

The Forum

NEW YORK STATE WETLANDS FORUM

MESSAGE FROM THE CHAIR

— Barbara B. Beall, The LA Group

A board member asked me the other day “why does the Forum always hang its hat on this ‘non-advocacy’ thing. Why can’t we be more honest about what is going on with wetlands?” A valid question which I gave much thought to.

When I first started in this field in 1985 I saw things in black and white. A project was either good or bad. Wetlands were either high quality or low quality. Thumbs up or thumbs down. A pretty simple view of the world. Fifteen years later everything is colored in subtle shades of gray. I regularly canoe in a marsh that is thriving with huge snapping turtles, great blue herons, tree swallows, kingbirds, redwing blackbirds, warblers and the like. Yet there are more cattails than there were ten years ago. Are the cattails there because of the surrounding land uses or just because cattails are very aggressive? Are the cattails really a problem...and if so how should that problem be fixed? (This is what I think about when I canoe?) In my work I look for solutions that balance the needs of my clients yet minimize impacts on the environment and have a net public benefit. Still, I wonder if I am leaving the world a better place for my son. Are there cumulative adverse impacts on wetlands from my projects and all the other projects? I know much more about wetlands than I did 15 years ago, but now I know how much I still don’t know.

Have the wetland issues changed, or has my perspective of those issues changed? Perhaps the gray results from a more realistic view of the complicated nature of wetlands and their management. I know I don’t have all the answers to wetland management. Given that each of us is biased by our own perspectives of what is happening with wetlands, I am skeptical that a single individual can find an adequate “simple plan” or set of recommendations to address those concerns. On the other hand, I’d bet money on the collective knowledge and experience base of our Forum membership to be successful in

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CORPS ONCE AGAIN PROPOSES REPLACEMENT NWPS

— Bernard Goode

On the eve of yet another “new” nationwide permit program that appears to be pieced together from a crazy quilt of special interest group suggestions, The Forum is privileged to have the humorous and long-seeing views of Bernard Goode. Bernie, as he is known to regulators, environmentalists and consultants alike, was the former head of the regulatory program of the United States Army Corps of Engineers. As a former occupant of the wetlands hotseat, Bernie has a unique perspective on the history of the nationwide permit program and some valuable suggestions for improving (or discarding, as the case may be) the most recent proposed changes.

Mr. John Studt
HQUSACE, CECW-OR
Washington, DC 20314-1000
Comments on 7/21/99 NWP Proposal
Dear John,

You thought I would be fully retired by now. So did I. I still seem to be in a fading process. But the NWP proposals recharged my batteries. Since I started this mess in 1977, I felt obliged to offer some suggestions on saving this terminally ill program.

You may recall my August 29, 1998, letter to you wherein I presented a bar chart on the growth in complexity of the NWP program. Well, I thought you might like to see it again since the latest proposals have added another 52 inches over those proposed last year and will more than double the length of the NWPs and conditions now in place. If you were to add the regional conditions proposed by the local Corps district and the 401 and/or CZM conditions imposed by the state, all of which have also grown exponentially, you end up with a program of unfathomable complexity. Again, my complexity index is inches of Federal Register column, admittedly not too scientific. But regardless, over 40 feet of Federal Register column length for just the national NWP program is mind-boggling.

Consider this one example of complexity taken from subsection k of proposed NWP 44:

No aggregate mining can occur within stream beds where the average annual flow is greater than 1 cubic foot per second or in waters of the United States within 100 feet of the ordinary high water mark of headwater stream segments where the average annual flow is greater than 1 cubic foot per second (aggregate mining can occur in areas

immediately adjacent to the ordinary high water mark of a stream where the average annual flow is 1 cubic foot per second or less), except for aggregate mining in lower perennial streams.

Forget for a moment the extreme limitation this tiny flow places on the use of this NWP. Forget also that the Corps has no authority to regulate mining per se in the first place. My point is, does anyone think the sand and gravel operator will understand this?

I decided not to comment on the specifics of this proposal because I did not want to leave the impression that I in any way think the current, let alone proposed, program is salvageable. However, there are two points that really concerned me. First, I am very troubled with the new emphasis on preserving buffers that the landowners are already experiencing. I am a big believer in buffers. I like it when landowners are willing to preserve them. I even like it when states pass laws that include reasonable regulatory authority over buffers. But I strongly disagree with the repetitive message contained in this proposal that, because buffers protect water quality, the Corps has the authority to require them. Forested mountains help water quality as well. Get a law first.

The second point I wanted to make is to strongly oppose the prohibition against using NWPs 39, 40, 41, 42, and 43 in non-tidal wetlands adjacent to tidal waters. Huge expanses of coastal wetlands on the East, Gulf, and Alaska coasts will be off-limits for these NWPs. Further, it would seem that virtually all of the Atlantic and Pacific

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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.

CALL FOR PAPERS

**STREAMS¹, NATIONWIDE PERMITS, WETLAND MAPPING
AND OTHER CONTENTIOUS ISSUES
CAN CONSENSUS BE FOUND IN THE NEW CENTURY
NEW YORK STATE WETLANDS FORUM, INC.
2000 ANNUAL MEETING
BINGHAMTON OR SYRACUSE IN MARCH OR APRIL 2000**

The focus of the Forum's 2000 annual meeting will be those difficult issues facing wetland and water quality management. Should upland stream buffers be regulated, and if so, how wide should they be? What is the best way to regulate buffers? Can streams be recreated? The incredible nationwide permit program proposed by the Corps. Wetland mapping in Saratoga County – what lessons can be learned? Reaching consensus on tough issues. Feel free to add your own topics of interest:

¹ – we were going to call it “Streams of Consciousness in the New Millenium” but that was too “new age.”

- | | |
|-------------------------------------|---|
| Streams | Saratoga County – Lessons Learned |
| Appropriate Riparian Buffer Widths | Fiber Optic Cable Installation |
| Stream Recreation Methods | Regulations and Projects |
| Stream Restoration Methods | Nationwide Permit Updates |
| Agricultural Activities in Wetlands | Grants Available to Communities for Stormwater Management |
| Wetland Mapping | Careers in Wetlands for College Grads |
| Status and Trends in NYS | |

Authors wishing to make a 15-20 minute presentation at this meeting should submit an abstract along with a submission form to Barbara Beall for consideration BY February 15, 2000. Submittals can be typed, on computer disk (MS Word or WordPerfect format), or e-mailed to: BeallBB@aol.com

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. Author¹ and Author². Address¹, phone number, fax number, email address. Address².

Abstract

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, should 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
2000 SPRING MEETING**

Mail completed form to: Barbara Beall, 97 Mannis Road, Queensbury, New York 12804

Contact Person _____

Affiliation/Address _____

City _____ State _____ Zip _____

Telephone _____ Fax _____ E-Mail _____

Session Topic _____

Interested in being an exhibitor? Y N

Having a poster session? Y N

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REDEVELOPMENT OF NEW YORK STATE'S CANAL SYSTEM

Canal Revitalization Programs

The New York State Canal System, 524 miles in length, is comprised of four canals which pass through 25 counties and more than 200 municipalities. In 1992, legislation titled "Thruway 2000" transferred management of this system from the NYS Department of Transportation to the NYS Thruway Authority (NYSTA) and created the NYS Canal Corporation (NYSCC) as a wholly-owned subsidiary of NYSTA. The NYSCC is the public benefit corporation entrusted with the operation, maintenance and development of the New York State Canal System. This legislation also required that a Canal Recreationway Plan be developed to guide the Canal Revitalization Program.

With \$32.3 million in expenditures over the next five years, the Canal Revitalization Program will fund projects which fall into four categories: Canal harbors, service port & lock projects, canalway trails and marketing. The goals of the various projects are to preserve and rehabilitate Canal infrastructure so that it is safe, accessible and available for future use; enhance recreational opportunities for water-based and land-side users; and promote and foster economic development throughout the Canal corridor. A major program objective is to secure private-sector funding for economic development initiatives.

Seven canal harbor sites are located in Waterford, Whitehall, Little Falls, Seneca Falls, Oswego, Rochester and the Tonawandas. All of the harbor sites are in various stages of design/construction, with the Seneca Falls harbor completed last spring. There are 96 service ports and lock projects proposed across the system that will provide basic services and amenities, and enhanced boater access to communities. Completion of these projects will increase investor confidence in the future of the Canal System. Private investment for additional project components such as marinas, charter and tour boat operations and tourism and hospitality services will be pursued through the NYSCC's marketing program. Private investors are encouraged to develop restaurants, hotels and B&B's and other revenue-generating businesses.

The investment in the NYS Canal System is already having major public benefits:

- ♦ In 1993 there were approximately 4,000 inquiries to the NYSCC's 1-800 telephone number. In 1998, there were more than 9,600 telephone and 20,400 mail/electronic inquiries.
- ♦ Tour boat operations on the Canal System have increased from 11

boat companies with 15 boats in 1993 to 21 companies and 42 boats in 1998.

- ♦ While commercial shipping has decreased dramatically over the last ten years, the NYSCC is undertaking efforts to bring commercial shipping back on the Canal. This will revive the traditional river route for moving materials between the Hudson River and the Champlain and Erie Canals.

Two other major initiatives are underway that will bolster development along the Canal Corridor. The National Park Service has completed a Special Resource Study of the Canal System. The study demonstrates the Canal's national significance and appropriateness of a National Heritage Corridor designation. This is an important marketing and promotion tool, and such a designation could be extremely helpful in efforts to secure federal funding for Canal development. In addition, in December of 1996, the U.S. Department of Housing and Urban Development (HUD) announced its Canal Corridor Initiative. Under this program, more than \$130 million in grants and loans have become available to Canal Corridor Communities.

The Canal Revitalization Program and these other initiatives present significant opportunities for Canal System development. By working with the private sector, state and federal agencies, and local governments, significant economic benefits for Canal corridor communities and the state will be realized.

The Regulatory Environment of the Canal System

Communities looking to revitalize waterfront along the Canal System face a multitude of permitting issues that will need to be reviewed. These include the National Environmental Policy Act (NEPA), the State Environmental Quality Review Act (SEQRA), permits for use of NYSCC land, waterfront property ownership, contaminated sites, local land use review, cultural resources review, wetlands and waters permitting, and miscellaneous permits such as Coastal Zone Management, SPDES permits for stormwater management control, sewage treatment, potable water and curb cut permits.

In the process of designing a project, it is important to assess site conditions thoroughly in the beginning of the project. Feasibility issues should be examined and the project designed to avoid difficult issues. Typically the public can then review the project design

during the NEPA and SEQRA review. Permit applications are submitted and processed during the development of construction drawings. There are three simple rules of thumb to avoiding problems in the design and permitting of projects. Avoid developing construction drawings until SEQRA has been initiated. Avoid releasing construction drawings for bid until SEQRA has been finalized. Avoid releasing construction contracts until all permits have been obtained.

NEPA/SEQRA: These federal and state regulations require that the environment is fully considered and balanced in the design, permitting and approval process of projects. NEPA is triggered whenever there is a federal action, such as funding, permitting, or a direct undertaking. SEQRA is triggered whenever there is a similar state or local action. These two laws form the procedural framework for reviewing potential environmental impacts of projects.

NYSCC: Using the Canal Recreationway Plan as a guide; the NYSCC reviews proposed projects for compatibility with the Plan's vision for the Canal System. During the early stages of project development, communities are advised to contact the Albany Headquarters and division offices of the NYSCC to obtain guidance for project development and to determine the technical requirements needed for project implementation. Compliance with SEQRA is required during the early stages of a project. The NYSCC may request Lead Agency status or, at a minimum, be included as an involved agency during a coordinated SEQRA review. Once SEQRA is completed, the NYSCC requires that all applicants proposing to occupy canal property apply for both a Use & Occupancy Permit and a Work Permit to occupy NYSCC land and construct the facility. The NYSCC's division and headquarters engineering, architectural and environmental staff reviews the applicant's proposed project.

Property ownership: Defining property ownership along waterfronts can be difficult and confusing. It is important to obtain a property boundary survey early in the project. Applicants can thus avoid proposing a project on land that is not under their control.

Contamination: Because of past industrial land uses along the canal, there is also the potential for contamination both on sites and in buildings. A Phase 1 Environmental Site Assessment is recommended to examine the potential for contamination. Luckily, due to changes both in regulations and funding for site clean-ups, contaminated sites have become less difficult to develop than in the past.

WETLAND QUESTIONS YOU WEREN'T AFRAID TO ASK

The New York State Wetlands Forum e-mail address has become a informal source of information for a number of people. If you have questions that you would like to have answered, feel free to contact the New York State Wetlands Forum at nywf@capital.net. The question is forwarded to an individual with experience in that area, and a response is provided by e-mail. The following is a summary of some of the questions asked on the e-mail site, as well as questions that were asked at a recent wetlands session at the New York State Lands Conservation meeting facilitated by Barbara Beall, Chair of the Forum.

Q. A utility company wants to place a 50 foot wide utility easement for an 8 inch gas pipeline through our organization's red maple swamp wetland conservation easement. We are concerned that we may end up with an outbreak of phragmites and other unwanted species in this wetland if the construction goes forward. What do we do? Let the utility company know about the conservation easement. It may give them an incentive to avoid your land. A utility company must work to obtain easements voluntarily from landowners, and after a substantial portion of the utility easements have been obtained, land owners who do not negotiate or where agreement cannot be reached, can be forced to have the easement located through their property through eminent domain. You can work with the utility company during these voluntary negotiations to address the actual location of the pipeline, any Best Management Practices you want them to undertake on your property, and any monitoring or notification requirements you want to implement. You can also negotiate the easement price.

A 50 foot wide right-of-way seems excessively wide. Generally, an 8-inch gas line requires a 2-foot wide trench. Some extra width will be necessary for construction vehicles and stockpiling of excavated soil, but a narrower right-of-way could accommodate this activity. If the length of swamp to be crossed is short (1,000 feet or less), it may be possible to accomplish the construction by diagonally boring under the swamp. Even if the segment is long, it may be possible to bore it in several segments.

If the gas line is more than 1000 feet in length and greater than 125 pounds per square inch, then it is required to be certified by the Public Service Commission (PSC). If so, then the PSC will have overall review and permitting authority for all local and state permits. The PSC review process allows for your group to become an involved party and publicly comment on the project. If the project

does not fall under PSC jurisdiction, then individual permits may have to be obtained for any disturbances to the swamp. If the disturbance is more than 500 feet and/or requires clearing in a forested wetland, then the Corps of Engineers will have to issue a written authorization for the work. If the swamp is a NYSDEC regulated wetland, then the NYSDEC will also have to issue a permit for the work. If a NYSDEC permit is required, then there will be an opportunity for your organization to be an involved party and to publicly comment on the project. It is also possible that both agencies will have to review and approve the project.

There are a number of Best Management Practices that are applicable for pipeline construction. Here are a few:

- ♦ Notify your organization prior to construction so that you can monitor construction.
- ♦ Installation of silt fences along the outside edges of the work area.
- ♦ Wash equipment prior to entering the wetland. The utility company would set up a staging area in uplands away from the wetlands on your property, with a wash pad area created out of silt fence and haybales to collect any invasive seeds from the old dirt on the machines.
- ♦ Separate topsoil from subsoil during excavation and replace the soil in the trench in correct order and to original grade.

With regard to the concern about phragmites and other invasive species that could be introduced, a good source of information is the web site at <http://www.catalinas.net/seer/er/plants/phraaust.htm>.

Q. If a wetland is already protected by state or federal agency regulations, should a land conservation organization obtain a conservation easement? Just because a wetland is regulated by either the state or federal regulatory agencies, does not mean that that wetland is "protected" per se. Agencies can still authorize activities in or adjacent to a wetland after considering applicable regulatory standards and whether the project is in the public interest. Also, activities near but not in the wetland (and thus not regulated) could have an adverse impact on the wetland itself. If a wetland is important to your community, be proactive now rather than reactive when development is proposed.

Q. How should we go about identifying wetlands to protect? When prioritizing where to establish conservation easements, you may

wish to choose wetlands which have the best qualities and are also under the greatest development pressures. Begin by identifying regional areas under the greatest development pressure. Then obtain aerial photography and mapping (i.e., soil surveys, NYSDEC wetland maps, National Wetland Inventory mapping if available). Using GIS or manual overlays, locate where wetland soils and mapped wetlands come together to identify where the wetlands are. Contact the NYSDEC to determine which wetlands are the highest quality. Forested wetlands, identified from the aerial photography, are generally considered more important due to the difficulty in recreating them, and the less frequent occurrences of the plant community. The NYSDEC Significant Habitat Unit in Latham, NY maintains records of occurrences of federally and state listed rare, threatened and endangered flora and fauna. You may also chose wetlands based on other important functions such as protecting water quality, or their linkage to other wetlands or habitats.

Q. Are there sources of money to fund wetland acquisitions? Inform the federal and state resource agencies in your area of your "top ten wetland acquisition wish list." These agencies work with project sponsors that can pay for wetland acquisition as mitigation (a.k.a. "in-lieu fee") for a project, or that need to make amends for a violation.

Q. We've just acquired a wetland under a conservation easement. What should we do to improve it? First of all, leave the wetland alone until it is well understood. Undertake a complete assessment of the wetland. Study its biology, including an inventory of flora and fauna and a habitat assessment (Habitat Evaluation Procedure or HEP analysis). Analyze a water budget (where water comes from, how long it stays and where it goes). Review other physical characteristics. Identify its functions and values (things wetlands do, some of which may be important to a community), through an assessment technique such as the Federal Highways Administration's Wetland Evaluation Technique (WET2) or the hydrogeomorphic technique (HGM). Obtain an inventory of historic photos to determine what the wetland looked like in the past. (Lists of aerial photography sources are available from the NYSDOT Map Unit Office in Albany and the USGS in Reston, Virginia). After collecting baseline knowledge, data and understanding, you will have a much better idea of how to proceed.

RECENT WETLAND/TAKINGS CASE

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

In a regulatory takings case, the United States Court of Appeals for the Federal Circuit held that the federal government did not take property without just compensation when the Corps of Engineers denied a dredge and fill permit for development in the Florida Keys. The landowner had no reasonable investment-backed expectation where the landowner bought the land knowing that federal, state, and local permits would be required, that environmental criteria were part of the permitting decision process, and that state or federal regulations could ultimately prevent him from developing the property. Good v. United States, ___ F.3d ___, 1999 WL 673336 (Fed. Cir. August 31, 1999).

Lloyd A. Good, Jr. purchased 40 acres of undeveloped land in the Florida Keys in 1973. The property included 32 acres of salt water and fresh water wetlands. In the sales contract and again when he hired a land planning and development firm, Good acknowledged that a portion of the lands may be below the mean high-tide line.

Good first submitted an application for a Corps permit in March 1981. Good proposed dredging and filling 10.5 acres of wetlands to create a 54-lot subdivision and a 48-slip marina. The Corps granted the permit in January 1984. In February 1983 the State granted a dredge and fill permit. The county granted approval in July 1984.

However, in September 1984 the Florida Department of Community Affairs appealed the county's approval of Good's dredge and fill permit. The matter was subsequently remanded to the county for reconsideration of its decision. In the meantime, the county had adopted a new land use plan and new development regulations. Under these new regulations, Good's project would not be allowed.

Good brought suit in state court alleging that the State had taken his property without just compensation. In a settlement, the State agreed that Good's application would be evaluated under the county's prior land use plan and development regulations but that any future development would be subject to the later enacted land use regulations.

The county gave preliminary approval to Good's plan in November 1989, subject to 15 conditions, the most significant of which was approval of the project by the South Florida Water Management District (SFWMD). SFWMD soon notified Good that SFWMD staff recommended denying the application. Good asked that his application be removed from SFWMD's agenda and

never obtained SFWMD approval for his project.

Instead, Good submitted a new scaled-down plan to the Corps in July 1990. This plan proposed building only 16 homes together with a canal and tennis court. However, all the homes would be located in the wetlands area. The overall wetlands loss was reduced from 10.53 acres to 10.17 acres. Between the time the Corps issued Good's 1988 permit and the time he applied for the 1990 permit, the Lower Keys marsh rabbit was listed as an endangered species thus requiring the Corps to consult with the Fish and Wildlife Service (FWS). As a result of the so-called "section 7 consultation," FWS concluded that Good's latest project proposal would not jeopardize the marsh rabbit. Nevertheless, it recommended denial of the permit based on the development's overall environmental impact. Because the 1988 permit had been issued before the marsh rabbit was listed as an endangered species, the "no jeopardy" finding of FWS did not apply to the earlier permit granted by the Corps to Good. The Corps notified FWS in May 1991 that Good intended to proceed with the project allowed by the 1988 permit. After further consultation, the FWS released a new biological opinion in December 1991 concluding that both the 1988 and 1990 plans jeopardized the continued existence of two endangered species. The Corps denied Good's 1990 permit application in March 1994. At the same time the Corps notified Good that his 1988 permit had expired. The Corps based its denial on the threat either project posed to the endangered species.

Good filed suit in July 1994 alleging that the Corps' denial of his permit constituted an uncompensated taking of his property in violation of the Fifth Amendment of the Constitution. The Court of Federal Claims granted summary judgment in favor of the government dismissing Good's suit. The court held that the Corps' denial of Good's permit did not constitute a "per se" taking under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), because the Endangered Species Act did not require that the property be left in its natural state and because the government had shown that the property retained value. The court also held that Good lacked reasonable, investment-backed expectations since both federal and state regulations imposed significant restrictions to develop his property both at the time he purchased it and at the time he began to develop it. After losing in the Court of Federal Claims, Good appealed.

It has long been recognized that property may be regulated to a certain extent, but that if regulation goes too far it will be recognized as a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The Supreme Court has set out several factors to be considered in determining whether a regulation effects a taking, including the extent to which the regulation interferes with distinct, investment-backed expectations. See Penn Central, 438 U.S. at 124.

In order to have an investment-backed expectation, a landowner must demonstrate that he bought the property in reliance on the non-existence of the challenged regulation. Creppel v. United States, 41 F.3d 627-32 (Fed Cir. 1994). "One who buys with knowledge or restraint assumes the risk of economic loss." The Court of Appeals acknowledged that the Supreme Court in Lucas set out a particular type of taking referred to as a "categorical" taking "where regulation denies all economically beneficial or productive use of land." See Lucas, 505 U.S. at 1015. However, the court went on to hold that the Supreme Court did not intend to eliminate the requirement for reasonable investment-backed expectations to establish a taking. The court noted that even in 1973 when Good purchased the land, the Corps had been considering environmental criteria in its permitting decisions for a number of years and had denied dredge and fill permits solely on environmental grounds. When Good bought the parcel he acknowledged the necessity and difficulty in obtaining regulatory approval. He also acknowledged that potential difficulty in the contract with his development company. Good thus had both constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property. In spite of the obvious difficulty in gaining all the permits required to develop on the property, Good waited seven years after buying the property to obtain a land development firm to seek the required permits, "watching as the applicable regulations got more stringent, before taking any steps to take the required approval." The court, therefore, concluded that Good "lacked a reasonable, investment-backed expectation that he would obtain the regulatory approval needed to develop the property." Good was aware of the need for regulatory approval to develop his land, was aware that it would be difficult to obtain the permits, and was aware that the standards and conditions governing the issuance of permits could change. Good's lack of reasonable investment-backed expectations defeated his taking claims.

FORUM BEGINS LONG RANGE PLANNING

Given that the New York State Wetlands Forum, Inc. ("Forum") celebrated its fifth year of existence, it is time to assess the workings of the Forum, and its effectiveness in maintaining a diverse membership and meeting the needs of its membership. In April, the Forum Board of Governors met to discuss long range planning. We would like your feedback on our ruminations which are summarized below.

Newsletter: Two main concerns surfaced – the newsletter needs to be non-advocacy/ non-promotional and it needs to be timely. While we think we have done a good job keeping the newsletter balanced and thus non-advocacy, and non-promotional, this would be safeguarded by having a more diverse group of people writing articles for the newsletter. To assure timely delivery of regulatory and legal information, the Forum proposes to establish an e-mail delivery system committee. This group would develop procedures for the writing and delivery of informational releases about regulatory and legal happenings, as well as meetings.

How you can help: Write an article summarizing a project, study or research you are conducting. The article does not have to be long or detailed. The main purpose of the article is to inform people about what you are doing, so that they can contact you and ask questions about your project.

Send us your e-mail address if you are interested in being included on our Forum e-mail list. Volunteer to serve on the newsletter/electronic mail committee to help develop procedures to implement this long-range plan.

Increase and Diversify the General Membership: The Forum was designed specifically to mix a diverse array of people interested in New York State wetlands. The Long Range Planning Group is intent on increasing and diversifying the Forum's membership, especially among local government representatives, environmental organizations, Native Americans, wildlife enthusiasts and the like. We are concerned however that we might be overlapping too much with other organizations and may not be effectively coordinating with them. We would like to have joint meetings with other organizations, have more diverse topics at meetings, and have scholarship funds for NGO/local governmental agencies to come to Forum meetings.

How you can help:

Give us some feedback about the composition of the organization.

Provide the Forum with names and addresses of other organizations or individuals

with whom a liaison should be established.

Let the Forum know if you are interested in cosponsoring a meeting.

Volunteer for the General Membership Development Committee.

Increase and Diversify Membership in the Development and Business Community: Many of the Forum members would like greater representation by the business and development community at our meetings. We were very fortunate to have Marco J. Marzocchi from the Wildwaters Group speak on economics in wetland alternatives analysis at this past year's annual meeting. However, it is unusual to have a developer speak about their projects and bring that perspective to our meetings. Perhaps the business community is not aware of the Forum, maybe the Forum appears too "green" for them, or they may prefer to be represented at Forum meetings by members who are consultants or attorneys. The Forum proposes to reach out to the business and development community at their own meetings to discuss the benefits of The Forum and to listen to this group to assess that community's understanding and perception of the Forum.

How you can help:

If you are a member of the business/development community, give us some feedback about the Forum.

If you are a consultant or lawyer who has been working with a developer on an interesting project, ask if you can write an article on your project, or see if your client

would be interested in making a presentation at an annual meeting.

Volunteer for the Business Community Membership Development Committee.

Increase and Diversify Membership in the Student–Academic Community: The Long Range Planning Group would like to have more student and academic involvement in the Forum due to the information on scientific research they can bring to the group. There needs to be more student exhibits and poster sessions at the meetings, and more articles on scientific research in the newsletter. It is possible that this community prefers to participate in the Society of Wetland Scientists, since the Forum has a broader perspective than just wetland science, and its newsletter is not peer reviewed. However, the Forum provides many benefits to the academic community, especially students, with an opportunity to network with a broad array of individuals working in the field, and it is easier to get an article published in the Forum newsletter. The Forum is considering offering incentives such as free membership to students who submit an article for the newsletter, or a discounted price for admission to the annual meetings for students who prepare a poster session at the annual meeting. We are also considering looking into getting CEUs for our annual meetings, and setting up a job search area on our web page.

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Forum members explore Beaver Lake Nature Center wetlands during 1999 annual meeting.
Photo courtesy of Barbara Beall.

The following is a summary of the “Vernal Pools” session presented by Edward Pawlak, Connecticut Ecosystems, LLC, and Kristian Whiteleather, SUNY-CESF, at the Forum’s 1999 Annual Meeting.

Edward Pawlak’s presentation, “Criteria for Vernal Pool Identification and Inventory,” was an informative and interesting session on the means and reasons for vernal pool identification. He first provided an introduction to how a vernal pool is defined, “a fishless, basin depression with at least two months of standing water in the spring and summer utilized by obligate vernal pool species.” He went on to describe a few species known to be vernal pool obligates, including the wood frog (*Rana sylvatica*), spotted salamander (*Ambystoma maculatum*), and fairy shrimp. Non-obligate vernal pool species mentioned include the spring peeper (*Hyla crucifer*), spotted turtle (*Clemmys guttata*), green frog (*Rana clamitans*), and the four-toed salamander (*Hemidactylium scutatum*).

Pawlak went on to discuss the values of vernal pools. First and foremost was the biodiversity they provided, especially as breeding habitat for endangered species, and also their biological productivity. He also pointed out that educational opportunities exist (who has not stared in fascination when they stumble upon the writhing forms of the spotted salamander during spring?) and they are also aesthetically pleasing.

The difficulties in protecting vernal pools are due in part to their ephemeral nature and also because in NYS most vernal pools are smaller than the regulatory 12.4 acre minimum (smaller vernal pools remain regulated by the ACOE). Vernal pools are difficult to identify when they are dry because the most obvious obligate species have most often moved on to other habitats. However, even when wet vernal pools may not be identified because amphibians face barriers when migrating back to the vernal pools and may not be present. Pawlak emphasized that connectivity among vernal pools needs to be maintained to provide new genes and, if necessary, new populations when the previous population has been extirpated. Further complicating the issue are depressional basins that saturate in spring and summer yet do not support obligate vernal pool species.

A vernal pool study was conducted by Pawlak to assist Haddam, CT in their natural resource planning and management. The objective was to identify vernal pools before they became part of a wetland permit application to allow for an informed site review plan and possible addition to the town’s Open Space Plan. The strategy involved identifying potential vernal pools

(PVPs) by obtaining permission to access the site (50% of PVPs were privately owned) followed by inspection and monitoring of the sites. Of the PVPs inspected, 70% were confirmed vernal pools with the remainder determined to be ponds, marshes, or shadows on the aerial maps. The study enabled the town to address issues of vernal pool connectivity when reviewing applications.

The second presentation by Whiteleather, “Vernal Pools: Are There Reliable Indicator Species?” focused primarily on the indicator species attributes important to vernal pool identification. Species desired as vernal pool indicators are found in a high density, easily sampled (with regard to time, equipment, and labor), easily identified with a known life history, and sensitive to changes. Seed shrimp, Ostracod, and Coleoptera are present when the vernal pool is saturated yet, more importantly, their cysts remain in the dried basin as year-round evidence of their colonization. The distinguishable egg masses of the spotted salamander and wood frog and the visible spotted salamander spermatophores even when the amphibian is absent are reliable indicators during their respective breeding seasons but not year-round, a serious drawback 10 months out of every year.

The effects of increased distances between wetlands and the resulting isolation decreasing opportunities for the re-colonization of extinct pools was also discussed. Whiteleather noted that water depth is more important to the presence of obligate species than the area and volume of the vernal pool and emphasized the hydrological as well as biological aspects of the vernal pool system.

Whiteleather pointed out to consultants and academics that at least two years of data should be used to accurately represent vernal pool characteristics. Frequently he discovered vernal pools teeming with indicators that were absent the previous year or a year later. Altogether his presentation complemented that of Pawlak and provided more scientific detail of vernal pool identification utilizing indicator species.

Both Whiteleather and Pawlak were unaware of obligate vernal pool plants or soils because the vernal pool may be larger than the soils or existing vegetation indicators due to the fringes not being inundated long enough.

(WETLAND QUESTIONS YOU WEREN’T AFRAID TO ASK)

[Cont’d. from page 4]

Common projects include restoring wetland hydrology (removing drain tiles or filling ditches), improving habitat diversity (planting a different type of plant community or a food source in uplands) or increasing public access through trails or interpretive programs. Such actions should be taken in a planned manner, in consultation with a qualified wetland scientist or ecologist, and with the proper state and federal permits.

Q. I wish to save a farm pond where my 3 year old and I love to fish for bluegills. The problem is that since we moved here 2.5 years ago, the cattails and the weeds are starting to grow at a very fast rate and choke the pond. How can I save this pond? The easiest and least expensive way to get rid of cattails and other weeds is to drain the pond to the point where the cattail roots are exposed, and then have the roots go through two or three freeze/thaw cycles in the winter. If the bottom is stable enough, you could also disc the roots when they are partially frozen to break them up so they freeze faster. If the pond has a deeper spot in the center where there are no weeds, you can have water stay in this area to provide some refuge for the bluegills. If not, you may have to restock the pond. If this method does not work, you may need to excavate the pond to a deeper depth (greater than 6 feet) so that weeds are less likely to grow. Such excavation may require permits from the US Army Corps of Engineers in Buffalo or New York, and the NYSDEC. You should contact them prior to any excavation work to discuss your plans. In addition, you should examine the area around your pond to determine if there are any sources of nutrients or sediments that are entering the pond and causing it to either fill up faster with weeds or sediments. Correcting any such sources will increase the life of the pond in the future.

Q. I am e-mailing you from Sarasota, Florida. A former collegemate of mine is working with the wetland project out of Warrensburg, New York. I am wishing to connect with him if you could please forward this e-mail to him. We found the person in question in the NYSDEC in Warrensburg. We faxed a copy of the e-mail to him and let her know his telephone number. The rest is up to them.

**SPECIAL EDITION
NEW YORK STATE WETLANDS FORUM, INC.
SAVE THE SOUND, INC.
1999 FALL MEETING**

**WETLAND MANAGEMENT'S INFLUENCE ON WATER QUALITY
IN THE METROPOLITAN NEW YORK CITY/LONG ISLAND REGION
NOVEMBER 8th and 9th
DANFORDS INN ON THE SOUND – PORT JEFFERSON, LONG ISLAND, NEW YORK**

The New York State Wetlands Forum, Inc. is teaming with Save the Sound, Inc. to present an exciting fall meeting on wetland management and its influence on water quality in the New York City-Long Island region. As the first "wetlands forum" on Long Island, the meeting is designed to provide networking opportunities for individuals involved in wetland management and water quality issues in the southeastern portion of New York State and surrounding areas. These include private consultants involved in the environmental, engineering and landscape architecture fields; marina operators and owners; Federal, State, County, and local governmental officials; and non-governmental organizations, not-for-profits, and community organizations.

This is a Preliminary Agenda.

For additional updates of the meeting, check out the Forum web-site at <http://www.capital.net/com/nywf/index.html>

PRELIMINARY AGENDA

MONDAY, NOVEMBER 8, 1999

7:00 - 9:00 Registration/Exhibit Set Up
 Continental Breakfast in Foyer

GENERAL SESSION 1

9:00 - 9:15 Opening Remarks: Vic Pyle, Habitat Project Manager, Save the Sound, Inc.

9:15 - 10:00 Wetlands and Water Resources in the Long Island Area

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10:00-11:00 CONCURRENT SESSIONS

Session A Non-Point Source Pollution and Stormwater Management

Moderator:

- Nonpoint source pollution/stormwater management for municipalities. Steve Nakashima, NEMO (invited)
- Stormwater strategies for municipalities. George Aponte Clark, NRDC (confirmed)

Session B Dredging and Harbor Management

Moderator:

11:00 - 11:15 Break

11:15 - 12:15 GENERAL SESSION 2: Legislative and Regulatory Updates

- Nationwide Permit Revisions and Regional Conditions. Roberto Barbosa, ACOE (invited)
- Essential Fish Habitat Assessments and the Magnuson-Stevens Fishery Conservation and Management Act of 1996. Diane Rusanowsky, NOAA/NMFS Milford Laboratory (confirmed)
- NY State DEC Wetland Permitting Program Review. Art Newell/Chuck Hamilton, NYSDEC (invited)

12:15-1:30 LUNCH

Keynote Speaker: Peter Lehner, Environmental Protection Bureau Chief
New York State Office of the Attorney General (invited)

1:30-2:30 CONCURRENT SESSIONS

Session C Wetlands and Watershed Management

Moderator:

- Watershed Advisory Committee Program. Rob Doscher, Westchester County Planning Department (invited)
- Manhasset Bay Water Quality Improvement Plan. Lynn Oliva/Jennifer Wilson-Pines, Town of Manhasset, NY (confirmed)

Session D Local Waterfront Revitalization Plans

Moderator:

- Developing and Implementing a Local Waterfront Revitalization Plan. TBD. NYSDOS (invited)
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-

2:30 – 2:45 Break

2:45 – 3:15 GENERAL SESSION 3: Funding for Wetlands Protection and Restoration Programs

- NY Clean Water/Clean Air Bond Act. Karen Chytalo, NYSDEC (confirmed)
- NY Environmental Protection Fund. TBD. NYS DOS (invited)
-

3:15 – 5:00 GENERAL SESSION 4: Wetland and Water Restoration Programs

- Long Island Wetland Restoration Initiative. Craig Rennie; Ducks Unlimited (confirmed)
- Getting the Work Done – Partnerships for Restoration. Lisa Holst, NYSDEC (confirmed)
- Bronx River Restoration. Jenny Hoffner/Michelle Bakacs, Bronx Partnership for Parks (invited)
- Babylon Wetland Restoration Projects. Richard Groh, Town of Babylon, NY (confirmed)

TUESDAY, NOVEMBER 9TH

8:30 – Noon FIELD TRIPS - These field trips include wetlands creation and restoration sites and visits to interesting wetland complexes on Long Island. Each trip is planned to be approximately 3.5 hours. Appropriate field wear required. Details and directions will be provided at the conference.

- Possible Field Trip Sites
- Long Island Pine Barrens
 - Native Plant Nursery – Riverhead
 - Peconic Estuary
 - Orient Point Grassland Restoration

THANKS TO OUR PROGRAM SPONSORS

New York State Sea Grant
 New York State Department of Environmental
 Conservation
 Cameron Engineering

**ABSTRACT SUBMISSION FORM
1999 FALL MEETING**

Mail completed form to: Save the Sound, Inc.; Attn: Vic Pyle; 185 Magee Avenue, Stamford, CT 06902-5906

Contact Person _____ Affiliation _____

Affiliation/Address _____

City _____ State _____ Zip _____

Phone _____ Fax _____ E-Mail _____

Session Topic _____

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

**CALL FOR PAPERS
WETLAND MANAGEMENT'S INFLUENCE ON WATER QUALITY
IN THE METROPOLITAN NEW YORK CITY/LONG ISLAND REGION
NEW YORK STATE WETLANDS FORUM, INC./SAVE THE SOUND, INC.**

**1999 FALL MEETING
DANFORDS INN ON THE SOUND
PORT JEFFERSON, LONG ISLAND, NEW YORK
NOVEMBER 8TH AND 9TH, 1999**

The focus of the Forum's fall meeting is wetland management and its influence on water quality in the metropolitan New York City/Long Island region. As the first Forum on Long Island, the meeting is designed to provide networking opportunities for individuals involved in wetland management and water quality issues in the southeast portion of New York State and surrounding areas. Topics to be discussed include:

Nonpoint Source Pollution/Stormwater Management	Local Waterfront Revitalization Plans	Bronx River Restoration
Funding for Restoration Programs	Wetlands and Groundwater Resources	Babylon Wetland Restoration
Habitat Restoration Initiatives	Legislative and Regulatory Updates	NY Clean Water/Clean Air Bond Act
Dredging/Harbor Management	Regulatory Issues - Nationwide Permit Revisions/Regional Conditions	Hempstead Harbor Management Plan
Wetlands and Watershed Management	Long Island Wetland Restoration Initiative	Watershed Advisory Committee (WAC) Program
Essential Fish Habitat Provisions	Smithtown Wetland Restoration	Sheets Creek Restoration

Authors wishing to make a 15-20 minute presentation at this meeting should submit an abstract along with a submission form to Vic Pyle for consideration BY October 15, 1999. Submittals can be typed, on computer disk (MS Word or WordPerfect format), or e-mailed to: savethesound@snet.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. Author¹ and Author². Address¹, phone number, fax number, email address. Address².
Abstract

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, should 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.

REGISTRATION/HOTEL INFORMATION

HOTEL INFORMATION: Please contact the hotel directly for reservations relating to the meeting. The room rates are \$130 for a single or a double occupancy room. The hotel information is: Danfords Inn On the Sound; 25 East Broadway; Port Jefferson, New York 11777; Ph: (800) 332-6367 or (516) 928-5200; Fx: (516) 928-3598; web: WWW.DANFORDS.COM. When making your room reservation, please indicate that you are with the New York State Wetlands Forum Inc./Save the Sound meeting.

REGISTRATION FORM

Name _____ Affiliation _____
Address _____
City _____ State _____ Zip _____
Phone _____ Fax _____ E-Mail _____

Prepaid Registration Fee (postmarked by October 22, 1999)	Circle your payment
Fee for speakers/moderators regardless of registration date	\$75
Prepaid Registration Fee (postmarked by November 1, 1999)	\$65
On-Site Registration	\$90
Will you be exhibiting?	\$100
\$150 Before October 8, 1999 (includes one free registration)	Y N
\$200 fee After October 8, 1999 (includes one free registration)	
Would you like to participate in the poster session?	Y N

Exhibitors and poster sessions should contact Vic Pyle at:
Save the Sound, Inc., 185 Magee Avenue, Stamford, CT 06902
Phone: (203) 327-9786; Fax: ((203) 967-2677; E-mail: savethesound@snet.net

NEW RULE REDEFINES “DISCHARGE OF DREDGED MATERIAL”

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

The latest salvo in the battle over the Tulloch Rule has been fired by the Corps of Engineers and the Environmental Protection Agency. On May 10, 1999, the Corps and EPA revised the Clean Water Act regulatory definitions of “discharge of dredged material” in response to a recent federal court case holding that the Corps’ and EPA’s assertion of jurisdiction over any redeposited dredged material, including incidental fall back, was improper.

In August 1993 the Corps and EPA issued a regulation known as the Tulloch Rule, which defined the term “discharge of dredged material” under Section 404 of the Clean Water Act as:

“any addition of dredged material into, including any redeposit within, the waters of the United States. This term includes, but is not limited to the following: . . . any addition, including any redeposit of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation.” 33 CFR 323.2(d)(1); 40 CFR 232.2.

In January 1997 the U.S. District Court for the District of Columbia ruled that the regulation exceeded the Corps’ and EPA’s authority under the Clean Water Act because it impermissibly regulated “incidental fall back” of dredged material. The court concluded that incidental fall back is not an “addition” of pollutants. Therefore, the Corps and EPA exceeded their statutory authority in attempting to regulate any redeposit of dredged materials. The court declared the rule invalid and enjoined EPA and the Corps from applying or enforcing the regulation. The District Court decision was affirmed on appeal. National Mining Congress v. United States Corps of Engineers, 951 F.Supp. 267 (D.D.C. 1997); *aff’d sub nom.* National Mining Association v. United States Army Corps of Engineers, 145 F.3d 1339 (D.C.C. 1998). (For more information on this case, see the Summer 1998 issue of the Forum).

In the continuing battle over the Tulloch Rule, the Corps and EPA have attempted to limit the damage from the Court of Appeals decision. To conform the regulation to the Court’s holding, two modifications have been made to the rule. First, the new rule deletes use of the word “any” as a modifier of the term “redeposit.” Second, the rule expressly excludes “incidental fall back” from the definition of “discharge of dredged material.”

As a result of this new rule, 33 CFR

Section 323.2(d)(1) and 40 CFR Section 232.2 now define “discharge of dredged material” as:

“Any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following: . . . (iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.”

Rather than a full scale retreat from the Tulloch Rule, the new rule is intended to comply with the injunction issued by the Court of Appeals, but “does not alter the well settled doctrine . . . that some redeposits of dredged material in waters of the United States constitute a discharge of dredged material and therefore require a Section 404 permit.” 64 Fed. Reg. at 25121 (May 10, 1999). In the new rule, the Corps and EPA have decided to engage in a case-by-case evaluation to determine whether a particular redeposit is subject to Clean Water Act jurisdiction. In National Mining Association, the Court of Appeals acknowledged that certain redeposits are subject to Clean Water Act jurisdiction, including mechanized land clearing, sidecasting, and removal of material and its subsequent redeposit in the waterway after segregation of minerals. National Mining Association, 145 F.3d at 1407. However, the court also recognized that the Clean Water Act “sets out no bright line between incidental fall back on the one hand and regulable redeposits on the other” and that “a reasoned attempt to draw such a line would merit considerable deference.” *Id.* at 1405.

The Corps and EPA have not attempted to draw a line in the sand - or in the swamp - with this new rule. Instead, they “will expeditiously undertake notice and comment rulemaking that will make a reasoned attempt to more clearly delineate the scope of CWA jurisdiction over redeposits of dredged materials in waters of the U.S.” 64 Fed. Reg., at 25121 (May 10, 1999). The Agencies did not announce a schedule for such future rulemaking.

HELP WANTED

The New York State Wetlands Forum is looking for nominations for individuals who would like to serve on the Board of Directors for three year terms (which can be renewed for the truly dedicated). Being on the Board of Directors requires an active role in organizing and directing some aspect of the Forum mission, such as newsletters, programs, administration, by-laws, or finances. It also requires that you provide ideas and guidance on the overall mission and direction of the organization, and contacts and ideas for programs and/or communication efforts. The Board of Directors meets 4 to 6 times a year, and participation at the annual and fall meetings is also expected. Please submit your resume and a letter indicating your wish to serve by December 1, 1999 to the NYSWF, Post Office Box 1351, Latham, New York 12110-1351. Or E-mail Barbara Beall at BeallBB@aol.com.

The Forum is also looking for individuals to serve on any of the committees, which meet several times a year, often by conference call. These include Newsletter, Program, By-Laws, Administration, and Long Range Planning. We are looking for help with the organization, layout, editing and publication of the newsletter. We are looking for help establishing administrative assistance for the database management and finances of the organization, establishing a more permanent home or office for the Forum, and increasing membership and newsletter distribution.

We are also looking for individuals to give us ideas about or to present, moderate or organize sessions at next year’s annual meeting. We think the preliminary agenda is very exciting, and plan on filling it in with equally good sessions and speakers, but whatever help you can give will be especially appreciated.

If you are interested in any of these activities, please send a note to the NYSWF post office box, E-mail Barbara Beall or the New York State Wetlands Forum at NYWF@capital.net, or contact one of the members of the Board of Directors listed on the homepage.

(REDEVELOPMENT OF NEW YORK STATE'S CANAL SYSTEM)

[Cont'd. from page 3]

Historical and Cultural Resources: The canal system contains a vast number of historical and archeological significant sites. It is important to assess this issue early in the process, to determine whether the project will have an adverse impact on the resources, and if those impacts can be avoided.

Wetlands and Waters: Both the NYSDEC and the US Army Corps of Engineers regulate the wetlands and waters associated with the NYS Canal System. Again, early assessment of the resources present on the site, and a project design which is sensitive to these resources will assist in the review.

Canal communities will have the greatest success if they assess site conditions early and design projects to avoid significant feasibility issues.

DEVELOPERS FILE MOTION TO HALT TULLOCH-RELATED ACTIVITY BY AGENCIES

Industry associations representing developers and mining interests asked a federal court August 13 to order two federal agencies to stop enforcing a regulation that prohibits the ditching and draining of wetlands (*American Mining Congress v. Corps*, D.D.C., No. 93-1754 SSH, 8/13/99).

The motion said actions by the U.S. Army Corps of Engineers and the Environmental Protection Agency violate the meaning of an appeals court decision invalidating the Tulloch Rule.

The U.S. Court of Appeals for the District of Columbia Circuit said in June 1998 that the Corps exceeded its Clean Water Act authority in trying to regulate the removal of material from wetlands (*National Mining Association v. Corps*, 145 F.3d 1399, D.C. Cir., 1998).

The motion, filed by the National Association of Homebuilders and the American Mining Congress, focuses on NAHB member False Cape Enterprises, a Virginia Beach, Virginia builder. The company is seeking to clear vegetation in and around a wetland before draining it in order to make a lake.

"They're trying to drain the wetland to create a lake for storm water management and aesthetic purposes."

The Corps said the activity would require False Cape to obtain a Section 404 permit that regulates development activities in wetlands, according to the motion.

The motion also said a May 10 notice

that seeks to define discharges for the purpose of regulating development in wetlands areas represents a "thinly disguised revival of the Tulloch Rule." [editor: see story, p. 11]

Both the effort to require a permit for False Cape's activity and the notice that strikes the term "incidental fallback" from the meaning of dredged material violate the appeals court order to not apply or enforce the Tulloch Rule, the motion said. The groups asked the court to compel the two agencies to comply with the injunction.

An EPA official said that no action has been taken against False Cape, but he could not comment on the motion. However, he said the issue at hand is "a land-clearing case" that does not involve incidental fallback and may not be appropriate to the Tulloch decision.

The motion comes as environmental groups, state officials, and other in Virginia are trying to come up with a strategy for dealing with wetlands losses in the wake of the June 1998 Tulloch decision.

According to officials with the Chesapeake Bay Foundation, an environmental group, more than 2,300 acres of wetlands have been lost to development in the year since the decision and another 6,000 acres could be harmed in the next year.

The NAHB questions the validity of those numbers. The wetlands being drained, they say, are not high quality but are marginal in terms of the environmental benefit they offer.

The following are some of the questions asked during the plenary session, "Ask the Regulators" of individuals who provided the regulatory and legislative updates at the Forum's 1999 Annual Meeting.

Q: How does the Fish and Wildlife Service decide between [contaminated sediment] dredging and leaving them in place?

A: Anne Secord, US Fish and Wildlife Service, responded that the FWS would dredge highly polluted areas, leaving less contaminated sediment in place. She also noted that there are newer dredging technologies with less of an impact to the natural resources surrounding the dredge site.

Q: What is the status of the Wetland Delineator Certification Program?

A: Diane Kozlowski, US Army Corps of Engineers, responded that there is no congressional funding for the program and no indication that it will move forward until funds are appropriated. Currently available funds are devoted to the appeals process.

Q: What is the status of HGM?

A: Diane Kozlowski, US Army Corps of Engineers, responded that the US Army Corps of Engineers Waterways Experiment Station is working on various models for regional specifications (currently the red maple swamps in the Northeast Region). Patricia Riexinger, NYS Department of Environmental Conservation, added that the NYS DEC is working with Ralph Tiner of the US FWS to develop HGM code for regions on NYS to indicate what functions wetlands may be providing. NYS is also involved in the effort for NYC watersheds. She also mentioned that Tom Snow, NYS DEC, utilized concepts of HGM for the NYS Water Quality Standards.

Q: What is the status of the Saratoga County revised freshwater wetland maps and what problems are holding them up?

A: Tom Snow, NYS DEC, responded that it is statutory for the maps to be updated. Article 24 may be amended to make future efforts less cumbersome. He added that the lines of communication were not always clear. As for what triggered the problem, Saratoga County is one of the fastest growing counties in NYS and better technology led to a lot of changes in the existing freshwater wetland maps for the county. This is a hot topic which The Forum hopes to follow-up on at its Annual Meeting in 2000.

PROSPECT ENVIRONMENTAL TRAINING COURSE

The U.S. Army Corps of Engineers's Professional Development Support Center, Huntsville, AL, offers a number of Proponent-Sponsored Engineers Corps Training (PROSPECT) environmental training courses. For more information on these course, contact John Buckley (205) 895-7431; e-mail john.p.buckley@HND01.usace.army.mil.

Engineering and Design of Constructed Wetlands for Water Quality Improvement **March 6-10, 2000, Orlando, Florida**

This advanced course provides state-of-the-art technical knowledge on how to construct wetlands for water quality improvement. Students will be introduced to the latest proven technologies that can be applied to the construction and use of wetlands for surface and wastewater improvement. Strong emphasis is placed on planning, design, engineering, construction, operations and maintenance, and monitoring for water quality improvement. An in-depth consideration is given to a variety of wetlands construction techniques and principles. Student activities involve case studies, problem-solving sessions, and field trips to wetlands functioning for water improvement. Participants must have completed the "Wetlands Development and Restoration" course. For more information, contact John Buckley (205) 895-7431; e-mail john.p.buckley@HND01.usace.army.mil.

Wetlands Evaluation Procedures **March 27-31, 2000, Mobile, Alabama**

This course provides an introduction and overview of existing wetland evaluation procedures and case study application to wetland systems for environmental impact assessment and evaluation purposes. Major areas of instruction include methods used to classify, identify, and evaluate the functions of wetland communities, requirements for wetlands evaluation and justification during project planning, operations, and natural resources management phases of the civil works program.

Fundamentals of Wetland Ecology **June 5-9, 2000, Annapolis, MD**

This course provides an introduction and overview of basic wetland concepts and principles in the context of planning and operating civil works environmental and mitigation projects. Students are provided with state-of-the-art basic knowledge of wetland flora and fauna, hydrology, soils, and ecology. Both saltwater and freshwater wetlands are addressed and the relationship of wetlands to adjacent terrestrial and deep water habitats are discussed. The course emphasizes wetlands functions and values in an ecosystem perspective.

EPA POSTS NEW GUIDELINES FOR CONSTRUCTED TREATMENT WETLANDS

EPA requests public comments on the draft *Guiding Principles for Constructed Treatment Wetlands: Providing Water Quality and Habitat*. The draft includes guiding principles for siting, design, construction, operation, maintenance, and monitoring of constructed treatment wetlands; information on current Agency policies, permits, regulations, and resources; and answers to common questions.

The *Guiding Principles* were developed by the Interagency Workgroup on Constructed Wetlands (U.S. Environmental Protection Agency, Army Corps of Engineers, Fish and Wildlife Service, Natural Resources Conservation Services, National Marine Fisheries Service, and Bureau of Reclamation).

Written comments should be sent to Peter Mali, Wetlands Division (4502F), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, fax (202) 260-8000 or by e-mail to mali.peter@epa.gov. To request a copy of the draft guiding principles or for further information, please contact Peter Mali or visit www.epa.gov/owow/wetlands/constructed/



Forum members view Niagara Mohawk Power Corporation wetland restoration project during 1999 annual meeting. Photo courtesy of Kerry Thurston

MORE ON THE NWP PROPOSAL

— Scott Hausman, Chairman, Association of State Wetland Managers

The U.S. Army Corps of Engineers published a proposal to issue and modify the Nationwide Permits in the Federal Register on July 21, 1999. The comment period has been extended one month and comments on the proposed rule are due on October 7, 1999. The Corps is proposing to issue five new Nationwide Permits (NWPs), and modify six existing Nationwides to replace Nationwide 26 when it expires. There are also additions and changes to the general conditions. The proposed rule, which can be found at www.usace.army.mil/inet/functions/cw/cecwo/reg/citizen.htm, is 120 pages long.

In addition, the Corps is proposing to add regional conditions to the Nationwides that are being developed by each district office. Concurrent with the Federal Register notice, each Corps District has published public notices to solicit comments on their respective regional conditions. Many of these can be found on the District's web pages. Following publication of the final rule on these Nationwides – currently slated for December 31, 1999 – the States and Tribes will have 60 days to issue 401 Water Quality Certification and Coastal Zone Management Act consistency determinations.

While the goal of these modifications is to improve protection of the aquatic

environment, they add significantly to the complexity of the Nationwides, with the layering of Nationwides, regional conditions, and 401 Certification/CZMA consistency. In addition, in those states with more than one Corps district, there are generally different regional conditions, with little apparent coordination between Corps districts concerning the differences in regional conditions imposed within the state's boundaries.

Individual states are working hard, first to comment on the proposed changes, and second to determine whether and how to deny and condition the Nationwides. Opportunities vary based on State law, the number of districts being dealt with, and the types of wetlands and activities that affect wetlands most common in the state. For example, in Wisconsin we are proposing to rescind all nationwides and replace them with four general permits and letters of permission. Minnesota is taking a similar approach. For the states that are impacted by more than one Corps District, this type of solution may not be much more difficult to implement because it becomes necessary for the state to become a broker between the different Corps Districts to try to get consensus.

The Association of State Wetland Managers is proposing to create a website at aswm.org/nationwidepermits.htm where states can post their comments on the Nationwides and/or their questions and proposed strategies concerning 401 Certification or CZMA consistency. The purpose is to provide states with information and contacts regarding the activities occurring in other states. It will be sorted by state. Those submitting comments or questions to the bulletin board need to provide a name, e-mail address and phone number so that other states may contact them for further discussion information.

Non-state entities may provide comments and questions. However, these groups need to identify either the state they are associated with or that they are national in nature and belong under a national heading.

Posting comments on the bulletin board is not a substitute for formally providing comments to the Corps of Engineers concerning the Nationwides at the end of the comment period. ASWM is not attempting to synthesize this information and forward it to the Corps as part of formal comments on the Nationwides. The Association is providing an opportunity for sharing of ideas across state boundaries.

To submit information for posting on the website, please forward your comments to permits@aswm.org.

VIDEO AVAILABLE ON CONSTRUCTED WETLANDS FOR MANAGING STORMWATER RUNOFF

America's water continues to be adversely impacted by many sources of pollution.

Modern-day impermeable surfaces, such as roads and parking lots, increase stormwater runoff which accelerates erosion and downstream flooding. This runoff transports contaminants such as sediments, nutrients, road salts, oils and pathogens to rivers and lakes.

According to the Environmental Protection Agency, silt and nutrients were the top two pollutants in their last "Assessment of U.S. Rivers."

A new Cornell Cooperative Extension video, "Use of Constructed Wetlands for Stormwater Runoff," shows developers, natural resource managers, community planners, educators and the general public how properly constructed wetlands

moderate flow extremes and improve water quality. Added benefits include enhanced groundwater recharge, aesthetic appeal, and the creation of wildlife habitat.

The 20-minute program:

- shows how wetlands function to reduce pollution,
- explains appropriate design elements,
- highlights success stories,
- suggests sources of assistance for planning and constructing a wetland.

Produced by Gary Goff, Rebecca Schneider, Paul Curtis, in the Department of Natural Resources, College of Agriculture and Life Sciences; and Glen Palmer, Media and Technology Services, Educational Television Center at Cornell University. Funding was provided by The US EPA Section 391 Nonpoint. Source Program administered by

the NY State Department of Environmental Conservation, and the USDA Renewable Resources Extension Act.

Copies of the new video "Use of Constructed Wetlands for Stormwater Runoff," may be obtained from the Cornell University Resource Center, 7 BTP, Ithaca, New York 14850 for \$19.95 (payable to "Cornell University"), which includes handling and postage. NYS residents must add applicable sales tax or provide exempt status. Other ordering options include: call 607/255-2090, fax 607/255-9947, or e-mail <<Dist_Center@cce.cornell.edu>> the Resource Center and place the order on MasterCard or VISA. Copies of this program may also be available at Cornell Cooperative Extension offices located throughout New York.

(MESSAGE FROM THE CHAIR)

[Cont'd. from page 1]

its search to create synergy and find consensus and solutions to the challenges we all face.

Given the diversity of the Forum membership, this group is really quite a unique experiment. I think of the Forum organization as a host and its members as the participants at a gathering. In planning the meeting and editing the newsletter, we try to give Forum members opportunities to explore the issues we believe you are concerned about. By not taking an advocacy position, the Forum organization can establish a necessary level of trust, and can provide a balanced and diverse viewpoint through the speakers that will act as a catalyst for an open exchange of information.

So how is the Forum being honest about wetlands? If the Forum organization is responsible for establishing an open atmosphere, then each member of the Forum is responsible for honestly exchanging information about wetlands, relating his or her knowledge and experience with these issues, for listening and considering opposing viewpoints, and for remaining tolerant of each others views. The Forum organization promises to do a better job of increasing discussion time at meetings and giving its membership more opportunities to find those solutions. However, in order for the Forum experiment to work, the members of the Forum need to make a commitment to take a more proactive role by offering to write articles, make presentations at meetings, and volunteering for work on its committees and Board.

As the Forum enters its next five years, our goals are to diversify the membership further and find better ways to disseminate information among its membership. We will continue our mission to build an environment where all individuals can discuss and share information about wetland issues, the difficulties they have faced and solutions they have found. What are your goals, and how will you become more involved?

(CORPS ONCE AGAIN PROPOSES REPLACEMENT NWPS)

[Cont'd. from page 1]

territories would be ineligible as well. This is unfair to the residents and businesses in these areas as well as to the coastal Corps districts. I found basically no justification in the preamble for this extreme limitation. Plus, I thought you wanted to get away from the endless controversy over what is "adjacent."

Getting back to the big picture, I remember our discussions in late 1976, early 1977, where we decided to accede to the pressures from EPA and the environmental community to extend the limits of "waters of the United States" above the 5 cfs flow point and into certain isolated waters. But we did so only on the basis that virtually all discharges into these new waters would be permitted in advance by the regulations. Having made this decision, we brought in other activities that had been previously exempted from the need for a permit such as bulkheads up to 500 feet long and structures in residential canals. Since neither the 1899 nor 1992 laws allowed for administrative exemptions, we were, in effect, legalizing these practices. Finally, we decided to add other minor activities as a way of reducing workload and unnecessary regulatory burdens such as for utility line backfills, minor road crossings, maintenance activities, navigation aids, and staff gages. All of these things were "permitted by this regulation." My suggestion that we call these activities so permitted "nationwide permits" was adopted.

In 1977 there were three types of permit authorizations — individual, general, and nationwide. The definition for a general permit included the same words as found in the 1975 regulations initiating that program — "substantially similar in nature" and "minimal" in impact. A nationwide permit on the other hand was simply defined as an "authorization that has been issued by this regulation." No similar in nature or minimal requirement. No reporting. No verification. No mitigation. So far, so good.

Congress was so pleased with the way these new NWPs took some heat off the ongoing 404 expansion controversy of that day, they rushed to take some credit with the 1977 amendments. In authorizing the already-established practice of general permits with the new section 404(e), they used the same definition found in the Corps' regulations for general permits but went on to say that general permits could be issued on a "State, regional, or nationwide basis." At the Corps we viewed this as a legislative endorsement of both our general permit program and our nationwide permit program. And in hindsight, this is where I and others made a huge mistake. We should have said something like:

Thank you very much. If we ever decide to issue a nationwide general permit, we will use this new authority. But right now, we only anticipate issuing general permits at the state and regional levels. And by the way, we plan to continue the use of nationwide permits to authorize certain things by the regulation.

So let the blame fall to me but the cure to you. Here is all you need to do:

Announce that all current nationwide general permits will not be renewed after their five-year expiration date of February 10, 2002. Allow NGP 26 (please note new abbreviation) to extend to this date as well.

Of course districts can revoke NGPs earlier as New England and perhaps others have already done. The other districts have over two years to develop their own replacement RGPs. But please provide some direction to keep things simple and more balanced.

Start over with NWPs. Consider giving them a new name. Do not subject them to state certifications (there is no application nor any site specific activity upon which to base a certification decision). Make them simple. Do not require reporting. Do not allow districts to override or condition them. These are things already permitted by the regulation. Over, done.

Turn your attention to making the individual permit process a viable option.

The regulated public is already extremely and unnecessarily burdened with the 404 program. A drastic change is called for lest the resources lose all federal protection.

Sincerely,
Bernard N. Goode

(FORUM BEGINS LONG RANGE PLANNING)

[Cont'd. from page 6]

How you can help:

If you would like to volunteer to serve on the Academic Liaison Committee, please contact the Forum.

If you are a professor or a student who knows about an interesting wetland research project on which you would like to write a short newsletter article or prepare a poster exhibit for an annual meeting, please contact the Forum.

Give us your ideas on how we can increase student/academic involvement in the Forum.

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.

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