00 - 9:00 Registration/Exhibit Set Up – Oneida Room**

**General Session 1 – Seneca/Cayuga Rooms**

**9:00 - 9:15 Opening Remarks: Barbara Beall, Chair, New York State Wetlands Forum**

**9:15 - 10:00 Wetlands and Water Resources in Onondaga County**

*Bruce Stebbins, Executive Director, Beaver Lake Nature Center (invited)*

*Robert Asanoma, Director, Save the County*

*Ray Nolan, NYSDEC Region 7 (invited)*

**10:00 - 11:00 Concurrent Sessions**

**Session A Interpretation and Development of Hydric Soils – Seneca Room**

Moderator: Frances Reese

*Fred Gilbert. Common hydric soils in New York State and identifying characteristics.*

*Ralph Tiner. Defining hydric soils in problem and atypical areas.*

**Session B New York State's Canal Corridor Program – Cayuga Room**

Moderator: Kevin Bernstein

*Barbara B. Beall, The LA Group, P.C.*

*Daniel O'Hara, Mayor of Baldwinsville*

*Bart Bush, Lakefront Development Corp.*

**Session C Land Use Economics – Mohawk Room**

Moderator: Raymond Cummings

*Speakers TBA*

**11:00 - 11:15 Coffee Break**

**11:15 - 12:15 Concurrent Sessions**

**Session D Vernal Pools – Seneca Room**

Moderator: Heidi Firstencel - Society of Wetland Scientists Mid Atlantic Chapter

*Speakers TBA*

**Session E Policy Potpourri – Cayuga Room**

Contact: Barbara Beall at 518-587-8100

*Possible Topics: Wetland Management in Transportation Corridors, Stormwater/Sediment Impacts to Wetlands*

**Session F Economic Values of Wetlands**

Contact: Barbara Beall at 518-587-8100

*Speakers TBA*

**12:15 - 1:30 Luncheon with Keynote Speaker**

*Ross Whaley, President, SUNY-CESF (Invited)*

**1:30 - 2:30 Annual Business Meeting – New York State Wetlands Forum**

**2:30 - 3:30 Concurrent Sessions**

**Session G Endangered Species and Wetlands – Seneca Room**

Contact: Bernie Carr at 315-695-7228

*Speakers TBA*

**Session H Successful Wetland Mitigation Strategies – Cayuga Room**

Moderator: Norbert Quenzer

*Joe McMullen, Terrestrial Environmental Specialists*

*Diane Kozlowski, Buffalo District ACOE*

*Jim Howe, Central and Western New York Nature Conservancy*

**Session I Incorporating Economics in Wetland Alternatives Analyses – Mohawk Room**

Contact: Barbara Beall at 518-587-8100

*Speakers TBA*

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- 3:30 - 4:00**      **Coffee Break**  
**4:00 - 5:00**      **Plenary Session – Seneca/Cayuga Room**  
**Property Rights and Wetlands - A Moderated Question and Answer Session**

Contact: Jennifer Brady-Connor at 518-872-1804  
*Carol Le Grasse, Property Rights Foundation of New York; Jon Kusler, Association of State Wetland Managers; Roland Vosburgh, Columbia County Planning*

- 5:00 - 6:30**      **Cocktail Hour and View Exhibits**  
**6:30 - 8:30**      **Dinner - Discussion Tables or Keynote Speaker**

**WEDNESDAY, MARCH 24th**

- 7:30 - 8:30**      **Registration and View Exhibits**  
**8:30 - 10:30**      **Regulatory and Legislative Updates**  
Moderator: Patricia Riexinger, NYSDEC (invited)  
    **8:30-8:50**      Thomas Snow, NYSDEC (invited)  
    **8:50-9:10**      Craig Benedict, U.S. Attorney's Office (invited)  
    **9:10-9:30**      Anne Secord, Dave Stilwell or Diane Mann- Klager, USFWS  
    **9:30-9:50**      Diane Kozlowski, ACOE, Buffalo  
    **9:50-10:10**      Dan Montella, USEPA  
    **10:10-10:30**      Recent Wetland Cases, Kevin Bernstein and Terresa Bakner

**10:15 - 10:30**      **Coffee Break**

**10:30 - 11:15**      **PLENARY SESSION - TBA**

**11:30**              **FIELD TRIPS**

Contact: Joe McMullen, Linda Gibbs or Heidi Firstencel (Vernal Pools)

**REGISTRATION/HOTEL INFORMATION**

THE HOTEL AT EXIT 37  
411 Electronics Parkway, Liverpool, New York 13088  
(315) 457-1122 Fax (315) 451-0675

Please contact the Hotel directly to make reservations. The reservation cut off deadline is March 1, 1998. After that date, rooms will not be held specifically for the New York State Wetlands Forum meeting. The room rates for this conference are \$71 for a single and \$81 for a double. When making your room reservation please indicate that you are with the New York State Wetlands Forum Inc.

**REGISTRATION FORM**

Name \_\_\_\_\_ Affiliation \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_  
Phone \_\_\_\_\_ Fax \_\_\_\_\_ E-Mail \_\_\_\_\_

	<i>Circle your choice</i>	
	With Dinner Tuesday	Without Dinner Tuesday
Prepaid Registration Fee (postmarked by March 1, 1999)		
Fee for speakers/moderators	\$75	\$55
Prepaid Registration Fee (postmarked by March 15, 1999)	\$95	\$75
On-Site Registration	\$120	\$100
Will you be exhibiting?	\$150 Before February 15 (includes one free registration)	
\$250 fee After February 15 (includes one free registration)	Yes	No
Would you like to participate in the poster session?	Yes	No

Exhibitors and poster sessions should contact David Hoyt at 315-772-4729 or hoytd@drum-emh4.army.mil

Make checks out to *New York State Wetlands Forum, Inc.*

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

Questions? Call the Association Offices at 518-783-1322.

*Note: See Call for Papers on Page 14. Please contact Kevin Bernstein (bernstk@bsk.com), Barbara Beall (beallbb@aol.com) or Jennifer Brady-Connor (aswmi@aol.com) if you would like to participate in one of our panel presentations.*

## (MESSAGE FROM THE CHAIR)

[Cont'd. from page 1]

submitting an abstract, or, if public speaking is not your idea of a good time, feel free to develop a poster session for display. Information is contained in this newsletter.

A question has been asked – “I am not a member of the Forum, why am I getting this newsletter?” The Forum has been provided a grant by the USEPA to increase circulation of the newsletter in order to build the Forum’s membership. Individuals who may not be members are receiving copies of the newsletter to increase their awareness of the important work of the Forum. A copy of our membership brochure is enclosed and our membership drive/dues letters are being mailed to everyone on the circulation list. Please renew your dues or consider joining if you are not a member.

I am a member of the Forum and am actively involved in this group because I believe wholeheartedly in its mission. Unlike many other wetland organizations, the Forum does not advance any particular wetland agenda. But, our mission to increase communication among a diverse membership is critical. The Forum provides a framework for its membership to network, increases understanding about diverse viewpoints, identifies common ground with others, and helps members identify ways to work together to create win-win situations. In my career, I’ve worked for environmental not-for-profits, for the Corps regulatory program, and am currently a wetland consultant. I am very aware of the need to provide a “forum” for these groups and others to communicate and increase their understanding and trust of one-another. The Forum is beneficial to anyone involved in wetlands in New York State. Please consider joining. I look forward to seeing you at the annual meeting March 24<sup>th</sup> and 25<sup>th</sup>, 1999

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.

## RECENT WETLANDS RELATED COURT OR ADMINISTRATIVE DECISIONS

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

There have been several interesting decisions that have been issued since the last newsletter. The *Forum* invites its readers to let us know about cases you think are interesting or important and should be reported in the *Forum*.

### **National Mining Association v. U.S. Army Corps of Engineers**

As you may recall, on June 19, 1998, the United States Court of Appeals for the District of Columbia Circuit affirmed the ruling of the lower court invalidating the Tulloch Rule. To close out this matter (in the courts at least), the Circuit Court on September 28, 1998 denied the Corps’ efforts for a Rehearing In Banc (meaning that instead of a panel of 3 judges hearing the case, the entire court of 11 judges hears the case). At this time, the Corps has not revised its previously issued guidance or issued further guidance on how it will proceed in light of this development in the courts.

### **Resource Investments, Inc. U.S. Army Corps of Engineers (9th Circuit, July 27, 1998)**

On July 27, 1998, the United States Court of Appeals for the Ninth Circuit addressed the issue of whether Section 404 of the Clean Water Act authorizes the Corps to require a landowner to obtain a dredge and fill permit before constructing a municipal solid waste landfill on a wetlands site.

Resource Investments, Inc. (RII), a private company, sought to construct and operate a municipal solid waste landfill on a 320-acre site in Pierce County, Washington. The landfill would occupy 168 acres of the 320-acre site and require clearing, excavating, filling, and grading approximately 21.6 acres of the site’s 70 acres of wetlands. The proposed landfill was in compliance with the local Solid Waste Management Plan. The plan was developed pursuant to the RCRA, 42 U.S.C. § 6943, which require each state to develop a plan for the safe and environmentally-sound disposal of solid waste within its jurisdiction.

RII filed an application with the Corps for a permit under Section 404 of the CWA to discharge “dredged or fill material” into the navigable waters of the United States. After an extensive review, the Corps denied RII’s application, on the grounds that RII had failed to demonstrate the unavailability of practicable alternatives for waste disposal that were less environmentally damaging, such as long-hauling solid waste by rail to

out-of- county landfills, and that the proposed landfill was not in the public interest because it would cause significant degradation of wetlands and posed an unacceptable risk of groundwater contamination. The district court affirmed the Corps’ denial of RII’s application for a permit on the ground that the Corps’ decision was not arbitrary, capricious, contrary to law, or an abuse of discretion.

On appeal, RII contended that the Corps lacked authority under Section 404 of the CWA to require a dredge and fill permit because, under RCRA, 42 U.S.C. §§ 6941-6949a, the regulation of municipal solid waste disposal, including the disposal of municipal solid waste in landfills constructed on wetlands areas, lies solely with the EPA or states with solid waste permit programs approved by the EPA.

The Court concluded as a matter of law that the Corps lacked authority under Section 404 of the CWA to require RII to obtain a permit from the Corps before constructing the solid waste landfill. First, the Court reasoned, the municipal solid waste that would be disposed of in the proposed landfill does not fall within the definition of either “dredged material” or “fill material.” Moreover, the layers of gravel and low-permeability soil, as well as the synthetic liner that would underlie the solid waste in RII’s proposed landfill, do not constitute fill material because their primary purpose is not to replace an aquatic area with dry land or to change the bottom elevation of a waterbody, but rather to serve as a leak detection and collection system.

Second, the Court reasoned, the siting, design and construction of a solid waste landfill on a wetlands area is specifically regulated under RCRA by EPA and states with solid waste permit programs approved by the EPA.

Accordingly, the Court held that when a proposed project affecting a wetlands area is a solid waste landfill, the EPA (or the approved state program), rather than the Corps, will have permit authority under the RCRA. If the project that will affect a wetlands area is not a solid waste landfill and the project involves the discharge of dredged or fill material, the Corps will have permit authority under Section 404 of the CWA.

[Cont'd. page 11]

## (DEC RELEASES DRAFT WATER QUALITY STANDARDS FOR WETLANDS)

[Cont'd. from page 7]

Also, wetlands are highly complex, diverse and variable aquatic systems. New York State contains a vast diversity of wetlands that not only vary in type, but also differ physically, chemically, and biologically. Furthermore, many wetland water quality characteristics (e.g., dissolved oxygen, pH, phosphorus and nitrogen content, suspended solids) can vary both spatially and temporally within the wetland. Therefore, developing and adopting a generic set of numeric water quality standards that account for and adequately protect the variability within these systems is not currently feasible.

\* \* \*

Many of the regulated community, local municipalities and DEC regions will probably soon be asking – **how much will all this cost.**

### • **Costs to the Regulated Community**

Adopting wetland water quality standards into regulations provides a mechanism for DEC staff to coordinate review on federally regulated wetland activities, heretofore effectively precluded due to lack of appropriate water quality standards. DEC staff can now respond to these permits to ensure their natural resource concerns are addressed in the permit. This may result in staff requiring mitigation for impacts that is not required by the Army Corps of Engineers (Corps) or the Corps may have one view of the project impacts and compensation requirements, whereas DEC staff may have a different opinion. Staff may also raise issues over the quality of the wetland resource being impacted or if the activity can further avoid the wetland. As a result, the regulated community may be required to submit additional information to satisfy the concerns of both regulatory agencies.

### • **Costs to local municipalities**

No new costs should be incurred to this entity as a result of promulgating wetland water quality standards. However, if a local municipality specifically applies for a particular wetland permit, then those costs identified in the regulated community section would apply to local municipalities.

### • **Costs to DEC staff**

Adopting wetland water quality standards into regulations may incur additional costs to DEC staff and/or administration. Although the exact costs incurred to staff may vary depending upon the particular regulatory program involved, additional costs may result from a shift in the workload. Regional DFWMR staff may spend more time reviewing some wetland permits, particularly

401s. However, where the workload is problematic or resource issues are not at stake, regional biologists have the option of waiving the review of Section 401 Water Quality Certificate and therefore automatically issuing the permit.

Division of Water and Environmental Permits staff may also incur additional costs through increased staff time spend reviewing certain permits, particularly SPDES permits involving direct discharges to wetlands. Promulgating these standards will now require DOW staff to determine if a discharge is proposed to both state or federal regulated wetlands. If a discharge is proposed to a state regulated wetland (e.g., Article 24), Environmental Permits staff should already be coordinating the review of the discharge between DOW staff and DFWMR's staff. However, the review of proposed discharges to non-Article 24 wetlands must also be coordinated with wetland staff.

Further costs to DEC staff may result from additional training staff may need to be able to fully implement these new regulations. Staff may also be required to provide additional public outreach to individuals requiring more information as to the implications of these new standards on existing wetland regulatory programs. This could result in the generation of educational or supporting documents/materials for distribution to other agencies, municipalities or the general public.

*Editors Note: If you have comments or concerns about DEC's anticipated rulemaking, contact Pat Riexinger or Tom Snow at DEC at (518) 457-6178.*

## U.S. WATERSHED ASSISTANCE GRANT AWARDED TO RIVER NETWORK

River Network has been awarded \$300,000 from the U.S. Environmental Protection Agency to fund a grant program to support the organizational development and long-term effectiveness of local watershed partnerships. Through the Watershed Assistance Grant Program, River Network will distribute grants ranging from \$2,000 to \$30,000 to local watershed partnerships in 1999. The program will be two-tiered: mini-grants of \$4,000 and less will be awarded for clearly defined, short-term organizational development projects; twelve-month grants of \$4,000 to \$30,000 will be awarded for projects of "demonstrable impact." For more information visit <http://www.rivernetwork.org/>; phone: 503-241-3506; or email: [info@rivernetwork.org](mailto:info@rivernetwork.org).

## (RECENT WETLANDS DECISIONS)

[Cont'd. from page 10]

### **Alaska Center for the Environment v. West (9th Circuit, September 16, 1998)**

In 1994, the Corps announced that it would issue five general permits authorizing the filling of certain wetlands specified in the Anchorage Wetlands Management Plan. Alaska Center filed suit in 1995 seeking an injunction against development under the general permits. Alaska Center challenged both the Corps' finding that the general permits authorize activities that are "similar in nature" and that the general permits authorize activities that have "minimal" individual and cumulative adverse environmental effects. Alaska Center also contended that the Corps illegally delegated regulatory authority under § 404 of the CWA to the Municipality of Anchorage.

In reaching its decision, the Court emphasized that prior to issuing a general permit, the Corps must publish an evaluation including a "precise description of the activities to be permitted . . . explaining why they are sufficiently similar in nature and in environmental impact to warrant regulation under a single General permit." Alaska Center argued that the Corps failed to meet the separate "similar in nature" requirement because it considered only the minimal environmental effects of the activities under the permits.

The Court found that the Corps placed great weight on ensuring that the activities allowed would each have a similar minimal effect on the environment. The Corps emphasized that "[t]he proposed GPs are designed so that secondary impacts that might differentiate the activities proposed for authorization have been reduced such that environmental impacts would not now differ among the GPs." Such considerations, the Court concluded, do not constitute arbitrary and capricious action. In fact, the regulations explicitly require the Corps to consider and explain why actions are "similar . . . in environmental impacts." The conditions attached to the general permits satisfied this requirement.

Still, the question turned to whether the Corps could use the same types of conditions to satisfy the remaining "similar in nature" requirement of the regulations. The term "similar in nature" is undefined in the statute.

The Court could not conclude that the Corps' interpretation is either plainly erroneous or inconsistent with the regulations. The conditions illustrate not only

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## **(CORPS MODIFIES PROPOSED NWP26 REPLACEMENTS; NEW YORK AND BUFFALO PROPOSE REGIONAL CONDITIONS)**

*[Cont'd. from page 1]*

allowed. For any discharge causing the loss of more than one quarter acre of freshwater wetland adjacent to a riverine system, notification to the District Engineer will be required: (a) that there are no unacceptable impacts on base flood plains; (b) that there are no practicable alternatives; and (3) that the permittee will minimize adverse impacts. Vegetative buffer zones will also be required under NWPs A and D.

NWP E (Mining Activity) may be completely or partially revoked in the Buffalo District.

NWP F (Reshaping of Existing Drainage Ditches) will apply to artificial drainage ditches only. The permittee must document the serviceability and maintenance of the ditch.

NWP 3 (Maintenance) will require notification to the District Engineer for reconstruction work extending more than 18 inches from an existing structure. Maintenance work will be limited to 100 feet upstream and 100 feet downstream of the structure. Fine grain sediments removed during maintenance must be deposited in an upland location. Watertight forms will be required when pouring concrete, the forms must be dewatered prior to pouring the concrete, and the water removed during dewatering must be pumped upland and filtered. Creation of any temporary structures under NWP 3 will require notification to the District Engineer. No in-stream work will be allowed during predicted high flow periods.

The Buffalo District may require sediment analyses for certain work under NWP 7 (Outfall Structures and Maintenance).

NWP 12 (Utility Activities) includes special notification requirements for permanent access roads and will require compensatory mitigation for the loss of one-third to one acre of wetland. Additionally, materials temporarily side-cast must be backfilled or removed within 30 days or less under this NWP. NWP 12 will not apply to pipelines and new rights-of-way crossing more than 1500 feet of forest and wetlands in the Buffalo District.

No more than one road crossing will be permitted under NWP 14 (Linear Transportation Crossings). Temporary road crossings in freshwater wetlands will be required to be placed on filter fabric and removed upon completion of work. Under NWP 14 impacts

will be limited to no more than one-third acre of impact for private facilities and no more than two acres for public facilities.

Any buildings permitted under NWP 40 (Agricultural Activities) must be necessary to agricultural production.

The Buffalo Regional conditions also require notification to the District Engineer for any in-water work done in the Bergen Swamp or on the western edge of Seneca Lake.

### **New York District Regional Conditions**

As with the regional conditions in Buffalo, the proposed regional conditions for the New York District include a bar against any loss of bogs, fens, or vernal pools. Work done under the NWPs in the New York District will require a compensatory mitigation compliance report. Additionally, the Corps has specified six Best Management Practices that it will require. Consistency Certification Concurrence from the New York State Department of State will be required for activities in any of six designated special management areas within the New York District. These areas include: Regional Coastal Management Programs, Local Waterfront Revitalization Programs, Significant Coastal Fish and Wildlife Habitats; Outstanding Natural Coastal Areas; Harbor Management Plans; and Areas for Concentration Development. No activity will be permitted under the NWPs that impacts any more than one-third of an acre for any activity subject to Adirondack Park Agency jurisdiction or within the New York City watershed.

In the New York District, NWP A will not apply to work done in the Hudson River, Mohawk River, Lake Champlain, Lake George, Schoharorie Creek, or Susquehanna River, or in wetlands directly contiguous to these waterbodies. Work done under NWP A cannot impact more than 500 linear feet of stream. Recreational activities associated with development cannot impact more than one acre, cannot substantially deviate from the natural contours, must minimize adverse effects to waters of the United States, and must have adequate water quality management plans. NWP A will not apply to new stormwater management facilities.

As in the Buffalo District, NWP C will not be available for the new stormwater management facilities in the New York District. Additionally, no loss of more than one acre of waters of the United States will be permitted under NWP C.

As in the Buffalo District, NWP D in the New York District will not be available for golf courses or ski resorts. Parking facilities built under this NWP will be required to have permeable surfaces.

NWP E may be partially or fully revoked in the New York District.

The New York District will require the use of Construction Best Management Practices for any work permitted under NWP F. Additionally, compensatory mitigation may be required by the District Engineer.

Work done under NWP 3 will be limited to 100 feet upstream and 100 feet downstream of the structure. Additionally, a permittee will be required to provide evidence of previous water depths before conducting any work to restore a waterway to those prior depths.

Information regarding stream velocity at the proposed intake and any device used to prevent impingement or entrainment of fish and wildlife must be provided to the District Engineer for work done under NWP 7.

Under NWP 12, materials temporarily side-cast must be backfilled or removed within 30 days. NWP 12 will not apply to facilities subject to the jurisdiction of the Federal Energy Regulatory Commission or the New York State Public Service Commission. No disturbance of more than 10 acres of waters of the United States will be permitted under NWP 12. Additionally, special requirements will apply for aerial transmission lines and buried cables and pipelines under this NWP.

Under NWP 14, no more than one-third of an acre of impact will be authorized for private facilities and no more than two acres of impact will be authorized for public facilities.

NWPs A, C, D, and F will not be available in the Hackensack Meadowlands District, Harbour Herron System in Staten Island, the Great Swamp in Putnam and Dutchess Counties, or for activities in the Mianus River.

### **Conclusion**

The regional conditions proposed by the Buffalo & New York Districts will be approved by the Corps if they are necessary to ensure the NWPs will authorize only those activities that result in minimal adverse effects on the aquatic environment, individually or cumulatively.

The proposed regional conditions will become effective when the new and modified NWPs become effective.

Public notices detailing proposed regional conditions in other regions or states are being published by other Corps District offices. The states of New York and New Jersey are reviewing the Nationwide Permits to determine the need for Clean Water Act § 401/Coastal Zone Management Act (401/CZM) regional conditions. 401/CZM

*[Cont'd. page 16]*

## (RECENT WETLANDS DECISIONS)

[Cont'd. from page 11]

similarity of environmental effects, but also similarity in the nature of the projects. While it may be true that the regulations do not specifically distinguish between such structures as "single-family housing" and "two-family dwellings," the Court was not persuaded that the general permitting process must necessarily require such fine distinctions.

The Court also rejected Alaska Center's argument that the Corps cannot make a sufficient public-interest analysis when its general permits allow a range of similarly confined activities. The record reflected that the Corps considered public interest in authorizing the activities. Thus, the Court concluded, the Corps did not act arbitrarily and capriciously in using the restrictions to satisfy the "similar in nature" requirement. The Corps made a reasonable determination that it should consider the public interest in general types of activities and guaranteed that where the activities did differ, those differences would have a similar impact.

Alaska Center also maintained that the Corps acted arbitrarily and capriciously by concluding that the discharges would have a minimal environmental impact. The Court concluded otherwise, holding that the Corps' actions were not arbitrary and capricious. The Court reasoned that the record did not support Alaska Center's allegations that the Corps simply designated whole classes of wetlands as unworthy of protection, nor was there any allegation that the Corps ignored the reports from other agencies. Instead, the Corps considered the relevant factors and came to an opposite conclusion. Although Alaska Center disagreed with the Corps' methodology and conclusions, such disagreement does not render the decision arbitrary and capricious.

Finally, Alaska Center claimed that the Corps improperly delegated authority to the Municipality to administer the permit. Alaska Center argued that because the scope

of the general permits made it impossible to predict all environmental effects, the Corps improperly established a set of subjective conditions to be considered by the Municipality. However, the Court concluded that review of the law and the record illustrated that there was no impermissible delegation, only an attempt to coordinate activity. Once a permit is validly issued, a project complying with its terms does not require any further action by the Corps.

### **Johnson v. U.S. Army Corps of Engineers (D. Minn. June 1, 1998)**

In this case, Plaintiffs sought a temporary restraining order and/or a preliminary injunction suspending the permits issued by the Corps to the Red Lake Band of Chippewa Indians and Pennington County for the River Road Phase III Project.

Plaintiffs (farmers, landowners and residents of Pennington County) opposed the Project, as permitted, because it would result in the needless destruction of approximately 30 acres of wetland. The Project is the third phase of a realignment and reconstruction of BIA Route 19, located on the Red Lake Indian Reservation.

In Count I of their Complaint, Plaintiffs alleged that pursuant to the Clean Water Act (CWA), only the Secretary, defined as the Secretary of the Army, acting through the Chief of Engineers, may issue permits, for the filling in of wetlands. Plaintiffs argued that as the statute does not allow for the subdelegation of issuances of permits from the Chief Engineer to the District Engineers, the permits at issue in this case are invalid.

In Count II, plaintiffs alleged that the District Engineer's rejection of the alternatives was "arbitrary, capricious or an abuse of discretion." Plaintiffs alleged that the CWA does not authorize the filling of wetlands if there are practicable alternatives to the proposed project — alternatives that would have less adverse of an impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.

In support of Court I, Plaintiffs relied on United States v. Mango. However, the Court thoroughly reviewed the Court's reasoning in Mango and the cases cited therein, and found that the conclusion that the Secretary lacks the authority to delegate the task of issuing Section 404 permits is erroneous.

The Court explained that the CWA does not specifically proscribe the subdelegation to the District Engineers the task of issuing Section 404 permits, nor is there any indication in the CWA's legislative history to support such proscription. The Court noted that the reality of interpreting the CWA, as proscribing subdelegation, is to provide that the Chief of Engineers personally perform tasks such as issuing tens of thousands of Section 404 permits per year, while at the same time managing an agency which employs thousands and administers many programs. The Court concluded that Congress could not have intended such a result.

The Secretary of the Army has the authority to issue regulations assigning work within the Department. Pursuant to this authority, and that provided in the CWA, it was reasonable for the Secretary to promulgate regulations that provide District Engineers the authority to issue Section 404 permits.

Plaintiffs also argued that the District Engineer's rejection of the off-Reservation alternatives was "arbitrary, capricious and an abuse of discretion."

However, the Court noted that, in issuing its decision, the District Engineer recognized the Project's purpose as providing a safer and more efficient road for public travel. Having reviewed the record, the Court found that the decision of the District Engineer to issue the Section 404 permit, to allow construction of the Project consistent with the preferred alternative is not arbitrary, capricious or an abuse of discretion. Because the District Engineer properly addressed safety and traffic concerns, the Court found no basis upon which to overturn the decision of the District Engineer.

## MEETING ANNOUNCEMENTS

**May 6-8, 1999.** Andover, Mass. Communities Working for Wetlands. Third Annual American Wetlands Month Conference. The Terrene Institute. 4 Herbert Street, Alexandria, VA 22305. Ph 703-548-5473, fax 703-548-6299. Email: [HYPERLINKmailto:terrinst@aol.com](mailto:HYPERLINKmailto:terrinst@aol.com) [terrinst@aol.com](mailto:terrinst@aol.com). web: [HYPERLINK http://www.terrene.org](http://www.terrene.org) [www.terrene.org](http://www.terrene.org).

**June 6-12, 1999.** Norfolk, Virginia. Wetlands, Functions, Assessment and Management. Society of Wetland Scientists 20th Annual Meeting. Conference chair: R. Harold Jones, PWS. USACE, CENAO-CO-R, 803 Front Street, Norfolk, Virginia. 23510. Ph. 757-441-7777. Fax. 757-441-7678. Email: [harold.rjones@usace.army.mil](mailto:harold.rjones@usace.army.mil).

**August 6-12, 2000.** Quebec City, Canada. Wetlands for the 21st Century. Society of Wetland Scientists. Ms. Elizabeth MacKay, Bureau 620, 2875 boulevard Laurier, Ste-Foy, Quebec, Canada G1V2M2. Ph 418-657-3853, Fax 418-657-7934. E-Mail [HYPERLINKmailto:cqvb@cqvb.qc.ca](mailto:HYPERLINKmailto:cqvb@cqvb.qc.ca) [cqvb@cqvb.qc.ca](mailto:cqvb@cqvb.qc.ca). web: <http://www.cqvb.qc.ca/wetland2000/>

## (UNDERSTANDING WETLANDS)

[Cont'd. from page 6]

they can't see clearly through. These sediments tend to settle out as the water slows down. Wetlands recharge the water supply as well as storing excess water. When a dry season approaches, they slowly discharge their supply, providing extra water to nearby aquifers and streams.

Besides containing waters, wetlands are remarkably effective water treatment plants. Because they are often in between land and water, wetlands often intercept pollutants on their way to open water. While these toxins are in the wetlands, they either settle out in the soil or are changed chemically by wetland plants. Many heavy metals are taken up by wetland plants and fixed in their tissues. Bacteria and viruses can be changed into harmless particles by reactions in wetland plants. In addition, wetlands remove and store excess nutrients such as phosphorous and nitrogen which cause eutrophication in

lake or river systems. Wetlands act as a regulator, dispersing and storing water at just the right time, and keeping many harmful chemicals, particles, and nutrients out of the rest of the watershed's waters.

Wetlands also provide habitat for many different species. Their thick vegetation provides shelter for birds and other animals. Migrating birds often stop to rest in wetlands since they provide plenty of shelter and food. In fact, some waterfowl are becoming endangered due to loss of wetlands along their migration paths. Many birds also use wetlands as nursery areas, laying their eggs and raising their young within the sheltering vegetation, calm waters, and abundant food resources in a wetland. Fish also lay their eggs in wetlands along rivers, lakes, and the ocean. In this way, they take advantage of fewer large aquatic predators, calmer waters, and food resources for their eggs and newly hatched young. Terrestrial animals, including bear, often use wetlands as a source of food or shelter. In fact, many

species only live in wetlands or cannot survive without them. About 45% of the animals on the EPA's endangered species list use wetlands for food or shelter. Since so many fish and waterfowl use wetlands, many fishers and hunters utilize them heavily.

There is one last thing that makes wetlands so important to people. They're beautiful. That strange, transitional mixture of vegetation and water has captured the imagination of many a painter, writer, scientist, plumber. A person can't help but feel a thrill the first time he or she sees teal or wood ducks flying from hidden recesses or stops to listen to the quiet swish of cattails accompanying the music of the marsh wrens and red-wing blackbirds. Wetlands seem, at times, to belong to another world; perhaps the faery land legends of the Old World originated from encounters with wetlands. To behold their beauty, many people continue to hike, relax, canoe, photograph, and bird in wetlands.

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## CALL FOR PAPERS

### "BALANCING WETLAND INTERESTS" NEW YORK STATE WETLANDS FORUM, INC. 1999 ANNUAL SPRING MEETING SYRACUSE, NEW YORK, MARCH 23 - 24 1999

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. There is still time to participate as a presenter. Potential Session Topics include but are not limited to:

#### Science

Hydric Soil Development  
Assessing Mitigation Success  
Wetland Functions and Values  
New Delineation Issues  
Intermittent Streams vs. wetlands  
Stormwater and Sediment Impacts  
Habitat Restoration  
Reference Wetlands

#### Policy

Property Rights versus Public Need  
Wetland Takings Transportation/Utility  
Infrastructure  
Development versus Protection  
Status and Trends in NYS  
Canal Corridor Initiative

#### Economics

Economics 101  
Economics in Permit Decisions  
Wetlands' Economic Values  
Weighing Public Interest Benefits  
Economics in Alternatives Analyses  
Funding Sources for Wetland Protection

Those wishing to make a 20 minute presentation at this meeting should submit a 250-word abstract, and a submission form for consideration to Barbara Beall, c/o the LA Group, 40 Long Alley, Saratoga Springs, New York 12866, (518) 587-8100 BY FEBRUARY 1, 1999. Submittals can be typed, on computer disk (MS Word) or by e-mail to nywf@capital.net.

### ABSTRACT SUBMISSION FORM

### 1999 ANNUAL SPRING MEETING

Mail to: Barbara Beall c/o The LA Group, 40 Long Alley, Saratoga Springs, New York 12866.

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

Affiliation/Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip +4 \_\_\_\_\_

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

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

Is your organization interested in being an exhibitor? \_\_\_\_ Yes \_\_\_\_ No      Having a poster session? \_\_\_\_ Yes \_\_\_\_ No

## WHAT IS THE NEW YORK STATE WETLANDS FORUM?

The New York State Wetlands Forum, Inc. is a non-advocacy organization comprised of individuals and groups with diverse backgrounds, interests and viewpoints regarding wetlands and their science, use and management. Incorporated in 1994, the Forum is a 501(c)(3) not-for-profit organization.

Its purpose is to:

- improve communication among people interested in wetlands,
- call attention to and objectively discuss local, statewide, regional, national and global wetland issues as they relate to New York State,
- improve its members' knowledge and understanding of wetlands, and
- make available information about wetlands to its members and the general public.

Membership benefits include:

- our information-packed bi-annual newsletter, The Forum, which reviews and discusses late-breaking wetland topics, regulatory updates, and other useful items.
- an invitation and reduced registration for our very popular two-day annual conference, where people interested in wetland issues from around the State gather to exchange information and experiences while attending a variety of presentations and field trips.
- announcements of other meetings, workshops, and field excursions in New York.
- opportunity to advance wetland knowledge in New York by serving on our Board of Governors and/or participating on the Forum's committees.

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## PLEASE TAKE A MOMENT TO BECOME A MEMBER OF THE NEW YORK STATE WETLANDS FORUM, INC.

Volunteers are the backbone of the Forum. Become actively involved in our efforts by:

- **Submitting a newsletter article.** It can be a commentary, research summary or an in-depth topic discussion.
- **Presenting a paper, moderating or organizing a session at our annual meeting.**
- **Volunteering to research or write a grant.** Thus far, USEPA grant funds have allowed us to put our newsletters on the world-wide web, and have increased our circulation and membership.
- **Serving on a committee.** Committees needing active members include.
  - Newsletter:* Suggest themes for future issues, solicit and review articles submitted.
  - Program:* Develop annual meetings and other seminars. Identify speakers, review abstracts, moderate sessions, assist in background logistics, suggest exhibitors, or develop a display for your organization.
  - Administrative and By-Laws:* The tough nitty gritty details that make an organization run. Identify people to serve on the Board, assist in revising by-laws, write grants, prepare budgets and find sources for funding.
  - Long Range Planning:* How can the Forum best foster communication about future trends and issues in wetland science, regulation, policy, protection, and management.

### WANT TO JOIN THE NEW YORK STATE WETLANDS FORUM, INC.

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**(CORPS MODIFIES PROPOSED NWP26 REPLACEMENTS; NEW YORK AND BUFFALO PROPOSE REGIONAL CONDITIONS)**

*[Cont'd. from page 13]*

regional conditions are developed by the State under § 401 of the Clean Water Act and § 307 of the Coastal Zone Management Act and become regional conditions to the NWPs. 401/CZM regional conditions will be added to the NWPs and announced by public notice issued by the Corps' districts. The public's opportunity to comment on 401/CZM regional conditions is through each state's public notice process, not through the Corps' public notice process.

**EPA NOT PUSHING CWA REAUTHORIZATION BECAUSE OF WETLANDS ISSUES**

— *Kevin M. Bernstein, Esq.*

Fearing a loss on wetlands protection, the Clinton administration will not introduce legislation to reauthorize the Clean Water Act (Act), the Environmental Protection Agency (EPA) has said. "The legislative battles don't look too productive in the next Congress," said Geoff Grubbs, Director of the Assessment and Watershed Protection Division in EPA's Office of Wetlands, Oceans, and Watersheds. "EPA is not going to come forth with support for additional authorization because there is too much to lose on wetlands," he told a nonpoint source conference sponsored by the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) and EPA. Instead, EPA will focus on what can be accomplished under current Clean Water Act authorities.

Charles Fox, EPA Assistant Administrator for Water, said that EPA does not believe anything is fundamentally wrong with the Act. However, he said EPA officials and others who work on Clean Water Act issues have met regularly with staff from the Senate Environment and Public Works Committee to discuss Clean Water Act issues, such as the total maximum daily loads program,

pretreatment programs, and the state involving loan fund. However, EPA officials have not used those meeting to present the committee with a reauthorization wish list.

EPA said drawing up legislation took "a tremendous amount of time and energy" in the 104th Congress, but the administration bill "was never given serious consideration." In May 1995, the House approved a major rewrite of the Clean Water Act (H.R. 961) drafted by Rep. Bud Shuster (R-Pa.), chairman of the House Transportation and Infrastructure Committee. H.R. 961 was strongly criticized by the Clinton administration and environmental groups and never was seriously considered in the Senate. Among other things, that bill would have eased wetlands restrictions and included takings provisions relating to property affected by wetlands regulations.

Draft Clean Water Act bills also were circulated in the 105th Congress. However, EPA said these also would have significantly weakened wetlands protections. It is unlikely, with everything happening in Washington, that we will see anything soon on reauthorization or wetlands.

**ANNUAL MEETING INFO INSIDE!**

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